# FEDERAL TRADE COMMISSION DECISIONS

## FINDINGS, OPINIONS, AND ORDERS

JULY 1, 1979 TO DECEMBER 31, 1979

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# FEDERAL TRADE COMMISSION DECISIONS

## Findings, Opinions and Orders

IN THE MATTER OF

## THE CLOROX COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2975. Complaint, July 2, 1979 — Decision, July 2, 1979*

**This consent order, among other things, requires an Oakland, Calif. manufacturer of household cleansers, detergents, bleach, specialty food products and charcoal briquets to cease misrepresenting characteristics, properties, quality or use of any cleanser; to cease advertising any of the above without first having in their possession documentation supporting their claims; to cease failing to maintain adequate records of substantiation documentation; and to cease failing to disclose precautionary measures specified in the order.**

### *Appearances*

For the Commission: *Jeffrey A. Klurfeld.*

For the respondent: *James O. Cole,* Oakland, Calif.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Clorox Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent The Clorox Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1221 Broadway, Oakland, California.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale and sale of household cleansers and detergents, bleach, specialty food products, and charcoal briquets. Sales by respondent for fiscal year 1978 exceeded $1 billion.

PAR. 3. Respondent maintains, and has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In 1976, respondent introduced a new household cleanser, marketed under the name "Soft Scrub." Soft Scrub was allegedly formulated to effectively clean the following surfaces which would otherwise be abraded and scratched if cleaned with scouring powder: formica, fiberglass, plastic, stainless steel, ceramic tile, chrome, appliance enamel, porcelain and aluminum. Approximately 50% of household surfaces are composed of these materials.

PAR. 5. Since its introduction, Soft Scrub has enjoyed great success. It is estimated that approximately 8,000,000 American households use the product.

PAR. 6. In marketing Soft Scrub, respondent affixed labels to containers thereof that represented directly or by implication that Soft Scrub could be safely used on appliance enamel without risk of substantial abrasion or scratching. Among the other surfaces on which Soft Scrub was recommended were plastic and fiberglass.

PAR. 7. In truth and in fact, Soft Scrub cannot be used on appliance enamel, plastic and fiberglass without risk of substantial abrasion and scratching thereto, unless certain precautionary measures are taken. These measures involve the type of applicator used, the quantity of product used, and the degree of pressure applied in cleaning.

Therefore the representations set forth in Paragraph Six concerning appliance enamel, plastic and fiberglass were, and are, unfair or deceptive acts or practices.

PAR. 8. Through the use of the representations set forth in Paragraph Six concerning appliance enamel, plastic and fiberglass, respondent has represented, directly or by implication, that at the time it made said representations, it possessed and relied upon a reasonable basis for making the representations.

PAR. 9. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making the representations set forth in Paragraph Six concerning appliance enamel, plastic and fiberglass.

Therefore the representations set forth in Paragraph Six concerning appliance enamel, plastic and fiberglass were, and are, unfair or deceptive acts or practices.

PAR. 10. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale and sale of merchandise of the same general kind and nature as merchandise sold by respondent.

PAR. 11. The use by respondent of the aforesaid false, misleading and deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 12. The acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted, and now constitute, unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged are continuing, and will continue, in the absence of the relief herein requested.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Clorox Company is a corporation organized, existing and doing business under and by virtue of the laws of the

State of California, with its office and principal place of business located at 1221 Broadway, in the City of Oakland, State of California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

For the purposes of this order, the following definition shall apply:

"Cleanser" is defined as "Soft Scrub," or as any other product with the same or similar chemical formulation which is manufactured, offered for sale or sold by The Clorox Company.

*It is ordered*, That respondent The Clorox Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labelling, offering for sale, sale or distribution of any "cleanser," as hereinabove defined, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

### I

1. Misrepresenting, directly or by implication, any characteristic, property, quality or use of any cleanser.

2. Representing, directly or by implication, any characteristic, property, quality or use of any cleanser unless prior to the time such representation is first made, respondent possesses and relies upon a competent and reliable scientific test or tests or other objective data which substantiate such representation.

3. Failing to maintain accurate and adequate records which may be inspected by Commission staff members upon reasonable notice of all documentation in substantiation of any representation regarding any characteristic, property, quality or use of any cleanser.

4. Failing to clearly and conspicuously disclose (in print of a size and type no less prominent than the majority of the text) the following statement, with nothing to the contrary or in mitigation thereof, on any label affixed to any bottle or other container of any cleanser that is intended for retail sale:

ATTENTION: To prevent scratching fiberglass, plastic, and appliance enamel on refrigerators, dishwashers, oven doors and on other appliances: USE SPARINGLY: AND RUB GENTLY WITH A DAMP SPONGE.

5. Other than on any label affixed to any bottle or other container of any cleanser, failing to clearly and conspicuously disclose the

following statement, with nothing to the contrary or in mitigation thereof, in any advertisement promoting the sale of any cleanser:

Use only as directed

## II

*It is further ordered*, That respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

## III

*It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

## IV

*It is further ordered*, That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

IN THE MATTER OF

# SKF INDUSTRIES, INC., ET AL.

## FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9046. Complaint, July 22, 1975 — Final Order, July 5, 1979*

**This order, among other things, requires SKF Industries, Inc. ("SKF") and Federal-Mogul Corporation ("FM"), two bearings manufacturers, to cancel their December 17, 1974 by-sell agreement whereby SKF agrees to cease distribution of certain bearings to the automotive aftermarket in exchange for FM's agreement to purchase its tapered roller bearings requirements from SKF, and other similar arrangements between them. The order prescribes specific limitations on FM's purchases of tapered roller bearings from SKF for 12 years following the effective date of the order, and requires the companies to notify their sales and policy-making staff of the terms of the order. Additionally, twice annually for each of two years, respondents are required to publish those terms in two major trade journals.**

### *Appearances*

For the Commission: *K. Keith Thurman, John R. Hoagland, Rhett R. Krulla* and *Annthalia Lingos.*

For the respondents: *Larry L. Williams* and *Robert J. Pope, Clifford, Glass, McIlwain & Finney,* Washington, D.C. for SKF Industries, Inc., *Fred W. Freeman* and *Kenneth J. McIntyre, Dickinson, Wright, McKean, Cudlip & Moon,* Detroit, Mich. for Federal-Mogul Corporation and *Haliburton Fales, 2d, Peter J. Dias* and *Alan L. Morrison, White & Case,* New York City for Aktiebolaget SKF.

## COMPLAINT

The Federal Trade Commission, having reason to believe that SKF Industries, Inc. and Aktiebolaget Svenska Kullagerfabriken, corporations subject to the jurisdiction of the Commission, have violated Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that Federal-Mogul Corporation, a corporation subject to the jurisdiction of the Commission, has violated the provisions of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45) and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint and states its charges as follows:

## I. DEFINITIONS

1. For the purpose of this complaint, the following definitions shall apply:

(a) "Bearings" are nonminiature machine parts which bear the friction occasioned when parts are in contact and have relative motion and which employ either balls or rollers as the moving elements. [2]

(b) The term "automotive aftermarket" includes all sales for replacement use directly to automotive wholesalers or retailers, other than vehicle dealers.

(c) The term "automotive" refers to parts having application on selfpropelled land vehicles, including, but not limited to, automobiles, trucks, buses, tractors, selfpropelled agricultural equipment and construction equipment.

## II. AB SKF

2. Aktiebolaget Svenska Kullagerfabriken (hereinafter "AB SKF") is a corporation organized and doing business under the laws of the Kingdom of Sweden since 1907, with its principal place of business at Gothenburg, Sweden.

3. AB SKF had sales of approximately $1 billion in 1971 and assets of $1.4 billion at the end of that year. In 1971, 85% of AB SKF's sales consisted of bearing sales, making it the world's largest manufacturer of bearings, with a 22% market share of bearings sold outside Communist countries.

4. Since its inception in 1907, AB SKF has expanded aggressively both by internal development and acquisitions. The Swedish corporation now has subsidiary or affiliate corporations in the United States, United Kingdom, France, Germany, Holland, Canada, Brazil, India, South Africa, Italy, Argentina, Spain, Australia and New Zealand. By 1971, AB SKF owned 16 manufacturing companies with 66 factories and maintained sales offices in practically all countries.

5. In 1915, AB SKF established a ball bearing plant in the United States. Until 1933, this plant was operated by the SKF Ballbearing Company of Hartford, Connecticut. On December 13, 1933, SKF Industries, Inc. (hereinafter "SKF") was incorporated under Delaware law as a successor to the SKF Ballbearing Company. In 1973, AB SKF held the beneficial ownership in approximately 94% of the capital stock of SKF. [3]

6. In 1965, AB SKF acquired controlling interest in RIV Officine diVillar Perosa S.p.A. (hereinafter "RIV"), an Italian producer of ball, taper roller (hereinafter "TR") and other bearings. Prior to its

acquisition by AB SKF, RIV sold ball and TR bearings in the United States.

7. AB SKF and several of its European affiliates export finished bearings and parts to the United States. Sales in the United States are made by AB SKF not only through SKF but also directly by AB SKF or its foreign subsidiaries. SKF Group shipments of bearings to the United States were approximately $5.5 million in 1972.

8. At all times relevant hereto, AB SKF and SKF sold and shipped their products throughout the United States and engaged in commerce within the meaning of the Clayton Act, as amended, and were corporations whose businesses were in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

## III. SKF Industries, Inc.

9. SKF is a corporation organized and doing business under the laws of the State of Delaware, with its principal office and place of business located at Front St. and Erie Ave., Philadelphia, Pennsylvania.

10. SKF is the nation's third largest manufacturer of bearings, with net sales of approximately $126 million in 1971. In that year, SKF held assets in excess of $113 million and realized a net income of approximately $1.48 million. SKF does not and has not engaged in the sale of significant quantities of any product other than bearings, almost all of which were ball or TR bearings.

11. In the last twenty years, SKF has grown rapidly through several acquisitions of stock or assets, including, among others:

(a) Tyson Bearing Corporation (hereinafter "Tyson"), a Delaware corporation acquired in 1955 whose principal place of business was in Massillon, Ohio. At the time of the acquisition, Tyson was a subsidiary of Nice Ball Bearing Company, was the nation's third largest manufacturer of TR bearings, and was engaged in or its business affected commerce within the meaning of the Federal Trade Commission Act, as amended. [4]

(b) Nice Ball Bearing Company (assets acquired in 1960) (hereinafter "Nice") then a division of Channing Corporation, a corporation organized and doing business under the laws of the State of Delaware with its principal place of business in New York, New York. At the time of the acquisition Nice was a substantial manufacturer of ball bearings and was engaged in commerce within the meaning of the Clayton Act, as amended, and the Federal Trade Commission Act, as amended.

Since their acquisitions, Tyson and Nice have become and been operated as divisions of SKF.

## IV. FEDERAL-MOGUL CORPORATION

12. Respondent Federal-Mogul Corporation (hereinafter "F-M") is a corporation organized and doing business under the laws of the State of Michigan, with its principal office and place of business located at 26555 Northwestern Highway, Southfield, Michigan.

13. During 1971, F-M had net sales of $269.6 million, assets in excess of $201 million and net earnings of $13.3 million. F-M manufactured automotive engine parts and bearings, with the latter accounting for one-third of its 1971 net sales. In 1971, F-M was the nation's fourth largest bearing producer and the largest seller of bearings to the automotive aftermarket.

14. At all times relevant hereto, F-M sold and shipped its products throughout the United States and engaged in or its business affected commerce within the meaning of the Federal Trade Commission Act, as amended.

15. On or about July 8, 1971, F-M and SKF commenced negotiations regarding the termination by F-M of the manufacture of TR bearings with an outside diameter of 4 inches or smaller and the purchase of such bearings by F-M from SKF for resale. [5]

16. In January 1972, SKF decided to discontinue the marketing of bearings to the automotive aftermarket.

17. On or about January 11, 1972, an agreement was reached between F-M and SKF whereby SKF promised to sell TR bearings, ball bearings and other bearings to F-M for resale to the automotive aftermarket. Under this agreement F-M would supply bearings to the former SKF customers in the automotive aftermarket with SKF personnel assisting F-M in changing over such SKF customers to F-M. Such agreement has been performed according to the terms set forth in this paragraph.

## VII. TRADE AND COMMERCE

18. The relevant geographic market is the United States as a whole and includes all bearings produced in the United States or manufactured abroad and imported into the United States.

19. The relevant product markets are:

(a) the manufacture and sale of TR bearings;
(b) the manufacture and sale of ball bearings; and
(c) the sale of bearings direct to the automotive aftermarket.

20. Sales of ball and TR bearings in the United States are substantial. In 1971, domestic sales of TR bearings were over $381 million and ball bearing sales were over $523 million.

21. Concentration in the manufacture and sale of TR bearings and ball bearings in the United States has been high since 1955. In 1971, the four largest sellers accounted for the following percentages of domestic shipments:

(a) TR bearings – 92%; and
(b) ball bearings – 63%. [6]

22. Entry into the manufacture and sale of TR and ball bearings is extremely difficult. A successful entrant must possess both considerable technical expertise and substantial financial resources.

23. No company has successfully entered the domestic manufacture of ball or TR bearings except through acquisition since World War II.

24. Prior to its acquisition of Tyson, AB SKF through SKF was one of the few most likely entrants into the domestic TR bearing market. AB SKF and SKF had the expertise (derived in part from AB SKF's production of identical items outside the United States), resources, and distribution system to be a significant competitor in the domestic TR bearing market, and had given serious consideration to entering that market by means of internal expansion.

25. In 1955, Tyson was the nation's third largest producer of TR bearings, with sales of such bearings of $2.95 million, accounting for 2% of total 1955 sales of TR bearings.

26. In 1958, SKF was a substantial domestic manufacturer of ball bearings with sales of $24 million, accounting for 9.5% of the domestic ball bearing market.

27. In 1958, Nice was a substantial manufacturer of ball bearings with sales of $6.8 million, accounting for 2.3% of total 1958 domestic ball bearing shipments of $255 million.

28. In 1971, SKF, with TR bearing sales of $17.6 million and ball bearing sales of $49.6 million, accounted for 4.6% of domestic TR bearing sales and 12% of domestic ball bearing sales.

29. In 1971, F-M was the nation's second largest producer and seller of TR bearings. In that year, F-M had sales of TR bearings of $53.2 million and accounted for 14.0% of total domestic sales of TR bearings. In that same year, F-M's sales of ball bearings were $26.6 million, accounting for 6.3% of the domestic ball bearing market, making it the 4th largest seller in that market. [7]

30. Sales of bearings to the automotive aftermarket are substantial, with 1970 shipments of $55.9 million. Concentration in this market

is high. In 1970, the four largest sellers accounted for 78.2% of total sales of bearings in the automotive aftermarket.

31. Entry into the sale of bearings to the automotive aftermarket is difficult. A successful seller must operate a large, sophisticated distribution system, offer products with a reputation for high quality and have ample financial resources and considerable expertise. An additional barrier to entry exists in the fact that many purchasers in the automotive aftermarket prefer to deal with a seller offering a full line of bearings rather than just a few types or sizes.

32. In 1970, SKF's sales of bearings in the automotive aftermarket were $4.1 million, accounting for 7.3% of that market. SKF was the nation's fourth largest seller of bearings to the automotive aftermarket in 1970.

33. In 1970, F-M's sales of bearings in the automotive aftermarket were $20.4 million, accounting for 36.5% of that market. In 1970, F-M was the nation's largest seller of bearings to the automotive aftermarket.

34. The acquisition of Tyson by SKF; the subsequent acquisition of foreign bearing companies including, among others, United Bearing Co., Ets. Rossi Freres S.A., RIV, and four Spanish bearing companies by AB SKF; and the arrangement between SKF and F-M, individually or taken as a whole, constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, in that substantial actual and potential competition between and among AB SKF (including SKF), Tyson, F-M and others in the manufacture and sale of TR bearings has been eliminated.

35. The acquisition of Nice by SKF; the subsequent acquisitions of foreign bearing companies including, among others, United Bearing Co., Kugellagerfabrik Saarland, Les Applications du Roulement, RIV, Compagnie Generale du Roulement, and four Spanish bearing companies by AB SKF; and the arrangement between SKF and F-M, individually or taken as a whole, constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, in that substantial actual and potential competition between and among AB SKF (including SKF), Nice, F-M and others in the manufacture and sale of ball bearings has been eliminated. [8]

36. The effects of the acquisition of Nice by SKF are substantially to lessen competition or tend to create a monopoly in the manufacture of ball bearings throughout the United States in violation of Section 7 of the Clayton Act, as amended, in that substantial actual competition between Nice, SKF and others in the manufacture and sale of ball bearings has been eliminated.

37. The arrangement between SKF and F-M constitutes an unfair

method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

(a) Substantial competition between and among SKF, F-M and others in the sale of bearings in the automotive aftermarket has been eliminated.

(b) The arrangement has eliminated F-M as a substantial potential purchaser of TR and ball bearings from manufacturers other than SKF.

## INITIAL DECISION BY MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

MAY 12, 1978

## I.

## STATEMENT OF THE CASE

The complaint in this proceeding issued on July 22, 1975. It charges that beginning in 1955, acting alone or in combination, respondents have committed various antitrust offenses both in the United States and abroad which have had the effect of reducing actual and potential competition in three domestic bearings markets — the manufacture and sale of tapered roller bearings ("TRB"), the manufacture and sale of all ball bearings, and the distribution of all bearings, including TRB, to the automotive aftermarket. Specifically, the challenged acts are:

1. A 1955 acquisition by SKF Industries, Inc. ("SKF") of Tyson Bearing Corp. ("Tyson"), a manufacturer of TRB.

2. A 1960 acquisition by SKF of Nice Ball Bearing Company ("Nice"), a manufacturer of ball bearings.

3. A series of acquisitions by Aktiebolaget SKF[1] ("AB SKF") of TRB and ball bearings manufacturers located outside of the United States. [3]

4. An "arrangement", entered into sometime during the period 1971–1974 and continuing to the present, between SKF and Federal-Mogul Corporation ("FM") relating to the manufacture and distribution of TRB and other bearings to the automotive aftermarket. This "arrangement" allegedly contemplates that SKF would continue to manufacture automotive bearings but would withdraw from distribution of bearings to the automotive aftermarket while FM would continue to distribute to the automotive aftermarket, but would withdraw from the manufacture of automotive TRB. The effects of

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[1] The complaint as issued names Aktiebolaget Svenska Kullagerfabriken. The corporate name of the Swedish respondent was changed on May 31, 1977 to Aktiebolaget SKF. Tr. 1076.

this arrangement are said to be the elimination of competition between FM and SKF as well as the elimination of FM as a substantial purchaser of TRB and ball bearings from manufacturers other than SKF.

The complaint does not allege that each of the four acts cited above constitutes a distinct violation. Thus the complaint does not charge that the 1955 acquisition of Tyson standing alone violates either Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act. Instead, Paragraph 34 of the complaint states that the acquisition of Tyson, as well as the foreign acquisitions by AB SKF *and* the arrangement between SKF and FM, "individually or taken as a whole" constitute an unfair method of competition in that substantial, actual, and [4] potential competition between AB SKF, SKF, Tyson, FM, and other manufacturers of TRB has been eliminated.

Similarly, the foreign acquisitions of AB SKF are not cited as separate violations of Section 5. They are challenged as part of a pattern of anticompetitive activity by AB SKF which is said to impact adversely on domestic bearings markets by eliminating independent foreign sources which could conceivably export to the United States and compete on their own against SKF in the domestic market.

While the acquisition of Nice is charged as a separate Section 7 violation (Complaint, ¶ 36), this act, too, is linked together in Complaint Paragraph 35 with the foreign acquisitions by AB SKF as well as the SKF and FM "arrangement", and all of these acts (again, "individually or taken as a whole") are alleged to be an unfair method of competition.

Finally, the complaint charges separately (Complaint, ¶ 37) that the "arrangement" between SKF and FM constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act by reason of the elimination of substantial competition between SKF and FM in the automotive aftermarket.

SKF's answer, filed on September 26, 1975, denies all material allegations of the complaint and avers that the 1955 acquisition of Tyson was a toe-hold acquisition of a [5] failing company, and the 1960 acquisition of Nice involved a firm which did not compete against SKF. In addition, the SKF answer raises the following affirmative defenses:

1. The 1955 acquisition of Tyson and the 1960 acquisition of Nice had been investigated by the Federal Trade Commission at the time they occurred, and SKF had been informed by the Federal Trade Commission that no enforcement action was contemplated. Relying upon this "clearance", SKF spent substantial sums of money on the acquired firms during the past 20 years. Under the doctrines of

equitable estoppel or laches, the Commission may not now challenge what it has approved in the past.

2. The proposed order — divestiture of the combination of Tyson and Nice and cancellation of the "arrangement" between SKF and FM — will have adverse effects on competition in that this relief will only serve to enhance the dominant position of others in the manufacture and sale of TRB.

While not conceding that the Federal Trade Commission has either in personam or subject matter jurisdiction over a Swedish company which has made acquisitions outside of the United States, AB SKF filed an answer on September 29, 1975 which denied all the material allegations of the complaint relating to it. Later, AB SKF agreed to waive [6] all objections to personal jurisdiction for the purpose of this suit only.[2]

FM's answer, filed on September 26, 1975, denied all substantive portions of the complaint relevant to it. In addition, FM raised affirmative defenses including inexcusable delay in bringing a proceeding relating to a 1972 agreement, and the claim that certain aspects of FM business were "failing companies" at the time when the so-called "arrangement" was made between FM and SKF.

In the prehearing stage, all parties were allowed some discovery, requests for admissions were answered, and stipulations were filed. Upon completion of the prehearing stage, the case-in-chief began on October 3, 1977 and was completed on October 13, 1977. The defense case was presented between November 28 and December 9, 1977. Hearings for rebuttal were held during the week of January 9, 1978. During the hearings all counsel were given full opportunity to be heard, and to examine and cross-examine witnesses.

The record was closed on January 13, 1978. Proposed findings of fact and briefs were filed by all parties on [7] February 14, 1978. Answering briefs were filed on March 1, 1978.[3]

After reviewing all the evidence as well as the proposed findings and briefs submitted by the parties, and based on the entire record, I make the following findings of facts:[4]

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[2] Proposed Findings of Facts, Conclusions of Law, and Main Brief of AB SKF, p. 33.

[3] By leave of the Commission, the filing date for this Initial Decision was extended from April 12, 1978 to May 12, 1978.

[4] Proposed findings not adopted in the form proposed or in substance are rejected, as either not supported by the entire record, or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record: "Tr." (transcript of testimony); "CX" (complaint counsel exhibit); "RSX" (respondent SKF exhibit); "RAX" (respondent AB SKF exhibit); "RFX" (respondent FM exhibit). CX's 1A-1Z-26, an index to complaint counsel's exhibits, contain a description of each exhibit and the date received in evidence or rejected. The same information for respondents' exhibits appears on RSX's 1A-H (for SKF); RFX's 150A-E (for FM); and RAX's 250A-C (for AB SKF). These indices also indicate which exhibits are in *camera*. References in citations to exhibits to "No." refer to numbered requests for admissions and answers to requests for admissions or paragraph numbers of stipulations. By the terms of my omnibus *in camera* order there is no

*(Continued)*

## [12] II.

## FINDINGS OF FACT

## The Respondents

### Federal-Mogul (FM)

1. FM is a Michigan corporation whose headquarters is located at Southfield, Michigan. It manufactures and distributes a wide-range of

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limitation whatever on the public use of this material in decisions written by the undersigned, the Commission, or other reviewing authorities. See "Omnibus *In Camera* Order," dated October 4, 1977. This order further provides that *in camera* exhibits are to be placed on the public record five years after the record closed — that is, on January 13, 1983.

[8] The appearances of the witnesses were as follows:

| *NAME* | *CALLED BY* | *TR. PAGES* |
|---|---|---|
| Joseph F. Toot<br>The Timken Company<br>(Bearings Manufacturer) | Complaint Counsel ("c.c.") | 399-514 |
| H. E. Markley<br>The Timken Company<br>(Bearings Manufacturer) | Stipulated Testimony | 496-497 |
| Shunji Ishino<br>NTN Toyo Bearing Manufacturing Co., Ltd.<br>(Bearings Manufacturer) | c.c. | 519-578 |
| Thomas W. Morrison<br>(Retired, Former Chairman, SKF) | c.c. | 744-815 |
| Paul Joseph Tracy<br>American Koyo Corporation<br>(Bearings Manufacturer and Importer) | c.c. | 823-871 |
| Russell S. Strickland<br>(Retired, former Vice President and Bearings Group Manager, F-M) | c.c. | 877-985 |
| Walter P. Wieland<br>FAG, Kugelfisher, Georg Schaefer & Co.<br>(Bearings Manufacturer) | c.c. | 998-1071 |
| Bruce R. Paxton<br>Hoover NSK Bearing Company<br>(Bearings Manufacturer) | c.c. | 1078-1109 |
| [9] Frank V. Smith, Jr.<br>Lipe Rollway Corporation<br>(Bearings Manufacturer) | c.c. | 1109-1148 |
| Warren E. Milner<br>(Retired, former General Manager, New Departure-Hyatt Bearing Division of General Motors Corporation) | c.c. | 1166-1181 |
| Philip B. Ziegler<br>New Departure-Hyatt Bearing Division of General Motors Corporation<br>(Bearings Manufacturer) | c.c. | 1182-1215 |
| Augustino Canonica<br>RIV Officine diVillar Perosa S.p.A.<br>(Bearings Manufacturer) | resp. AB SKF | 1251-1334 |

*(Continued)*

automotive products including ball bearings and TRB, oil seals, O-rings, gaskets, and pistons. In 1971, FM's sales were $269.6 million.[5]

2. In 1970, the Bower Division of FM ("Bower") produced TRB at

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| | | |
|---|---|---|
| William J. Kelly<br>Winstead Precision Ball Corporation<br>and Former Vice President,<br>FAG Bearings Corp.<br>(Bearings Manufacturer and Importer) | resp.<br>SKF | 1340-1424 |
| Philip Sutherland<br>(Former Treasurer of Tyson) | resp.<br>SKF | 1428-1448 |
| A. Stuart Murray<br>(Retired, former Vice President<br>of SKF) | resp.<br>SKF | 1449-1515 |
| John A. McAdams<br>SKF<br>(Treasurer) | resp.<br>SKF | 1520-1551 |
| [10] Henry M. McAdoo<br>(Retired, former President, Nice<br>Ball Bearing Division of SKF) | resp.<br>SKF | 1556-1603 |
| Joseph A. Heron<br>SKF<br>(Assistant Treasurer) | resp.<br>SKF | 1603-1636 |
| Tibor E. Tallian<br>SKF<br>(Vice President, Technology Services) | resp.<br>SKF | 1637-1681 |
| Shaun F. O'Malley<br>Price Waterhouse & Company<br>(Retained Expert) | resp.<br>SKF | 1775-1906 |
| Fred H. Meyer and<br>Leonard J. Brzozowsky<br>Cresap, McCormick and Paget, Inc.<br>(Retained Experts-Joint Appearance) | resp.<br>SKF | 1944-2039 |
| Thomas F. Russell<br>FM<br>(Chairman and Chief Executive<br>Officer) | resp.<br>FM | 2050-2218 |
| William Webster<br>FM<br>(Vice President and Group Executive,<br>World Wide Marketing Group) | resp.<br>FM | 2270-2294 |
| [11] Raymond Peck<br>FM<br>(Automotive Aftermarket Sales<br>Manager, World Wide Marketing<br>Group) | resp.<br>FM | 2400-2431 |
| Donald R. Potter<br>FM<br>(Director of Pricing, World Wide<br>Marketing Group) | resp.<br>FM | 2496-2536 |
| Richard F. Harrington<br>Aetna Bearings Company<br>(Bearings Manufacturer) | c.c.<br>(on rebuttal) | 2547-2579 |
| W. Stewart Johnson<br>Brenco, Inc.<br>(Bearings Manufacturer) | c.c.<br>(on rebuttal) | 2672-2718 |
| Stephen R. Nelson<br>Economist<br>Federal Trade Commission<br>(Expert Witness) | c.c.<br>(on rebuttal) | 2733-2868 |

[5] Complaint and FM Answer, ¶¶ 12, 13; CX's 249P, Q; RFX's 163A-164Z-1; Tr. 2051.

two plants located in Detroit, Michigan (the Shoemaker and Hart plants) and a plant located in Macomb, Illinois.[6] The circumstances surrounding the closing of the Shoemaker and Hart plants are among the central issues of this proceeding.

3. FM currently has two TRB plants. In 1974, a TRB plant came on stream in Hamilton, Alabama. This plant manufactures TRB having an OD (outer diameter) of 4" to 8", and as of 1977 produces low-volume TRB in the 0" to 4" [13] range.[7] FM continues to manufacture TRB at the Macomb, Illinois plant. This plant produces TRB having an OD of 8" or over as well as straight roller bearings.[8]

4. At all times relevant to this case FM sold and shipped bearings throughout the United States and engaged in or its business affected commerce within the meaning of the Federal Trade Commission Act.[9]

Aktiebolaget SKF (AB SKF)

5. AB SKF is a Swedish corporation founded in 1907. Its principal place of business is located in Gothenburg, Sweden.[10]

6. In 1971, worldwide sales of AB SKF, including subsidiaries and affiliates, were over $1 billion. Of this total about 80 percent was derived from the sale of bearings.[11] [14]

7. AB SKF is the world's largest bearing producer (it accounts for over 20 percent of the world market) and worldwide it is one of the three leading TRB producers.[12]

8. AB SKF has owned or partially-owned affiliates producing TRB or ball bearings in Europe, South America, Africa, India, Australia, New Zealand, and the United States.[13]

9. AB SKF's United States affiliate, respondent SKF, is engaged in commerce and its business affects commerce.[14] In addition, AB SKF's foreign affiliates export bearings to the United States and thus the Swedish firm is engaged in foreign commerce with the United States.[15] Moreover, as noted later in this Initial Decision, AB SKF participated in and ratified an illegal market allocation which substantially affects the commerce of the United States.[16] [15]

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[6] RFX 163V; Tr. 2075-77.

[7] CX's 250Z-37 (Nos. 196a, b); RFX 214 (p. 1) *in camera;* Tr. 2150-51, 2357.

[8] CX's 250Z-37 (Nos. 197a, 198a), 251D (Nos. 21-22); RFX 214 (p. 1) *in camera.*

[9] Complaint and FM Answer, ¶ 14.

[10] Complaint and AB SKF Answer, ¶ 2.

[11] CX's 2H, S, 250Z-188 (No. 678).

[12] CX's 4G, 250Z-183 (No. 681), 250Z-188 (No. 679), 341D; Tr. 1001, 1406.

[13] Complaint and AB SKF Answer, ¶ 4; CX's 2Z-11-13.

[14] Finding 14.

[15] CX's 10B-N *in camera*, 253A-U *in camera.*

[16] Findings 52, 74, 85, 91, 92, 94.

SKF Industries (SKF)

10. In 1915, AB SKF formed the SKF Ball Bearing Company of Hartford, Connecticut. A successor company, SKF Industries, Inc. ("SKF"), was incorporated under Delaware law in 1933. SKF's principal place of business is located in Philadelphia, Pennsylvania.[17]

11. Throughout its existence SKF has been a manufacturer of bearings. Recently, however, it has diversified into other automotive products. In 1971, SKF had net sales of approximately $126 million.[18]

12. Currently, SKF through its Tyson Division manufactures TRB in Massillon, Ohio and Glasgow, Kentucky. The Massillon facility manufactures TRB over 4" OD while the Glasgow plant produces TRB in 0" to 4" OD range.[19]

13. SKF's Nice Division manufactures ball bearings at plants located in Philadelphia and Kulpsville (Lansdale), Pa.[20] [16]

14. At all times relevant to this case SKF sold and shipped its products throughout the United States and engaged in commerce within the meaning of the Clayton and Federal Trade Commission Acts, and was a corporation whose business affected commerce within the meaning of the Federal Trade Commission Act.[21]

The AB SKF-SKF Relationship

15. AB SKF is the beneficial owner of 94 percent of SKF's common stock.[22] However, by the terms of a voting trust agreement dated April 1, 1955, AB SKF has assigned legal title to its SKF common stock to three voting trustees, each of whom is a United States citizen domiciled in the United States. All actions by trustees must be unanimous. Voting trustees may elect themselves to the SKF board and may serve as officers of the company. AB SKF, as the holder of voting trust certificates, receives dividends declared on SKF stock. The voting trust agreement, with minor changes, has continued in effect from 1955 to the present.[23] [17]

16. AB SKF's annual reports describe SKF as a member company of the AB SKF "Group",[24] and AB SKF's relationship with its

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[17] Complaint and SKF Answer, ¶¶ 5, 9; CX 250Z-184 (No. 685).

[18] Complaint and Answers of SKF and AB SKF, ¶ 10; CX's 250Z-187 (Nos. 707-08), 252B (No. 13). See Finding 101 for recent acquisition by SKF of diversified auto products manufacturer.

[19] CX's 250Z-27-28 (Nos. 164-65), 250Z-133-134 (Nos. 537-39).

[20] CX's 250Z-71 (No. 320), 250Z-134 (No. 540).

[21] Complaint and SKF Answer, ¶ 8.

[22] Complaint and AB SKF Answer, ¶ 5; CX 250Z-184 (No. 688).

[23] CX's 5A-9i; Tr. 1547. A 1976 amendment, apparently dictated by the Department of Defense for security reasons, creates special obligations on the voting trustees to avoid disclosure of classified information to AB SKF. RSX's 2A-J.

[24] CX 2Z-13.

subsidiaries has been described as "geocentric".[25] Details of the relationship between SKF and AB SKF, however, have not been extensively explored on the record beyond evidence showing that prior to 1954 AB SKF had at one time loaned money to SKF in the form of extended payment terms for the purchase of merchandise;[26] SKF purchases steel from AB SKF;[27] SKF personnel have participated in technical exchanges with AB SKF personnel;[28] unnamed AB SKF officials visited the Tyson facility before [18] and after SKF's acquisition of Tyson;[29] and when SKF contemplated a joint venture in needle roller bearings with a French firm called "Nadella", AB SKF was consulted.[30]

17. While the evidence relating to day-to-day control by AB SKF over SKF is inconclusive, the involvement of the Swedish parent in the FM-SKF "arrangement" is plainly shown on the record and is the basis for my conclusion that an order should be issued against AB SKF. See Findings 52, 74, 85, 91, 92, 94.

## The Products

18. Anti-friction bearings, which are designed to reduce the friction created by a rotating load, consist of a cup which accommodates a cone. The cone is made up of rolling elements retained by a "cage". The rolling elements, which are either balls (as in ball bearings) or rollers (as in tapered roller bearings) are the crucial determinants of the operating characteristics of the bearing.[31] Ball [19] bearings are produced in various grades and types including radial (annular), angular contact, self-aligning, and thrust.[32] The most commonly used roller bearings are tapered,[33] spherical,[34] and cylindrical.[35] Tapered roller bearings (TRB or "tapers") are designed to absorb both vertical and horizontal loads in such applications as the front wheels of passenger cars.[36]

19. The practices challenged in this complaint are said to take place

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[25] CX 258B. Also see CX 416E *in camera* for reference by independent consultant to "worldwide SKF product/plant rationalization" and CX 190L for evidence of SKF's worldwide pricing strategy. But see Tr. 2827 for indication that national divisions of AB SKF enjoy considerable organizational autonomy and CX 258B which shows that a U.S. consent decree limits the ability of AB SKF to apply multi-national concepts to SKF.

[26] Tr. 1547–49. SKF, however, establishes its own budget and does its own financing. Tr. 1589.

[27] Tr. 760–61.

[28] Tr. 760–61, 1653.

[29] CX 421C (No. 18). AB SKF provided no funds to SKF for use in acquiring Tyson or Nice. Tr. 1528–29. SKF has never been consulted by AB SKF about the parent's foreign acquisitions. Tr. 1539–40.

[30] The Swedish parent's involvement was apparently limited to offering antitrust advice.

[31] CX's 250E–G (Nos. 11–17); Tr. 403.

[32] CX's 376B, 377B, 392A–Z–67; Tr. 1597–98.

[33] By far the largest use of TRB is in such automotive applications as gearboxes, front wheels, and drive units. CX 2Z–6.

[34] Used in heavy industry applications such as mining, steel, and paper machinery. CX 2P.

[35] Used where heavy loads are present such as rolling mill and mining machinery. CX 2V.

[36] CX's 249D–E, i, 250Z–17 (No. 130), 250Z–18 (No. 134); Tr. 429.

in three alleged markets — the manufacture of TRB (Finding 104), an all ball bearing manufacturing market (Findings 129–146), and the sale of all bearings, including TRB and ball bearings, to the independent auto aftermarket (Findings 20–22). [20]

There is no dispute between the parties that the markets for anti-friction bearings do not break down to geographic areas: all bearings markets are national in scope.[37]

## The SKF-FM "Arrangement"

### The Aftermarket For Automotive Bearings

20. The so-called "arrangement" between SKF and FM relates to the distribution of all bearings to the automotive[38] aftermarket.

21. Various kinds of bearings are sold in the auto aftermarket — ball bearings (including clutch throw out bearings), cylindrical, needle and spherical roller bearings, and TRB.[39] In rank of importance, automotive TRB constitute about 40 percent of all bearings purchased by a warehouse distributor to the auto aftermarket[40] and about 90 percent of TRB used in passenger car automotive [21] applications are in the 0" to 4" outer diameter range.[41] TRB sold in the auto aftermarket are standard bearings which fit all makes of domestic and foreign cars and the worldwide production of these products is interchangeable.[42]

22. While the parties agree that there exists a bearings auto aftermarket, respondents disagree sharply with complaint counsel about how that market should be defined. As complaint counsel would have it, there exists an economically significant "independent auto aftermarket" which consists of competition at the manufacturing level for the business of independent warehouse distributors (WD's), but does not include sales by bearings manufacturers to auto companies for resale to franchised car dealers — that is, the so-called "OE (original equipment) service market." Respondents, on the other hand, say that sales to the OE service market must be included in one auto aftermarket because franchised car dealers — the penultimate customers in the OE service market — are in direct competition with the last commercial buyers in the WD distribution chain, that is, franchised car dealers, garages, service [22] stations, mass merchandisers, and do-it-

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[37] Complaint and Answers of AB SKF and SKF, ¶ 18; CX 35Z–11

[38] For purposes of compiling universe figures, the term "automotive" includes passenger cars, light and heavy trucks, buses, trailers, tractors, self-propelled agricultural and construction equipment, and vehicles, such as trailers and agricultural equipment, pulled by self-propelled vehicles. CX's 35E, 250Z–133 (No. 534).

[39] Tr. 2752.

[40] Tr. 2861.

[41] Tr. 1347, 2863.

[42] CX's 249J–K; see CX's 35E, F for list of automotive applications for bearings. Tr. 2207.

yourself shops which buy from the automotive jobbers supplied by automotive WD's.[43]

The record supports complaint counsel's position that at the manufacturing level, two distinct markets exist — one representing sales to WD's (the independent auto aftermarket),[44] the other consisting of an OE service market. The record shows the following: [23]

(a) The bearings industry, including respondents, recognizes as a distinct market the independent auto aftermarket — *i.e.*, sales to automotive WD's who, in turn, sell only to jobbers.[45]

(b) Distinct prices prevail in the independent auto aftermarket which are insensitive to price changes in the OE service market.[46]

(c) Industry members maintain separate sales forces for the independent auto aftermarket.[47]

(d) In terms of range of products, the requirements of the independent aftermarket are different from those of the OE service market. The independent automotive aftermarket requires bearings for every make and model for which there is still a large number of registered vehicles. The OE service market needs only a few items.[48] [24]

(e) OE service customers — the automobile companies — exercise considerable buying power since they purchase not only for replacement use but also for OE installation. WD's in the automotive aftermarket are smaller firms which stock a wide variety of parts for resale to jobbers, and lack the leverage of the automobile manufacturers.[49]

23. The sale of bearings (including TRB) to the independent auto aftermarket, as defined in Finding 22, is highly concentrated.

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[43] See RSX 123 and Tr. 2865–67. See also RSX 33B. There is some disagreement, but not nearly as intense, about whether certain sales by bearings manufacturers to industrial distributors should be included. There are some anecdotal references in the record to sale by industrial distributors to automotive jobbers. See, *e.g.*, RSX 111A; Tr. 2452. But there is no real dispute that industrial distributors are a distinct group of buyers from bearings manufacturers, who handle different products (as well as a different range of products), sell at different prices, and distribute to different customers than the automotive WD's. CX's 190o–P, 250Z–9 (Nos. 105–06), 250Z–18 (Nos. 452b, c), 250Z–126 (No. 513), 250Z–127 (No. 514), 250Z–131 (No. 526); RSX's 59P, 91L; RFX 214 (pp. 32–34) *in camera*; Tr. 419–20, 917–18, 1469, 2061–66, 2151–52, 2275, 2296–97.

[44] To the extent that bearings manufacturers sell directly to jobbers and mass merchandisers these sales are included in the independent auto aftermarket. Tr. 2852. Such jobber sales have become uncommon since the 1960's when bearings manufacturers limited their automotive wholesale distribution essentially to WD's. Tr. 2119. Complaint counsel's universe also includes sales by the bearings division of auto manufacturers to WD's.

[45] CX's 200A–201F; RSX 91D; RFX 214 (pp. 33–34) *in camera*; Tr. 2209, 2425.

[46] CX 416J *in camera*; Tr. 2524.

[47] Tr. 1196, 2523–24. Parts manufacturers do not make sales by calling directly on car dealers; they always use a WD, who, in turn, relies on jobbers. Tr. 2854; see also CX 250Z–133 (No. 536).

[48] Tr. 2758–57. It has been estimated that presently a WD needs between 260 to 300 part numbers in the 0" to 4" range. Tr. 2444, 2494, 2536, 2864–65. A part number is either a cup or a cone or an assembly of cup and cone. Tr. 2449–50.

[49] Tr. 2755–56.

TABLE 1: MARKET SHARES OF SALES OF ALL BEARINGS TO THE AUTO AFTERMARKET (PERCENT)[50]

| | *1970* | *1971* | *1972* | *1973* | *1974* | *1975* |
|---|---|---|---|---|---|---|
| FM | 35.4 | 36.2 | 41.8 | 46.5 | 44.7 | 44.8 |
| GM (New Departure-Hyatt) | 25.9 | 23.7 | 25.1 | 21.6 | 22.1 | 20.6 |
| SKF | 7.8 | 8.2 | 0 | 0 | 0 | 0 |
| Federal Bearings (not related to FM) | 7.7 | 8.1 | 8.4 | 7.6 | 6.5 | 7.1 |
| L&S | 8.7 | 7.7 | 8.5 | 8.3 | 9.3 | 10.0 |
| Timken | 6.0 | 6.6 | 7.5 | 7.6 | 9.4 | 11.2 |
| Green | 4.1 | 5.3 | 3.9 | 3.7 | 3.9 | 2.6 |
| Lipe-Rollway | 3.8 | 4.1 | 4.3 | 4.2 | 3.6 | 3.1 |
| Aetna | .6 | .2 | .3 | .4 | .5 | .5 |

Source: CX's 215i, 254A–N (Nos. 79–99, 102–113, 120–130) *in camera*, 349A–E (Nos. 79–125) *in camera*, 351A–D *in camera*, 353A–B (Nos. 79–131) *in camera*, 423A–B; RSX's 91H *in camera*, 122B *in camera;* RFX 154 *in camera.*

[25] 24. The segment of the auto aftermarket most directly involved in this case — sales of TRB to the auto aftermarket — is even more highly concentrated than indicated in Finding 23.

TABLE 2: MARKET SHARES OF SALES OF TRB TO AUTO AFTERMARKET IN 1970 AND 1973 (PERCENT)[51]

| | *1970* | *1971* | *1972* | *1973* | *1974* | *1975* |
|---|---|---|---|---|---|---|
| FM | 35 | 48 | 52 | 55 | 48 | 45 |
| Timken | 35 | 24 | 25 | 23 | 28 | 31 |
| GM (NDH)[52] | 12 | 13 | 13 | 13 | 13 | 11 |
| L&S | N.A. | 8 | 9 | 7 | 10 | 12 |
| Tyson | 6 | 5 | 0 | 0 | 0 | 0 |
| Others | 12 | 2 | 1 | 2 | 0 | 1 |

Sources: CX's 180 *in camera*, 190M, 254C–D *in camera;* RSX's 93D *in camera*, 95E *in camera*, 105B *in camera;* RFX 154 *in camera;* Tr. 2382, 2473–74, 2518.

25. Entry into the manufacture of bearings for sale to auto aftermarket is difficult, particularly for foreign firms. The record shows the following:

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[50] Total dollar sales increased from about $52.5 million in 1970 to about $78.2 million in 1975. See Sources cited in Table 1.

[51] In 1970, total TRB sales to the automotive aftermarket were $17 million. In 1973, total sales were $22 million. See sources cited in Table 2.

[52] New Departure-Hyatt Division of General Motors.

(a) Because of the small quantity and large variety of bearings involved in sales to WD's, it is uneconomical for foreign bearings manufacturers to sell in the United States auto aftermarket. Other conditions which make it virtually impossible for a foreign exporter to compete in [26] the domestic auto aftermarket are lack of a large sales force, inability to make prompt deliveries, and unstable prices resulting from fluctuating currencies.[53]

(b) Effective aftermarket distribution requires a large sales force supported by warehouse facilities located throughout the country.[54]

(c) WD's prefer to deal with a single source of bearings who not only carries a complete line of ball bearings, cylindrical bearings, needle bearings and TRB, but within each type of bearing, the supplier is expected to carry the many different part numbers required in the replacement field.[55]

(d) WD's also prefer to deal with a supplier who carries products other than bearings such as gaskets, O-seals, pistons, and other automotive products.[56]

26. Since 1970, there have been no new entrants into the sale of bearings to the automotive aftermarket except for Schatz Manufacturing Co. and American Koyo. In 1975, [27] Schatz had achieved only a minuscule share of sales and by 1976, this firm had been acquired by Federal Bearings (not related to FM).[57] American Koyo, a subsidiary of the large Japanese producer Koyo Seiko, has recently entered the automotive aftermarket, but its chances of success are slight.[58]

### The Condition of FM in the TRB OEM and TRB Aftermarket

27. In 1970, FM manufactured TRB for both the original equipment market (OEM) and the auto aftermarket.[59]

28. For several years prior to 1970, FM's TRB manufacturing arm, Bower, had declining profits.[60]

29. In early 1970, FM retained the Boston Consulting Group Inc. ("BCG"), an independent market analysis firm, for the purpose of examining Bower's position in various TRB markets and to suggest alternative ways to improve profitability.[61] [28]

30. The BCG study, which is dated July 1970, found that The Timken Roller Bearing Co. (Timken) was dominant in several OEM

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[53] CX's 190N, 249L, 250Z-25-26 (No. 157), 250Z-89 (No. 385), 250Z-116 (No. 477); Tr. 2191, 2782-83.

[54] Complaint and SKF Answer, ¶ 31; CX's 250Z-10 (Nos. 110-111); RSX 33C.

[55] Tr. 1422-23, 2296-97, 2299, 2536, 2865.

[56] CX 190N; Tr. 1422-23, 1470, 2283, 2296-97.

[57] CX's 254i (No. 112) *in camera*, 422.

[58] Tr. 870, 2782.

[59] Tr. 2101-03.

[60] CX 190E; Tr. 2140-41.

[61] Tr. 2141-42.

TRB markets including the OEM automotive, farm equipment, and construction markets as well as the industrial aftermarket.[62] Given its huge shares of these markets, and its low costs resulting from economies of scale, Timken was able to use selective price cuts whenever Japanese imports became a threat as was the case in the automotive OEM market for high-volume 0" to 4" TRB,[63] the very products manufactured by Bower's Shoemaker plant. According to BCG, Timken's costs would always be less than Bower's, Bower would never be more than marginally profitable, and even this poor performance by Bower would be at Timken's sufferance.[64]

31. BCG concluded that continuation of FM's production of 0" to 4" TRB at its Shoemaker and Hart plants could [29] not be justified.[65] The profitability of the Shoemaker plant as a percentage of sales had already declined from 18.5 percent in 1964 to 5.1 percent in 1969, and BCG anticipated further declines in profitability as a result of accelerated price-cutting by Timken to meet the threat of Japanese imports of low-priced, high-volume 0" to 4" TRB.[66]

32. In its July, 1970 report to FM management, BCG considered several alternatives:

(a) Bower could conceivably refocus from the automotive, farm equipment and construction equipment OEM markets and concentrate on such growth markets as the railroad, industrial or steel industry use of bearings in which FM had little or no penetration. BCG concluded, however, that the tooling expenses and the delay inherent in such a drastic change made this alternative unprofitable.

(b) Continuation in the automotive, farm equipment and construction equipment OEM and aftermarkets as the second source to Timken was considered by BCG to be an unattractive choice because this alternative required [30] extensive investment at a time when there was a strong prospect of further price-cutting by Timken to meet Japanese imports.

(c) Withdrawal of FM completely from the production and sale of TRB including termination of sales to the auto aftermarket.[67]

33. On balance, BCG recommended the last alternative — complete withdrawal of FM from all aspects of the TRB market, including aftermarket distribution.[68]

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[62] Timken's share of the OEM automotive, farm equipment, and construction markets was 41%. Timken's had 64% of OEM industrial sales and 84% of industrial aftermarket sales. CX 190H.

[63] About 90% of the U.S. TRB market is concentrated in the 0" to 4" range. CX 249J.

[64] CX's 190E, F, G, i–L, o, R–T, V, Z–Z–1.

[65] Shoemaker produced 62 high-volume 0" to 4" TRB part numbers. Tr. 2075–76. FM's Hart Avenue plant in Detroit produced low-volume 0" to 4" and over 4" TRB. CX 250Z–42 (No. 212a); Tr. 2077.

[66] CX's 190F, G, T–V.

[67] CX's 190W–Y.

[68] CX's 190Z–Z–1; Tr. 2143.

34. In Spring, 1971, a document entitled "Bower Division Strategy Plan" was prepared by FM management for the Board of Directors. This document analyzed the problems and strengths of Bower, considered various alternative plans, and reached conclusions which agreed in some parts and disagreed in others with the recommendations of BCG. Among the conclusions reached were:

(a) The production of high-volume 0"–4" TRB at the Shoemaker plant should be terminated.

(b) The Hart Avenue, Detroit, Michigan plant of Bower, where low-volume 0"–4" TRB and TRB over 4" were produced, should be closed. [31]

(c) A new plant should be constructed in the Southeast at which 4"–8" TRB would be produced.

(d) Equipment and tooling required to produce TRB in excess of 8" should be moved from the Hart Avenue, Detroit, Michigan plant to the Macomb, Illinois plant of Bower.[69]

35. In still additional recommendations to FM Board of Directors made on July 27, 1971 in an "add-on study", FM management confirmed the principle recommendation made in its Spring, 1971 "Bower Division Strategy Plan" — that is, to close the Shoemaker and Hart plants. But the "add-on study" did not endorse the complete TRB withdrawal recommendation of BCG and noted, instead, the request of the auto aftermarket division that FM retain its position as a distributor of TRB to the auto aftermarket by purchasing these products from outside sources.[70]

36. Eventually FM management decided to stay in the bearings auto aftermarket because it believed that the loss of TRB would seriously affect aftermarket sales of other products. This view derived from the knowledge that [32] the success of FM in the automotive aftermarket was largely attributable to its ability to offer the convenience of a "package" of products including tapered roller bearings, engine bearings, cylindrical roller bearings, ball bearings, oil seals, O-rings and pistons.[71]

37. A measure of the success of this package concept is shown by the ability of FM to command a premium of up to 20 percent on TRB sales since WD's prefer to deal with a single source rather than multiple suppliers of separate items.[72]

38. Still another factor considered by FM management was the possible adverse effects on other aspects of FM's manufacturing

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[69] CX's 18A–Z–26; Tr. 2144.

[70] CX's 189A–K; Tr. 2144–45. Also see CX's 191B and 341D *for summary of reasons for closing the Detroit plants.*

[71] CX's 190N, 198B; RFX 214 (pp. 1, 35) *in camera;* Tr. 2057–58, 2282–84, 2296, 2751–52.

[72] RFX 214 (pp. 39–40) *in camera;* Tr. 2290. One such package consists of a line of anti-friction bearings and oil seals. Tr. 2284. See also CX 255C; RFX 208.

business which might result from the loss of TRB sales. As noted in Finding 36, it had been the experience of FM's Service Division that certain groupings of different automotive aftermarket parts comprise a particularly attractive offering to WD's. Ball bearings, TRB and oil seal comprise one such offering. FM through its National Seal [33] Division was a leading manufacturer of oil seals, and, through its BCA Division, produced ball bearings. Both oil seals and bearings were profitably distributed to the automotive aftermarket by FM in 1971, and notwithstanding the closing of the Shoemaker and Hart plants continued distribution of TRB was considered to be important by FM management not only to protect its huge market share in the TRB aftermarket, but also so as to protect its profitable aftermarket sales of oil seals and ball bearings.[73]

39. Based upon the management recommendations made on July 27, 1971, the FM Board of Directors voted to close the Shoemaker and Hart plants on October 27, 1971.[74] On the same day, FM publicly announced its decision to phase out of the OEM market for passenger car TRB within 12 to 24 months. The decision was attributed to the encroachment of foreign imports as well as entrenched domestic competition. The announcement stated that FM had "no intention of [34] abdicating its position in the passenger car tapered roller replacement market."[75]

40. FM's inability to compete effectively in the manufacture of 0"–4" TRB because of foreign competition and Timken's reaction to this foreign competition has been substantiated by the United States Department of Labor. On November 12, 1973, the Department of Labor published a notice stating that the former workers[76] at FM's Shoemaker and Hart plants were eligible for adjustment assistance because the U.S. Tariff Commission had found that increased imports of TRB, resulting in large part from trade concessions, was a major factor causing unemployment.[77] [35]

### The Condition of SKF in the Bearings Automotive Aftermarket

41. SKF's Automotive Products Division (APD), its auto aftermarket distribution arm, was created in 1962.[78]

42. APD offered a single line of products, bearings, for distribution

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[73] RFX 214 (pp. 1, 24) *in camera*; Tr. 2073. See also CX's 238–243.

[74] RFX's 202A–C; Tr. 2138, 2147.

[75] CX's 191D, 250Z–108 (Nos. 453a, b), 265A–C. The announcement also stated that the decision would result in an extraordinary, one-time write-off, net of taxes, of $10 million, equivalent to $1.81 a share. Later, an additional $5 million was written off. In effect, FM's shut down of its Detroit TRB plants meant it was giving up about $20 million in annual OEM sales. CX 327A; Tr. 2147–48.

[76] The closing of the Shoemaker and Hart plants resulted in a lay-off of some 1900 Detroit workers. Tr. 2147.

[77] RFX's 165A–B. See also CX's 249Q, W, 341D.

[78] CX 250Z–104 (Nos. 438b, c).

in the automotive aftermarket. The APD line consisted of clutch release bearings and front wheel ball bearings manufactured by SKF's Nice division, and TRB manufactured by both the SKF Tyson division and SKF's parent, AB SKF. However, less than one-half of APD's TRB requirements were supplied by Tyson. APD's major outside source of TRB was FM — that is, before FM itself discontinued the manufacture of 0" to 4" TRB. APD also distributed needle roller bearings and cylindrical roller bearings.[79]

43. APD's sales grew from $803,972 in 1962 to $4,582,247 in 1971. In 1971, APD consisted of a general manager, five district managers, and fifteen salesmen.[80] APD had six warehouses from which it served its customers.[81] [36] APD's sales consisted of 20 percent TRB, 40 percent clutch throwout bearings, and the balance in other ball bearings and other parts.[82] APD sold to large WD's, small WD's, and jobbers.[83]

44. In 1971, APD and FM's aftermarket distribution division (Service Division and later World Wide Marketing) were competitors in the sale of bearings to the auto aftermarket.[84]

45. Prior to 1971, APD had a record of poor performance. This was mainly attributable to the limited product line it had available in a market in which buyers prefer to deal with as few sources as possible.[85] As a result, APD had losses in each of the years 1965 to 1970.[86]

46. In 1971, however, APD showed a profit.[87] An SKF study conducted during the negotiations over the [37] "arrangement" with FM (which eventually led to the shut down of APD) found:

> APD has been gradually expanding shipments and decreasing the ratio of selling expenses to sales over the past few years and is now showing a small profit. If APD were discontinued, any decision in the future to re-enter this market would entail a similar long period of loss years to build up the division.[88]

The Development of the FM-SKF Arrangement

47. Since it became apparent by mid-1970 that the future of FM's TRB manufacturing arm was bleak (see Finding 30), FM began to consider possible alternative sources of supply as early as February 1971. The search by FM for an adequate source of supply of TRB for the auto aftermarket distribution was influenced by the requirement

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[79] CX's 250Z-129-30 (Nos. 520-24); Tr. 1468-71, 2463-66.

[80] CX 250Z-104 (No. 441).

[81] Tr. 2369, 2409.

[82] Tr. 2473-74.

[83] Tr. 2411, 2428.

[84] CX's 45B, 260A, 261C; Tr. 2405, 2470.

[85] Tr. 1470-71.

[86] RSX 80A.

[87] RSX 80A. These 1971 results tend to undermine the reliability of a 1970 SKF study which predicted APD losses in the foreseeable future. RSX 62.

[88] CX 45B.

that a company servicing the TRB automotive aftermarket maintain an inventory which includes a wide range of slow-moving items, as well as a stock of the popular high-volume parts. Accordingly, in order to compete effectively a TRB automotive aftermarket supplier must make supply arrangements which assure a reasonably full line of TRB.[89] [38]

48. Beginning in March 1971, one possibility actively considered by FM as a source of TRB was a joint venture in the United States with the Japanese producer Koyo Seiko.[90]

49. As noted in Finding 34, in Spring, 1971, Bower management endorsed the BCG recommendation that the Shoemaker and Hart plants be closed.

50. At about the same time (April 1971) FM began to consider Timken and General Motors as possible "outside" sources of supply. Discussion with Timken ended when on advice of its counsel, Timken refused to supply any TRB.[91] Also in Spring, 1971, General Motors' New Departure-Hyatt Division concluded that it could only supply FM on an emergency basis since its limited capacity was needed for captive use.[92]

51. Sometime prior to May 1971, officials of SKF heard industry rumors that FM intended to withdraw from the production of 0"–4" TRB but that it was going to remain in aftermarket distribution.[93] [39]

52. On or about May 13, 1971, at a meeting of the Anti-Friction Bearing Manufacturers Association ("AFBMA"), FM's MacArthur[94] discussed with SKF's A. Stewart Murray[95] and James H. Sutherland[96] the line of automotive bearings then available through SKF. These discussions were initiated by FM. FM indicated its interest in obtaining from SKF for aftermarket distribution TRB in the 0" to 4" range which it no longer intended to manufacture. SKF said it was interested in supplying these TRB to FM. SKF knew that it would have to rely on AB SKF's European production for many of the TRB needed by FM, and SKF's dependence on AB SKF production was assumed by both parties at every stage of the negotiations between FM and SKF.[97] [40]

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[89] Tr. 2536, 2964–65. FM's assessment of the range of TRB required for the auto aftermarket has varied with time. As matters now stand FM apparently can get by with 259 TRB parts. Tr. 2356–57. See also CX's 18A, 255A. In 1971, the minimum number was reduced from 800 to 600. Tr. 2356–57, 2443–44.

[90] Tr. 2124–26.

[91] Tr. 496–97, 2154–56.

[92] Tr. 1203–04, 2156–57. In December 1971, American Koyo appeared to be reluctant to bid for FM's low-volume auto TRB although the high-volume business was attractive. CX 331A.

[93] Tr. 772, 803–04.

[94] MacArthur was Chief Executive Officer between 1970–75. Tr. 2052, 2116.

[95] Executive Vice-President and director of sales, marketing, and engineering. CX 258A; Tr. 1451.

[96] Vice-President and director of distributor sales. CX 98.

[97] CX's 85K, 58F–S, 106, 115A, 250Z–185 (Nos. 541b, c), 250Z–160–61 (No. 680), 352G, (No. 70); Tr. 2159, 2169–70, 2335, 2477, 2479. See also Tr. 809 for description of limited range of SKF line. The limits of SKF's line were well-

*(Continued)*

53. Also sometime in May 1971, officials of Koyo Seiko and FM met in Florida and came to a general agreement about the kinds of parts, division of ownership, and management of a United States joint venture involving the two firms. It was contemplated that the joint venture would assemble and finish high-volume 0" to 4" TRB and ball bearings from components provided by FM or Koyo Seiko or some third-party source depending upon lowest cost.[98] FM believed that the economies of scale resulting from the joint venture, together with the provision for low-cost acquisition of components, would result in lower costs than the cost of producing the same parts in FM's own plants.[99]

54. Shortly after the May AFBMA meeting with SKF, in June 1971, FM officials internally assessed their alternatives (when they closed the Shoemaker and Hart plants) as follows: [41]

(a) Sourcing its aftermarket needs for certain popular 0"–4" TRB through a joint venture with the Japanese firm, Koyo Seiko.

(b) Importing 0"–4" TRB from sources outside the United States.

(c) Sourcing 0"–4" TRB with SKF, GM or Brenco.

(d) Selling only TRB over 4" OD.

(e) Abandoning all roller bearing sales, including auto aftermarket sales.

(f) Closing down FM's field warehouses.

(g) Adding other products to be sold by FM's aftermarket operations.[100]

55. On June 3, 1971, Russell[101] of FM sent officials of Koyo Seiko a rough draft of a letter of intent for the creation of the joint venture to be known as FMK, Inc. It was proposed that FMK, Inc. would produce high-volume 0" to 4" TRB only.[102] [42]

56. On June 19, 1971, Peck, who had responsibility for FM's Service Division sales to the domestic auto aftermarket,[103] recommended to FM's management that it source at least some of their 0" to 4" TRB needs with SKF. The reasons cited were:

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known at FM since FM had supplied TRB to SKF prior to the closing of the Detroit plants. CX 85Y–Z; Tr. 2322, 2462–66. In contrast, AB SKF had a relatively complete range of bearings available from its European and other foreign plants. CX 250Z–73 (No. 328c).

[98] CX's 202A–C; Tr. 2127–28. The proposed venture would produce a maximum of seven part numbers. Tr. 2131. It has always been the pattern of the TRB industry that a few standard items account for most of the business. CX 250Z–24 (Nos. 151a, b). Thus in 1973 eight part numbers (4 cups, 4 cones) accounted for 84% of all 0" to 4" TRB imported from Japan and 38% of all 0" to 4" domestically consumed. RFX's 158U, V. Of all 0" to 4" TRB sold to the auto aftermarket, 30 part numbers represent about 60% of the dollar sales volume. Tr. 2530–31. These popular TRB part numbers are used globally in all makes of cars. Tr. 2289.

[99] Tr. 2128.

[100] CX's 259A–B.

[101] Between 1970–1975, Russell was the second ranking officer of FM. Since 1975 he has been Chief Executive Officer. Tr. 2052, 2117.

[102] CX's 208A–F; Tr. 2416, 2330.

[103] CX 184; Tr. 2403.

> This would be our first choice with regards to the anti-friction line. We [FM] would become SKF's marketing arm to the automotive aftermarket. This would be more palatable to all of our distributors and I could see some business gained by taking over SKF's existing customers.[104]

57. On July 1 and 2, 1971, FM met with Koyo Seiko to review the joint venture proposal.[105] In a letter of intent dated July 2, 1971, FM again outlined the purpose of the joint venture — *i.e.*, initially to assemble the highest volume TRB — and set forth details relating to the number of shares, percent of ownership, the proposed name of the company (FMK, Inc.), management responsibility, [43] the financial support to be provided by each joint venture partner, restrictions on the disposition of each partner's share, and profit goals. The proposal as drafted by FM was approved by Koyo Seiko.[106]

58. A meeting between SKF and FM took place in Detroit, Michigan, on July 8, 1971, and involved FM's MacArthur, Russell, Webster,[107] and Potter[108] and SKF's Murray and Sutherland. FM again informed the SKF officials that FM was considering closing its Hart and Shoemaker plants in Detroit, but that it intended to remain in the TRB automotive aftermarket provided a satisfactory source for these bearings could be found. There was a discussion of SKF as a possible source of supply, with emphasis on sizes and quantities which SKF could offer.[109]

59. On July 9, Peck of FM's aftermarket distribution arm repeated his endorsement of SKF as a source of supply and added: [44]

> In fact there would be definite pluses here. If SKF discontinued sales to the automotive aftermarket we would enjoy approximately $3,000,000 to $4,000,000 in additional sales of the Bower line. It would also open the door to customers we do not sell, such as American Parts System.[110]

60. Also, in June or July 1971, SKF officials (Murray, Sutherland, and Morrison) discussed the connection between FM taking over the APD accounts, and SKF supplying bearings to FM for aftermarket distribution.[111]

61. As noted earlier, on July 27, 1971, FM management, in an "add-

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[104] CX 259A. This June 19 memo also indicates that the proposed joint venture with Koyo Seiko would have been an acceptable alternative as a source of high-volume TRB. (". . .I do not feel we would have a problem integrating these [Japanese] numbers into our anti-friction and seal package"). CX 259A; see also Tr. 2416.

[105] CX's 204, 205A–E; Tr. 2128–29.

[106] CX 206A–D. See also FM's draft of joint venture agreement. CX's 207A–Z–25.

[107] Since 1969 Webster has been in charge of all operations of the FM Service Division which includes sales to the auto aftermarket. CX 185; Tr. 2272.

[108] Since 1968 Potter has held a variety of high-ranking jobs in the Service Division of FM. Tr. 2436–42.

[109] CX's 85Z, 250Z–185 (Nos. 542–43); Tr. 1475–76, 2160, 2321.

[110] CX 261C. American Parts System, a former account of APD, is a major WD chain and one of the largest purchasers of bearings among WD's. Tr. 2369; see also CX's 56A–o. For proof of the special importance attached to this account by FM see CX's 54A–55C; Tr. 2343.

[111] Tr. 778, 806–07.

on study" to its April, 1971 submission, recommended to its Board of Directors that it approve the closing of FM's 0" to 4" TRB production facilities and that 0" to 4" TRB be purchased from an outside source.[112]

62. At a meeting in Philadelphia on September 2, 1971, involving FM's Russell and Webster and SKF's Murray and Sutherland, the matter of SKF becoming a source of TRB [45] for FM was discussed in detail. As a result of these discussions, Russell felt that he had "some assurance" that SKF would sell a line of 0" to 4" TRB to FM.[113] In addition, there was a discussion of SKF supplying automotive ball bearings to FM for aftermarket distribution.[114]

63. During the September 2 meeting, the SKF and FM officials also discussed APD's problems.[115] SKF asked FM to assist SKF in the preparation of APD's parts catalogue, a substantial cost to SKF which could be reduced through use of FM's data. FM eventually refused to provide this service to a competitor.[116] As part of the September discussion, apparently SKF and FM considered the desirability of FM taking over the APD accounts since Webster's notes of the September 2, 1971 meeting contained the following:

> Followup on combining APD-FMS [FM Service Division] — around October 1st.[117]

[46] 64. After the September 2, 1971 meeting, FM submitted a letter to SKF which stated that FM had asked SKF if SKF would quote on certain high-volume TRB.[118]

65. Also following the September 2, 1971 meeting with FM officials, SKF officials commissioned a study to consider the relative profit to be had in selling to FM as compared to continuing the APD operation. The study, which was completed on December 20, 1971, concluded that it might be more profitable for SKF if FM took over APD's customers, and SKF sold bearings to FM for aftermarket distribution.[119]

66. In September and November 1971, FM officials continued to meet with Koyo Seiko representatives. The Koyo Seiko representatives were told that the joint venture was still being considered.[120]

67. On October 27, 1971, FM announced the closing of its Shoemak-

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[112] Finding 35.

[113] Tr. 2168.

[114] Tr. 2824.

[115] Tr. 2161–67, 2825.

[116] Tr. 2470.

[117] CX 263; Tr. 2824. See also Tr. 807.

[118] CX 102.

[119] CX's 45A–C; Tr. 774–75. The relative profitability of selling through FM is dependent, of course, on the sale price which is subject to negotiation. CX's 45A–B, 49A–C; Tr. 775, 1538.

[120] Tr. 2131–32.

er and Hart TRB manufacturing facilities and its intention to remain in the automotive aftermarket.[121] [47]

68. On October 28, 1971, Webster of FM received a telephone call from Morrison of SKF in which Morrison stated that he wished FM to understand that although there had been discussions concerning a supply arrangement no agreement had been reached. During the telephone conversation, Morrison said that FM had weakened its bargaining position with SKF by stating in the October 27 public announcement that it was going to stay in the TRB aftermarket without first having come to any firm arrangement with SKF about the supply of TRB.[122]

69. On November 3, 1971, officials of SKF (Murray and Sutherland) and FM (Russell and Webster) met in Philadelphia. The nature of the discussion between these competitors is revealed in CX's 264A–C, Webster's notes of the November 3 meeting.[123] In addition to a discussion relating to quantity, range, and price of TRB required by [48] FM from SKF and AB SKF overseas, Webster's notes show that the following subjects came up:

> 10. APD-Nice CTO's [clutch throwout bearings manufactured by Nice Division of SKF] only problem.[124]
>
> 11. FMK numbers may be critical to the arrangements.[125]
>
> 12. Possibility
>
> a. We source FMK with SKF.
> b. SKF goes out of APD.
> c. We source some CTO's with Nice.
> d. SKF goes out of marketing CTO's *in Replacement*.
>
> * * * * * * *
>
> 24. APD could be phased out tomorrow.[126]

70. Sometime in November 1971, FM informed Koyo Seiko that FM would have to review its total TRB picture.[127] [49]

71. A meeting between representatives of FM and SKF was held on November 24, 1971. It was at this meeting that FM first offered to

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[121] Finding 39. Closing-down operations were not completed until June 1973 for Shoemaker and March 1974 for Hart. CX's 250Z–36 (Nos. 194a, b), 250Z–37 (Nos. 195a, b).

[122] Tr. 2327–28. Respondent makes much of this point as indicating that FM had no leverage to negotiate for the close of APD. But surely in the give-and-take of this kind of conversation, FM might have regained a measure of leverage if the proposed joint venture with Koyo Seiko and the prospect of still additional competition for Tyson had been casually mentioned in passing. See Finding 69 for evidence that the Koyo Seiko venture was, in fact, mentioned at the very next meeting.

[123] Tr. 2328–31.

[124] This is a reference to the obvious problem of disposing of Nice's production of auto clutch throwout bearings should APD be closed. Tr. 2329–30.

[125] Reference is to FMK — the proposed FM-Koyo Seiko joint venture — and the high volume part numbers to be produced by this joint venture. Tr. 2330. See Findings 53, 55.

[126] CX's 264A–B [Emphasis in original].

[127] Tr. 2132.

buy from SKF its requirements of high-volume TRB, including the so-called "FMK numbers" covered by the proposed joint venture with Koyo Seiko.[128]

72. Also, at the November 24, 1971 meeting, FM and SKF had further discussions about the condition of APD. APD's sales by product line segments were discussed[129] and SKF told FM "Target for elimination of APD 2/1/72."[130] Webster of FM, who was present at this meeting, testified as follows:

> Well, we felt that SKF's attitude toward its aftermarket operation was in response to our expressing a desire and willingness to source certain large volumes of zero to four tapered roller bearings with SKF.[131]

[50] He added:

> If the people at SKF were to close out their aftermarket operation, obviously we would be interested in seeing if we could achieve some of that business.[132]

73. Finally, at SKF's insistence, agreement was reached during the November 24 meeting that automotive ball and clutch throw out bearings were to be included in the arrangement (although FM itself manufactured the same bearings) because APD was being closed and as a result SKF would no longer have an outlet for these bearings.[133]

74. Both before and after the November 24 meeting, FM and SKF discussed the supply arrangement on practically a daily basis.[134] FM expressed its concern over the ability of SKF to produce all of the 0" to 4" OD TRB [51] (some 400 items)[135] which FM required. As noted earlier (Finding 52) both sides to the "arrangement" proceeded on the assumption that SKF would have available to it the overseas facilities of AB SKF to meet FM's requirements. Without such assistance SKF's

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[128] Tr. 2383–84, 2475. See also Webster's notes of the November 24 meeting which indicates that "F-MK numbers" (*i.e.*, the Koyo Seiko joint venture bearings) were to be included in the arrangement (CX 108) and notes of the November 3 meeting which state that "FMK numbers may be critical to the arrangements." CX 264A.

[129] Tr. 2473–74.

[130] CX 108; Tr. 2476. Although there is clear evidence that a decision to close down APD had been reached by November 1971, the SKF Board of Directors was not informed of this decision until January 31, 1972. CX's 250Z–187 (No. 549), 352E (No. 50); RSX 66D.

[131] Tr. 2384.

[132] Tr. 2384.

[133] CX's 85Z–6–7, 51A; Tr. 2382, 2386. The insistence of SKF was clearly the dominent reason (see Tr. 807–08) notwithstanding the testimony of FM officials that bearings were included because this might produce a favorable price to FM on TRB, or because it may have been more profitable for FM to source high-volume bearings with outside sources rather than produce them itself. Even if this latter point had some validity it would not explain why SKF would necessarily be chosen as the outside source. Tr. 2382–83, 2472–73.

[134] Tr. 2471.

[135] The number had been reduced from 600 to 400 because the Detroit facilities of FM were to produce 200 items on an "all-time" (5 years supply) basis prior to shutdown. CX 107; Tr. 2388, 2470–71.

own line was clearly too limited to meet FM's aftermarket requirements.[136]

75. On January 11, 1972, SKF and FM officials met and came to a final agreement on the terms for supplying TRB.[137] At this meeting respondents also discussed SKF's role in transferring the APD accounts to FM.[138]

[52] 76. On January 13, 1972, Webster of FM wrote to Murray of SKF "for the purpose of setting forth and confirming our *mutual understanding* as a result of our discussion on January 11th" [Emphasis added]. According to this letter the "mutual understanding" included:

> Since it is our [FM's] intention to buy all our requirements for the bearings in these five categories [including high volume TRB] from you . . . SKF will automatically participate in our sales volume increases. History dictates that our sales volume should continue on a steady incline.
>
> A formal agreement covering our purchases is now being prepared.
>
> You have advised us of your intention to close your Automotive Products Division (APD) and have asked us to supply your present customers.[139]

77. During the hearings SKF officials testified that APD would not have been closed unless they were certain that SKF was assured of the FM aftermarket business for TRB.[140] It is clear that this assurance included an agreement that SKF would supply FM's needs for high-volume TRB.[141]

[53] 78. Morrison of SKF testified that APD was closed because he believed that more profit could be made by selling bearings, including ball bearings, to FM than through APD.[142] The prospect of ball bearing sales to FM was important to SKF since the manufacture of ball bearings was more profitable than TRB production.[143] SKF officials also testified that the closing of APD was part of a company-wide retrenchment brought about by declining overall corporate profits in the period 1965 to 1971.[144] No explanation was given as to why this retrenchment would require the closing of APD at the exact moment in its development when it first showed a profit. [54]

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[136] It was contemplated that about 100 of the 400 TRB to be supplied by SKF would be produced by SKF, the remaining coming from AB SKF's plants in England (Luton), Italy, Germany and other overseas facilities. Tr. 2479. In dollar amount, $3 million of the annual amount of TRB were to come from SKF, while $2 million were to be produced by AB SKF overseas. Tr. 2480.

[137] CX's 47A–E; Tr. 2172, 2339, 2479–80.

[138] CX's 47C–D, 250Z–186 (No. 547); Tr. 2339.

[139] CX's 47B–C. This letter agreement was not signed by SKF.

[140] Tr. 775–76, 1500.

[141] See Findings 72, 76.

[142] Tr. 774–75.

[143] Tr. 807–08.

[144] Tr. 1584–85.

79. At trial, both FM and SKF officials denied that the offer of the supply contract was contingent on the closing of APD or that the offer was inspired by a promise by SKF to close APD.[145]

80. On January 21, 1972, Russell of FM wrote to Koyo Seiko saying that FM's decision to discontinue production of 0" to 4" TRB at Shoemaker might make the joint venture impractical since FM now needed a source of a full line of automotive TRB.[146]

81. Despite the January 21, 1972 letter, planning between FM and Koyo Seiko for the joint venture continued for a full year.[147] On October 5, 1972, Koyo Seiko sent a cable to FM requesting a date for completion of all details respecting the joint venture. On October 6, 1972, [55] Koyo Seiko was told by FM that consideration of the joint venture must be placed in suspense because of a Federal Trade Commission investigation, apparently the investigation which led to the instant complaint. On December 14, 1972, the project was formally abandoned by FM.[148]

82. According to FM officials, the joint venture plan was dropped because they believed that no full-line supplier (SKF, for instance) would agree to sell slow-moving TRB unless the more profitable high-volume part numbers were included in the package.[149]

### Consolidation of FM-SKF "Arrangement"

83. On the basis of additional negotiations during a meeting on January 11, 1972 of FM and SKF officials, proposed written agreements were submitted by FM to SKF.[150]

[56] 84. The first proposed agreement reduced to writing the understanding reached at the January 11, 1972 meeting between FM and SKF respecting their mutual efforts to transfer the APD accounts to FM.[151]

85. The second of the proposed agreements covered the terms, prices, and quantities of TRB to be purchased by FM from SKF. The agreement contemplated that SKF would produce the 100 highest volume items while the 300 low-volume TRB were to be produced by AB SKF in England, Italy, Germany, and other areas. The agreement

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[145] Tr. 793-95, 1482, 1485, 2172-73, 2349-50, 2481.

[146] CX's 208A-B; Tr. 2132-33.

[147] As late as August 25, 1972, FM briefed Koyo Seiko representatives on the project and outlined the division of responsibilities between the joint venture partners, noting, however, that "there are still many points to be ironed out." CX's 209A-B; Tr. 2134. On September 1, 1972 Koyo Seiko sent FM a draft joint venture agreement which followed the format of an earlier FM draft. CX's 210A-212B.

[148] CX's 213-214B. In October, 1975, Koyo Seiko opened a manufacturing plant in Orangeburg, South Carolina which finishes and assembles high-volume 0" to 4" TRB from parts imported from Japan. Tr. 882-84.

[149] Tr. 2134-37. Note, however, that SKF continues to supply high-volume TRB despite other arrangements having been made by FM for the "fillers." See Finding 96.

[150] CX's 48A-L; Tr. 2340, 2480-81.

[151] CX's 48B-D.

also covered the purchase of certain fast moving ball bearing part numbers by FM from SKF.[152]

86. Neither of the proposed written agreements was executed by SKF[153] but as of February 10, 1972, FM believed [57] an agreement had been reached with SKF for the joint solicitation of the APD accounts by FM and SKF.[154]

87. Beginning in February 1972, FM and SKF engaged in a joint effort to transfer the APD business to FM.[155]

88. On May 16, 1972, FM sent a blanket purchase order to SKF for its then existing requirements of 0"–4" TRB.[156]

[58] 89. The relationship between FM and SKF remained on a purchase to purchase order basis from May 1972 until December 1974.[157]

90. The value of bearings purchased by FM from SKF pursuant to the arrangement is shown in Table 3.

TABLE 3: BEARINGS PURCHASED BY FM FROM SKF 1972–1975
(Dollars)

| | *TRB* | | *Bearings From Nice* | *Total* |
|---|---|---|---|---|
| | *From Tyson* | *From AB SKF* | | |
| 1972 | 1,181 | 297 | 2,873 | 4,521 |
| 1973 | 742 | 1,405 | 2,314 | 4,564 |
| 1974 | 2,780 | 1,876 | 2,408 | 7,780 |
| 1975 | 5,538 | 2,926 | 1,263 | 9,736[158] |

Sources: CX's 254R–O *in camera*

## Problems in the SKF-FM Arrangement

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[152] CX's 48E–L; Tr. 2480–81.

[153] Tr. 2481. Webster of FM testified as follows:

> Q. Were either of those agreements accepted by SKF?
>
> A. Not to the extent they were signed and returned, no. Tr. 2340.

The formality of signing aside, it is obvious that the terms of the contracts were accepted by both sides. See Tr. 2347, 2480–81.

[154] CX 266; Tr. 2341. As early as January 27, 1972, Potter of FM requested that SKF submit a list of APD customers and their annual purchases by product group. CX's 250Z – 137–38 (No. 551). Detailed information respecting the APD accounts as well as data on the performance of each APD salesman were provided by SKF to FM by February 1972. CX's 250Z – 139 (Nos. 557–58), 250Z – 149 (No. 561).

[155] CX's 50, 54A–B, 55A–56o, 60A–W, 61, 63A–64, 67A–68, 70–72D, 75A–C, 116, 118–26, 128–31, 133, 135–39, 250Z–106 (No. 442), 250Z–139–41 (Nos. 557–67), 250Z–153 (No. 607); Tr. 2341–42, 2422. There were 367 APD accounts whose 1971 purchases of bearings from SKF totaled $3,384,518. CX 250Z–139 (No. 557). As part of the shutdown of APD, FM purchased APD's inventory and retained some of the APD sales force. CX 47C; Tr. 2342. See CX 117 for draft press release which indicates that internally SKF viewed the arrangement as a complete transfer of the APD operation to FM. That FM was consulted about all aspects of the end of APD is further shown by the meeting held on August 22, 1972, in which SKF and FM discussed the closing down of the SKF field warehouses servicing the APD division. CX 250Z–129 (No. 556).

[156] RFX's 167A–J.

[157] Tr. 2481–82.

[158] Discrepancies between parts and total in Table 3 apparently due to purchases of bearings other than TRB or ball bearings. See, *e.g.*, CX 254U (No. 164) *in camera*.

91. Both before and after the signing of the formal contract in 1974, FM found AB SKF to be an unreliable supplier. Parts supplied from AB SKF's subsidiaries in Europe were delivered late, if at all. While most of the TRB subject to the arrangement were produced by SKF's Tyson [59] Division, the production of the AB SKF's foreign plants was important for purposes of maintaining a reasonably complete line. In FM's view, SKF reneged on assurances of its ability to supply FM with necessary bearing parts and shipped parts which were not ordered, resulting in costly delays and the use of unnecessary warehouse space. As a consequence, FM experienced difficulty in meeting its customers' demands which, in turn, resulted in serious customer dissatisfaction.[159]

92. Because of the unreliability of AB SKF as a supplier, almost from the inception of the "arrangement," FM has considered alternative sources of supply although the arrangement clearly contemplated a requirements contract.[160] For various business reasons none of the [60] few possible alternative "outside" suppliers of TRB have been acceptable to FM.[161]

93. In the fall of 1974, SKF and FM discussed the execution of a written buy-sell agreement. These discussions resulted in the execution on December 17, 1974, of a nonexclusive supply agreement which contained the following extended "term":

> The initial term of this Agreement shall be from January 1, 1975 to December 31, 1979. Either party may terminate this Agreement as of December 31, 1979 by [61] giving written notice of termination at least thirty (30) days prior to December 31, 1975. If such notice is not given, the term of this Agreement shall be extended to December 31, 1980. Thereafter, the Agreement shall be extended annually for one year periods unless written notice of termination is given by either party at least 180 days prior to the end of the calendar year five years next preceding. This Agreement may be terminated as of any date by mutual consent of the parties.[162]

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[159] CX 255D; RFX's 188A-B; Tr. 2174-79, 2351-52, 2484. The problems with AB SKF reached such proportions that FM's Russell went to AB SKF's plant in Luton, England to express his displeasure. Tr. 2177, 2352.

[160] CX 59A.

[161] FAG (FAG, Kugelfisher, Georg Shaefer & Co.) a large German anti-friction bearing manufacturer was contacted by FM in 1972 and 1973. Apparently, FAG was willing to supply some TRB but reevaluation of the Deutsche Mark had the effect of increasing prices to the point where negotiations broke down. CX's 267A, 338A-K *in camera*, 373; RFX 157 *in camera*; Tr. 1027.

Societe Nouvelle de Roulements, S.A. ("SNR") a French firm was contacted by FM in 1973. SNR declined to quote prices on 96 TRB part numbers due to fluctuating monetary conditions. CX 13U; RFX 170.

Negotiations in 1973 with American Koyo (U.S. subsidiary of Koyo Seiko) broke down over American Koyo's unwillingness to stamp FM's trademark on its products. RFX's 210A-D, 211.

NTN (NTN Toyo Bearing Manufacturing Co. Ltd.) a Japanese producer, could only supply four TRB numbers; besides FM's customers did not like the idea of finding a Japanese bearing in an FM box. CX 13R; RFX's 183A-87; Tr. 552-54. See, however, CX 356A for indication that "SKF arrangement" may have influenced outcome of negotiations with NTN.

[162] CX 80B.

94. Despite the signing of the formal contract, FM's problems with SKF have persisted. These problems relate to quality and delivery.[163] Thus, on May 27, 1975, Russell, by then the President of FM, notified Skinner, President of SKF, of FM's extreme displeasure with AB SKF's shipping performance. Russell indicated that FM currently was analyzing the feasibility of returning to the manufacture of 0" to 4" TRB or of withdrawing from the TRB automotive aftermarket entirely.[164]

[62] 95. Because of these difficulties with SKF, FM further reduced its aftermarket product line to 259 part numbers — the minimum necessary to remain in the replacement business.[165] Nevertheless, SKF could supply from its Tyson Division only 160 of these part numbers.[166] Therefore, FM renewed its attempts to purchase 0" to 4" TRB sources other than SKF. These attempts have concentrated on those slow-movers not readily available from SKF,[167] but FM has met with no success for various reasons.[168]

[63] 96. Since the relationship with SKF had not given FM a satisfactory source of supply, and efforts to develop alternatives had not been successful, on October 1, 1975, FM's Bearing Division prepared a study for management which investigated the possibility of FM's re-entry into the production of 0"–4" TRB, but limited to 99 slow-moving parts which SKF had proved to be incapable of supplying but which FM's aftermarket sales considered to be a necessary part of its line if FM was to remain an effective supplier to the TRB automotive aftermarket. The recommendation was accepted by FM's Board of Directors as necessary to protect FM's automotive aftermarket sales of ball bearings, engine bearings and oil seals. Accordingly, FM invested $1.3 million in its Hamilton, Alabama plant to provide the necessary tooling to produce the 99 (subsequently expanded to 112) TRB part

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[163] Tr. 2351–52.

[164] RFX's 189A–B; see also Tr. 2352 for other FM efforts to improve performance of AB SKF plants and CX's 355A–B for suggestion by SKF that foreign imports be eliminated.

[165] Tr. 2357, 2493–94.

[166] Tr. 2494.

[167] Tr. 2180, 2352–53, 2494.

[168] A March 1975 purchase order with L&S Bearing Co. of Oklahoma City, Oklahoma was cancelled when a quality audit revealed that the L&S bearings did not come up to FM's standards. CX's 12P, 269A–B, 271–75C; RFX's 171A–81; Tr. 2484–85.

Contact was made again with General Motors in 1975. In June 1975, General Motors agreed to supply 16 part numbers but on a one-time basis only. CX's 13Q, 256B, 357A, 364; RFX 191B; Tr. 1206, 1212, 1214–15.

In July 1975, Timken again rejected FM's offer to purchase a line of 0" to 4" TRB. Tr. 497, 2179–80.

American Koyo was asked in September 1975 to quote on 88 TRB part numbers not available from Tyson. While American Koyo replied that it was not able to offer FM quotations on all part numbers, it has supplied small quantities of TRB. CX's 254Z–18 (No. 282) *in camera*, 277A–B; RFX's 212A–B, 213A–B; Tr. 852, 866. Success with American Koyo may improve in the future if FM does not insist on the removal of the words "Koyo" and "Japan" from these bearings made by Koyo in Japan. CX's 360–61.

CX's 401–05 show an unsuccessful attempt by FM to source TRB from National Engineering Industries, Ltd. of Jaipur, India.

numbers. The balance of the line (about 150 part numbers) continues to be purchased from SKF.[169]

## Effects of SKF's Withdrawal from TRB Automotive Aftermarket

97. With the close of APD, almost all (90 to 95 percent) of the former APD accounts were taken over by FM.[170]

98. FM's share of bearing sales to the automotive aftermarket increased substantially with the close of APD and the transfer of former APD accounts to FM. By 1973 FM had nearly 50 percent of the market, but in later years there was some erosion of its huge share.[171]

99. The state of competition in the auto aftermarket is such that a consulting group retained by FM reported as follows in 1976 on the 15–20 percent premium (over Timken's prices) charged by FM:

> . . .since few warehouse distributors even knew of the 15–20 percent premium on 0–4" tapers, it is doubtful that price competition in this part of the line has been very extensive.[172]

[65] 100. The SKF-FM arrangement as embodied in the December 17, 1974 contract does not prevent SKF from selling through aftermarket channels other than FM and there is some evidence of exploratory conversations by SKF with other aftermarket distributors.[173] The record indicates, however, that realistically this could not be done since the Tyson facilities are barely able to service FM's needs, and, in fact, Tyson's Glasgow plant had to be expanded in 1971 just to meet FM's requirements.[174] Moreover, the record shows that operating under the arrangement with FM, SKF used very close to 100 percent of its TRB capacity in 1973 and 1974.[175] FM officials have said that they would only be concerned about a renewal of SKF aftermarket sales if it meant that SKF could not continue to provide adequate quantities of TRB to FM.[176] As matters now stand, SKF is not a competitor in the automotive aftermarket.[177]

[66] 101. In 1976, SKF purchased the assets of McQuay-Norris Manufacturing Co., a manufacturer and distributor of such automotive parts as engine sleeve bearings, pistons, piston rings, valve train

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[169] CX's 13A–Z–6, 255D; RFX's 191A–H, 203A–C; Tr. 2180–84, 2352, 2355–57, 2476A, 2494–96.

[170] Tr. 2424. FM took on former APD accounts who were in direct competition with FM's own WD accounts. Tr. 2426.

[171] Findings 23, 24. See also CX 250Z–171 (No. 663a).

[172] RFX 214 (p. 40) *in camera*. See also Tr. 2190.

[173] Tr. 794, 1483.

[174] Tr. 1483, 2506.

[175] CX 250Z–34 (No. 187).

[176] Tr. 2516.

[177] CX's 250Z–171 (No. 660), 352G (No. 71).

components, chassis parts, transmission parts, water pumps, and air conditioning parts.[178] There is credible expert opinion that the McQuay-Norris product line is complimentary to the SKF bearings line, and that the McQuay-Norris sales force and distribution system may represent an opportunity for SKF to reenter the bearings auto aftermarket.[179]

## The Tyson Acquisition

102. SKF entered the United States TRB industry in 1955 when it acquired a controlling stock interest in Tyson Bearing Corporation ("Tyson"), a Delaware corporation which produced TRB at a plant located in Massillon, Ohio.[180] At the time of its acquisition of Tyson, SKF manufactured no TRB.[181]

[67] 103. In 1955 Tyson and SKF were engaged in commerce within the meaning of the Clayton and Federal Trade Commission Acts.[182]

### The Tapered Roller Bearings Market

104. There is no dispute between the parties, and the record fully supports the complaint allegation that the manufacture of TRB is a relevant market for the purpose of this proceeding which is distinct from markets consisting of other roller bearings or ball bearings.[183]

### TRB Concentration

105. At all times relevant to this case — that is, between 1955 to date — the manufacture of TRB in the United States has been highly concentrated.[184]

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[178] Tr. 1513-14, 2365.

[179] Tr. 2523, 2785-86.

[180] Complaint and SKF Answer, ¶ 11; CX's 250Z-118 (Nos. 482-83), 250Z-184-85 (Nos. 690-91), 250Z-189 (Nos. 685-86).

[181] CX 421C (No. 17).

[182] Finding 14; CX's 16T, 27C-D.

[183] TRB manufacture is recognized in the Census of Manufacturers and other official United States government statistical compilations as a distinct manufacturing market. Separate technical standards for TRB have been established by industry-wide groups. TRB manufacture, which is much more difficult to accomplish than the production of ball bearings, requires the use of special machinery to control precisely the roller angles and surfaces. TRB is manufactured either in separate plants or on separate machines in plants which produce other bearings. The manufacturers of TRB are a small, well-defined group of producers who monitor each others' competitive activity. Within this well-defined group, TRB producers respond to competitive initiatives of each other, and do not respond to competition from producers of other bearings. The price of TRB is not sensitive to changes in the prices of other bearings, nor do the prices of other bearings respond to TRB prices. The unique characteristic of TRB — its ability to withstand thrust and radial load — has resulted in its use in low speed-high load applications, including various automotive applications such as the front wheel position. In contrast, ball bearings are used in applications in which dual direction load is not a crucial factor. Once a piece of equipment has been designed for TRB, a change to ball bearings or other forms of roller bearings is not feasible. CX's 2Z-6, 190H, 249C, 250D (No. 10a), 250Z-16-17 (Nos. 129-33), 250Z-26 (Nos. 158-59), 250Z-122 (Nos. 497-98), 250Z-148 (Nos. 590-91), 250Z-152-53 (Nos. 603-06), 250Z-155 (No. 613), 252B (No. 9), 252C (No. 19), 252E (No. 30), 257B, 352i (No. 90), 376B, 377B; Tr. 402-03, 408, 429-31, 522-24, 530, 533-34, 540, 767-68, 771, 812, 839-40, 843, 928-32, 1174-76, 1659.

[184] Findings 106-109.

106. TRB manufacturing has been dominated at all times by Timken which has an impressive array of advantages over both existing firms and any prospective entrants which include economies of scale, historical leadership in engineering and research, an integrated source of steel, a full-line of products, worldwide distribution and service facilities, and the ability to adopt flexible pricing policies including aggressive responses to price-cutting of other producers, particularly the Japanese importers.[185]

107. Complaint counsel have not proposed precise market shares for 1955, but the configuration of the TRB industry at that time is not in dispute.[186] Timken had [69] overwhelming dominance.[187] Its market share ranged between 60% to 80%. Tyson had about 2% of the market.[188] Other producers were Bower (now FM), Kaydon (now Keene), International Harvester, General Motors (New Departure-Hyatt Division), and Torrington.[189]

108. In the period 1971 to 1975, the value of shipments of TRB by United States producers and imports increased from about $350 million to over $500 million. Market shares during this period were as follows: [70]

TABLE 4: U.S. MARKET SHARES OF TRB PRODUCERS 1971–1975
(PERCENT)

| | *1971* | *1972* | *1973* | *1974* | *1975* |
|---|---|---|---|---|---|
| Timken | 55.0 | 55.5 | 59.6 | 63.1 | 65.2[190] |
| General Motors (NDH) | 13.8 | 13.3 | 13.0 | 11.6 | 8.3 |
| FM | 12.6 | 13.3 | 8.6 | 5.2 | 5.7 |
| Brenco | 5.7 | 5.0 | 5.0 | 5.9 | 6.0 |
| SKF | 5.3 | 5.2 | 5.6 | 6.1 | 5.8 |
| American Koyo | 2.0 | 2.1 | 2.6 | 2.8 | 2.3 |
| Torrington | 1.7 | 1.4 | 1.5 | 1.7 | 2.1 |
| NTN | 0.7 | 0.8 | 0.8 | 1.2 | 1.3 |
| International Harvester | 2.2 | 2.2 | 1.9 | 1.4 | 1.2 |
| L&S | 0.4 | 0.4 | 0.3 | 0.4 | 0.6 |
| NSK | 0.3 | 0.7 | 0.8 | 0.4 | 0.3 |
| Green | 0.1 | 0.1 | 0.1 | 0.0 | 0.0 |
| FAG | 0.1 | 0.1 | 0.1 | 0.2 | 0.1 |
| Federal Bearing | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

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[185] CX's 190A–Z–1, 341C; RFX's 158V–W, Z–11, 197, 214 (p. 2–3) *in camera;* Tr. 420, 425, 781–83, 1101, 1139–40, 1345–50, 2819–20.

[186] 1955 universe figures are not available. Sales in 1954 were $156,407,000. CX 14.

[187] Tr. 781.

[188] CX 421C (No. 15). Tyson's 1955 sales were $2,950,000. Complaint and SKF Answer, ¶ 25.

[189] CX's 16R, 250Z–124 (No. 506); Tr. 441, 549–50, 892–93, 1488.

[190] Timken's TRB market share has been estimated at close to 70% in 1976, RSX 214 (p. 2) *in camera*, and at over 90% of non-captive 0" to 4" TRB production for OEM markets. Tr. 2819.

Sources: CX's 17, 180, 254Z-2-3 *in camera*, 335A *in camera*, 411A, 412, 413, 414A, 415A; RSX's 84B *in camera*, 91G *in camera*, 93D *in camera*, 95D *in camera*, 97E *in camera*, 98C *in camera*, 99C *in camera*, 105B *in camera*, 111D *in camera*, 113C *in camera;* RFX 155 *in camera;* Tr. 2518.

109. Between 1955–1975 effective market concentration may have been even higher than indicated in Finding 108 since General Motors' New Departure-Hyatt Division (NDH) manufactured [71] substantial quantities for captive rather than merchant market distribution, and International Harvester's production was mainly for captive use.[191]

Entry into TRB Market

110. The parties agree that entry into the manufacture of TRB is extremely difficult.[192]

[72] 111. Between 1954 and 1970, only two firms entered into TRB production in the United States. Brenco Incorporated entered domestic production in 1960 by developing and specializing in large bearings for railroad industry applications.[193] The Japanese producer Koyo Seiko established a United States affiliate, American Koyo, in 1965 to manufacture high-volume TRB in the United States from parts produced in Japan.[194]

[73] Tyson as a Failing Company

112. Within the constraints of attempting to reconstruct circumstances which existed more than 20 years ago, respondents have adequately met the requirements of the "failing company defense" in that they have demonstrated (1) that the bankruptcy of Tyson was

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[191] CX's 16R, 190J, 335A *in camera*, 354 *in camera;* RFX 214 (p. 3-4) *in camera;* Tr. 444, 767, 796, 836-37, 885-86, 890-91, 2818.

[192] The absolute capital investment required to enter TRB manufacturing is enormous. About $1.25 to $1.50 of investment dollars are currently required to achieve a dollar of TRB sales. There are significant economies of scale in the production of TRB. The technical expertise required to manufacture TRB is complicated and costly to develop. TRB equipment is usually designed on a custom basis by the producer itself. The technology involved in designing equipment and producing TRB requires expertise in several disciplines including metallurgy, microgeometry, physics, chemistry, mechanical engineering, and electronics. Skilled workers, who must go through an extensive training program, are needed to produce TRB. In order to achieve customer acceptance a new entrant is subjected to a vigorous, long, and expensive testing period to assure that its quality is acceptable. For a new TRB entrant starting from scratch, it may require as long as 10 years to become viable. Even when established producers create new TRB facilities they need up to 5 years to move from the planning stage to production. The engineering and service capabilities of existing firms in the TRB market would have to be duplicated (a difficult proposition) in order to produce low-volume "specials" as required by TRB users. In addition, since TRB customers often do not allow extensive lead time to develop new tooling, large inventories must be maintained. Even if initial entry is achieved, the development of a firm into a full line producer, which is considered an advantage, is slow and expensive. CX's 249K-M, 250Z-25 (No. 156), 250Z-26-27 (Nos. 161-62), 250Z-33 (Nos. 182, 184), 250Z-38-39 (No. 201), 250Z-116 (Nos. 477-78), 252B (Nos. 10-11), 342, 343B, 348L (No. 134), 421A-D; RSX 32A; Tr. 424-25, 431-35, 438-40, 539-40 567-68, 771, 782-83, 787, 839-40, 843-45, 919-20, 1093-94, 1122, 1126-27, 1130, 1346, 1348-51, 1402, 1463-67, 1657-59, 2150-51, 2185, 2570, 2683, 2702-04, 2710, 2712, 2817, 2819, 2835. With respect to the scale barrier, a foreign firm can produce and sell part of its production abroad and thereby achieve the lower production costs associated with large volume output. Tr. 2741.

[193] RSX 74A; Tr. 2672-88.

[194] Tr. 832-33.

imminent and the prospects of a possible reorganization of Tyson under either Chapter Ten or Chapter Eleven of the Bankruptcy Act were dim or nonexistent in 1955 and (2) other less anticompetitive acquirers were not available. Findings 113–122.[195]

113. Tyson, a Delaware corporation, was started in 1929 by one Frank Tyson, a former employee of Timken. Support in Tyson's early years came primarily from Russell Colgate of the toothpaste family. Later a large interest in the company was obtained by the Channing Corporation. By the end of 1954, substantially all the outstanding stock of Tyson was owned by the Channing Corporation and the Colgate family.[196]

[74] 114. Before the SKF acquisition, Tyson was a manufacturer of a cageless-type tapered roller bearing which was not regarded as a commercially acceptable alternative to Timken's cage-type bearing.[197] Forced to compete against Timken with a more expensive to produce and nonconventional product, Tyson had been discounting from the Timken's price.[198] Beginning in 1948 or 1949, Tyson began to convert to cage-type bearings. This conversion required a large expenditure of capital.[199]

115. In addition to its design problem, Tyson was handicapped by the fact that it offered a limited line of items.[200] Moreover, it had an inadequate plant which by 1955 was in poor condition.[201]

[75] 116. With the exception of a few profitable years (such as the period 1951–53 when it had military contracts during the Korean War) Tyson operated at a loss after World War II. In 1954, its operating loss was $379,000.[202]

117. During the entire period of 1929 to 1954, Tyson tottered on the brink of financial collapse. The record shows the following:

(a) In 1935, financial problems led to reorganization of the company under § 7.7–B of the Bankruptcy Act.[203]

(b) In 1947, the president of Tyson recommended that the company be liquidated because of its financial condition.[204]

[76] (c) In the period 1948–1950, Tyson obtained loans from the Reconstruction Finance Corporation (RFC) in the amount of $1,260,000. But the firm was unable to generate funds to meet its payments to RFC and other creditors. By June 1950, the situation

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[195] See also Tr. 1429.

[196] CX's 250Z–105 (Nos. 443–44), 250Z–109 (Nos. 455–56), 308E, 309, 421A (Nos. 2, 6); Tr. 1430.

[197] CX's 307E, 308E, G, 421A–B (Nos. 3, 9); Tr. 780, 977–78, 1429–29A, 1459–60.

[198] Tr. 1429–29A, 1435, 1459.

[199] CX's 302A–B, 303A–C, 306B, 421B (No. 10).

[200] CX's 352H (No. 75), 421B (No. 9); Tr. 1466.

[201] Tr. 977–78, 1457–58.

[202] CX's 308E, F, 320A, 421B–C (Nos. 13–15); RSX 6N.

[203] CX 308E; RSX 6M. See CX's 303A–C.

[204] CX 421B (Nos. 7–8).

became so desperate that legal counsel recommended that the president of the company be empowered by the board to "take any course of action which . . . becomes advisable, including the closing down of the plant, consenting to foreclosure by the RFC, consenting to the appointment of a receiver of the mortgaged or unmortgaged assets or filing a petition in bankruptcy."[205] In January 1951, Tyson informed the RFC that it was unable to meet payments on the outstanding loans out of income.[206] Again in 1952, Tyson had insufficient cash to meet payments on loans.[207] On at least one occasion during this period, [77] Tyson was forced to borrow funds to meet its payroll. By Fall, 1953, the company had defaulted on a $60,000 RFC loan secured by accounts receivable loan with the result that RFC impounded the accounts receivable. This action of the RFC deprived Tyson of sufficient cash to operate beyond October 1, 1953.[208] At a special meeting of the Board of Directors of Tyson on September 21, 1953, a representative of the RFC outlined the position of the agency in relation to the outstanding loan obligations of Tyson. Specifically, the RFC demanded cash payments on the loans outstanding by June 30, 1954 and recommended among other alternatives that the necessary cash be obtained by a merger or the sale of Tyson to a firm with sufficient resources to retire or substantially reduce the indebtedness to RFC.[209] Since the shareholders were unwilling to provide the additional capital to Tyson necessary to meet the RFC demand, immediate efforts were made to contact prospective acquirers. Efforts to obtain additional capital through an acquisition were unsuccessful and in July 1954, Tyson was forced to advise the RFC that it would be necessary to default on its monthly payments of the loan.[210] At the time of the acquisition, Tyson had [78] loans outstanding to the RFC in excess of $1.7 million. Pledged to secure these loans were nearly all of the assets of Tyson including land, buildings, equipment, inventory, and an insurance policy on the life of the president of Tyson.[211]

118. By December 1954, Tyson was for all practical purposes bankrupt since its debt service requirements exceeded funds available by approximately $280,000.[212]

119. Throughout its history of almost continuous financial peril, Tyson sought out potential acquirers. The record shows the following:

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[205] RSX 16; see also CX's 310A–311C, 421B (Nos. 11–12); Tr. 1430–31, 1435.

[206] CX's 306A–F; see also RSX's 17–20.

[207] CX's 304A–G, 307A–G.

[208] RSX 23B; Tr. 1431. See also CX's 312A–314B.

[209] RSX's 23A–i.

[210] CX's 316A–C, 320A–321D; RSX's 25A–E.

[211] CX's 16G, H; RSX 30F.

[212] CX 27E; Tr. 1435, 1458–59. See also CX's 325A–B.

(a) In 1950, Chanselor and Lyon, a West Coast distributor of automotive parts declined an offer to consolidate.[213]

(b) During the 1950's Tyson approached Eaton Manufacturing Co., Torrington, Willys-Overland, Portsmouth Steel Company, Monroe Auto Equipment Co., Otis & Company, Louis Berkman Company, J.H. Whitney & Co., and Borg-Warner with acquisition proposals. All of these acquisition overtures were unsuccessful.[214]

**[79]** (c) In the early 1950's, Bower Roller Bearing Company (before Bower was acquired by FM) evaluated Tyson as a possible acquisition candidate and concluded that it was not interested because of Tyson's "atrocious" facilities and its unconventional product line.[215]

(d) A proposed merger with Nice in the early 1950's collapsed when Nice backed away from the deal.[216]

(e) In early 1955, Alexander Guterma, President of the Shawano Development Corporation made an offer to merge Tyson into Shawano. This deal fell through when it became apparent that because of Guterma's reputation in the business community, a merger with Shawano would not be acceptable to either the RFC or Tyson's management.[217]

(f) Guterma apart, the record indicates that Tyson was in such desperate financial straits that it would not back away from any possible acquisition.[218]

**[80]** 120. Seeking to alleviate its desperate financial condition, Tyson contacted SKF in January 1955 about a possible acquisition.[219]

121. The record shows that by the time of the SKF acquisition (March 1955) principal backers were unwilling to provide additional funds, banks would not extend loans, it was not possible to issue stock to obtain funds, and a series of other attempted acquisitions had proven to be unsuccessful.[220] But for the SKF acquisition, Tyson would have been forced into liquidation.[221]

122. Upon acquiring Tyson, SKF made arrangements for a bank loan which paid off the largest outstanding debts and made available working capital. SKF was the surety on the loan.[222]

### [81] SKF as a Potential Entrant

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[213] CX's 306A, 315A; Tr. 1432–33.

[214] CX's 315A–B; RSX's 11A–B, 12, 14, 24A–B; Tr. 1432.

[215] Tr. 976–78.

[216] CX 421D (No. 22); Tr. 1433, 1574–75.

[217] RSX's 27, 28C, 29A–B; Tr. 1434.

[218] Tr. 1433.

[219] Tr. 1458–59.

[220] CX's 319A, 421C (No. 15); Tr. 1437–38.

[221] CX 421C (No. 19).

[222] CX's 16H, 308K; RSX 6X; Tr. 1458–59, 1523. The purchase price for most of the outstanding shares was $1 million and SKF became the surety on a $2 million loan obtained to pay off existing debt. Tr. 1522–23.

123. Since the Tyson acquisition was a "toe-hold" acquisition (Finding 107) of a failing company (Findings 113–122) whether or not SKF was a potential entrant in 1955 is irrelevant. If this were still an issue in this case, I would have concluded that there is adequate evidence that SKF with the aid of AB SKF was a potential entrant de novo or by toe-hold acquisition in 1955.[223] Complaint counsel, however, failed to prove that in 1955 SKF was one of the few [82] most likely actual entrants, or that SKF's existence on the fringe of the United States TRB market had any effects on that market. In any case, these considerations, too, are irrelevant for even if SKF were the most likely potential entrant and it could be inferred that by waiting in the wings it had a procompetitive effect by tempering Timken's [83] pricing decisions, the toe-hold acquisition of a failing company is not unlawful under any definition of the potentiality theory.

## Federal Trade Commission Investigation of Tyson Acquisition

124. The Federal Trade Commission investigated the 1955 Tyson acquisition and informed SKF on July 2, 1956, that no action would be taken.[224] As part of the Commission's investigation of the SKF

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[223] The record shows the following:

(a) It is advantageous for a bearing company to offer TRB, other forms of roller bearings, and ball bearings because customers prefer to deal with a full-line supplier who can meet their total bearings needs. CX's 27C–D, 250Z–78 (No. 328), 300B, 421D (No. 24); Tr. 535, 1097, 1130–31, 2069.

(b) SKF's 1955 product line included ball bearings as well as cylindrical and straight roller bearings which are product markets adjacent to TRB. The same sales force can be used to sell all bearings. CX's 27C, 250Z–32 (Nos. 179–80); Tr. 830, 845–46.

(c) Before the Tyson acquisition, SKF recognized that the lack of TRB was a significant gap in its product line. CX 16U.

(d) Before the acquisition of Tyson, SKF wanted to broaden its line by including the manufacture and sale of TRB. CX's 250Z–113 (No. 469), 250Z–114 (Nos. 470, 471), 250Z–126 (No. 511), 352B, C (Nos. 19, 29); Tr. 1489–90.

(e) At the time of the Tyson acquisition, SKF possessed technical skills, financial resources, a nationwide marketing and sales organization, and the ability to organize large scale bearing production. CX 352B (No. 17).

(f) SKF had available to it the resources and expertise of AB SKF which in 1954 was a major world-wide producer of TRB. While AB SKF's experience was in the production of through-hardened TRB, the development of case-hardened TRB expertise (the type of TRB favored in the U.S. market) was not beyond the reach of this giant multinational corporation, notwithstanding the costs involved. That there are problems in developing case-hardened technology, does not mean that the problems cannot be overcome by an organization of the size of AB SKF, especially when respondents already have in their employ experts who are fully conversant with the nature of the technical problems. Compare, for example, the generalized statements in the record about the difficulty of converting to case-hardened and the testimony relating to technological solutions to specific problems which clearly seem to be within the capability of a firm like AB SKF. Tr. 414, 542–44, 784, 798, 894–95, 897, 1021–22, 1095–97, 1111–13, 1399–1401, 1660–65, 2684. See also CX's 4A–2–17 for proof of the vast technological and research resources of AB SKF.

(g) Historically, SKF's parent AB SKF has followed a policy of seeking new TRB markets. Thus in the period from 1953 to 1971, AB SKF expanded through internal growth its world-wide production of TRB by either improving existing facilities or the construction of new TRB facilities in the Netherlands, Brazil, West Germany, Spain, Mexico, United Kingdom, India, South Africa, and Iran. CX's 250Z–67 (Nos. 303–06), 250Z–68 (Nos. 309–310), 250Z–70 (Nos. 314–16), 250Z–72–73 (Nos. 322–325), 250Z–74 (No. 329), 250Z–75 (No. 334), 250Z–76–77 (Nos. 336–342), 348G–J (Nos. 72–75, 78–79, 82–83, 85, 87, 91, 94, 98, 102–103, 105, 108–110).

[224] CX's 16A–V; RSX 4. See Tr. 1527 for proof of reliance by SKF on the Commission's clearance before making investments in Tyson. The Commission reserved the right to take action in the future if other evidence or subsequent developments warrant such action.

purchase of Nice (Finding 147), the Tyson acquisition was reinvestigated in 1960 and again no action was taken.[225]

125. Ten years after the Commission had indicated that it did not intend to challenge the Tyson acquisition, SKF constructed a new TRB facility in Glasgow, Kentucky in 1965. Since 1955, SKF has invested $27 million in its Tyson division including construction of the Glasgow plant and remodeling of the Massillon facility.[226]

## [84] The Nice Acquisition

126. In 1960, SKF acquired all the assets of Nice Ball Bearing Company ("Nice"), a division of the Channing Corporation, the same company which had previously owned a substantial interest in Tyson.[227]

127. At the time of the acquisition by SKF, Nice manufactured ball bearings at plants located in Philadelphia and Kulpsville (Lansdale), Pennsylvania.[228]

128. In 1960, both Nice and SKF were engaged in commerce within the meaning of the Clayton Act.[229]

### The Ball Bearings Market

129. Complaint counsel argue that the 1960 acquisition of Nice by SKF occurred in a highly concentrated "all" ball bearing market,[230] and that this alleged horizontal [85] acquisition must be judged by the strict standards applied by the courts and the Commission to the elimination of actual competition.

130. The record shows that the alleged "all" ball bearing industry was concentrated between 1954–1972.

TABLE 5: FOUR AND EIGHT FIRM CONCENTRATION RATIOS FOR ALL BALL BEARINGS[231] (1954–1972)

| | *4 Firm Concentration (Percent of shipments)* | *8 Firm Concentration (Percent of shipments)* |
|---|---|---|
| 1954 | 71 | 85 |
| 1958 | 66 | 81 |
| 1963 | 63 | 79 |
| 1967 | 61 | 78 |
| 1972 | 57 | 72 |

Source: CX 3B.

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[225] See RSX 59A.

[226] Tr. 784–85, 1462–64, 1524.

[227] Finding 113; Complaint and Answer of SKF, ¶ 11; CX's 250Z–156 (No. 616); RSX 59J; Tr. 1578.

[228] CX 250Z–71 (No. 320).

[229] Finding 14 and Complaint and Answer of SKF, ¶ 11.

[230] See Findings 130–31.

[231] The major bearings firms in the early 1960's were General Motors, Fafnir, Marlin Rockwell, Federal Bearing, Norma Hoffman, Hoover, FM, and Borden. CX's 250Z–157–58 (No. 620), 352G (No. 67); Tr. 584, 747, 918, 1083.

[86] 131. Between 1972 and 1975 market shares in the alleged "all" ball bearings market were as follows:

TABLE 6: MARKET SHARES IN 1972–1975 OF SELLERS IN AN ALL BALL BEARINGS MARKET (INCLUDING IMPORTS) (PERCENT)

| | *1972* | *1973* | *1974* | *1975* |
|---|---|---|---|---|
| Fafnir | 29.7 | 29.7 | 29.8 | 28.3 |
| General Motors (NDH)[232] | – | – | – | – |
| Marlin Rockwell | 17.3 | 17.1 | 17.5 | 18.0 |
| SKF (including Nice Division) | 17.0 | 15.1 | 14.9 | 15.6 |
| FM | 9.9 | 9.0 | 8.4 | 9.8 |
| NSK | 4.2 | 7.7 | 8.2 | 6.7 |
| NTN | 3.6 | 4.2 | 4.5 | 5.5 |
| FAG | 5.8 | 5.9 | 5.6 | 4.7 |
| Federal Bearing | 4.5 | 4.0 | 3.5 | 3.6 |
| Barden[233] | – | – | – | – |
| Koyo | 2.6 | 2.6 | 2.6 | 2.1 |
| Aetna | 0.1 | 0.1 | 0.1 | 0.1 |
| Torrington | 0.4 | 0.4 | 0.5 | 0.6 |
| George Miller | 0.4 | 0.6 | 0.8 | 0.8 |
| Green | 0.7 | 0.6 | 0.6 | 0.4 |
| L&S | 0.6 | 0.5 | 0.5 | 0.4 |
| Nachi | 0.1 | 0.2 | 0.4 | 0.4 |
| INA | 0.0 | 0.1 | 0.2 | 0.1 |
| International Harvester | 3.2 | 2.0 | 2.0 | 2.7 |

Source: SKF's Confidential Requests for Admissions & Complaint Counsel's Response, ¶¶ 51–73; CX's 17, 180, 335A *in camera*, 349J–T *in camera*, 412, 413, 414A, 415A; RSX's 82B *in camera*, 84D *in camera*, 93D *in camera*, 95D *in camera*, 97E *in camera*, 98D–E *in camera*, 99D–E *in camera*, 101C *in camera*, 103G, i, K, M *in camera*, 105B *in camera*, 111D *in camera*, 114i *in camera*, 116B *in camera*.

[87] 132. Although market shares are not available for each producer in 1958, based upon uncontested universe figures, SKF had 8.3 percent of the alleged "all" bearings market and Nice had 2.2 percent.[234]

133. Respondent SKF, however, vigorously contests the existence of such an "all" bearing market[235] and claims instead that Nice was essentially a producer of non-precision, commercial grade, ground and

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[232] General Motors did not report total ball bearing sales (Tr. 1186) but unquestionably General Motors (New Departure-Hyatt) was among the top four producers. CX 250Z–92 (No. 396); Tr. 747, 842. See also CX 254W (No. 179) *in camera*.

[233] Not available in usable form.

[234] The total value of shipments was $309,727,000. CX 14. SKF had sales of $25.7 million, Nice's sales were $6.8 million. Complaint and SKF Answer, ¶ 27; CX's 32A–34D. 1960 sales of other bearing producers are not shown in the record with adequate precision to calculate each company's market share. See also Tr. 2837.

[235] Both sides agree and the record shows that miniature ball bearings having an OD of less than 9 mm are a market distinct from all other bearings for the following reasons: no positive cross-elasticity of demand, non-substitutability, separate customers and producers, unique manufacturing facilities, and industry recognition. CX's 28L, 250X–Z–1 (Nos. 71–79), 250Z–5–6 (No. 96), 250Z–85–86 (No. 378), 250Z–91 (No. 393), 250Z–93 (No. 397), 250Z–97

*(Continued)*

unground radial bearings of less than ABEC–1 quality while SKF in 1960 made bearings of [88] ABEC–1 or better quality which are known as precision bearings.[236] According to respondent SKF these quality distinctions led to application and customer distinctions with the result that Nice and SKF were not actual competitors in 1960.

134. While exact conditions in 1960 may be difficult to reconstruct, the burden nevertheless is on complaint counsel to prove the extent of actual competition between acquired and acquiring firms at the time of acquisition. Complaint counsel failed to sustain the burden: the record shows extremely limited competition between Nice and SKF in 1960.[237]

[89] 135. In 1960, SKF was engaged exclusively in the production of precision ball bearings of ABEC–1 quality or higher. It produced no bearings of less than ABEC–1 quality.[238]

136 Nice produced ground and unground commercial-grade bearings. Nice never produced bearings of ABEC–1 quality or better.[239]

137. Precision bearings of ABEC–1 standard or better are made of high-quality steel.[240] They are produced in metric dimensions.[241] They are standardized in design and are universally interchangeable.[242]

[90] 138. Commercial grade bearings made by Nice in 1960 were manufactured from a simple grade of carburizing steel.[243] With some exceptions Nice bearings were produced in inch sizes.[244] Between 1960 and the present, manufacturers of commercial grade ball bearings have deliberately not established industry standards since these bearings are manufactured mainly to meet the particular needs of specific customers.[245]

139. Precision bearings of ABEC–1 or better quality are usually manufactured on different equipment than commercial bearings and

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(Nos. 411–16), 250Z–147–48 (Nos. 587–88), 250Z–149 (Nos. 594–95), 250Z–153–54 (Nos. 608–09), 250Z–155–56 (Nos. 614–15), 250Z–157 (Nos. 618–19), 250Z–159 (No. 624), 250Z–161–62 (No. 631), 252A (No. 7), 352J (Nos. 94–96); Tr. 850, 934–35, 1006–07, 1179–80, 2752, 2763, 2833.

[236] The Anti-Friction Bearing Manufacturers Association ("AFBMA") through its Annular Bearing Engineering Committee ("ABEC") has established certain quality precision standards recognized by both the industry and the government. These standards for radial bearings cover such elements as dimensions, tolerance or accuracy, and life prediction. Bearings meeting the standard of ABEC–1 or greater are known as precision bearings. Bearings not intended to meet ABEC standards are known as "commercial-grade" bearings. RSX's 59C–D; Tr. 748–50, 1639.

[237] Findings 135–146.

[238] Tr. 787, 1563, 1638. During a short period in the 1940's, SKF attempted to produce commercial-grade bearings but withdrew from that market because the venture was unsuccessful. Tr. 1483–84.

[239] Tr. 1108, 1557, 1656–57. Included in the Nice line were clutch throw out bearings for distribution to the auto aftermarket. CX's 36F, 352A (No. 8), 424A–Z–47. With the decline of the manual clutch and the concomitant drop in the need for throw out bearings, Nice lost a large part of its auto aftermarket business. Tr. 1566–67.

[240] Tr. 1642, 1646–49.

[241] Tr. 1562.

[242] Tr. 749–50, 1642–43, 1648–49.

[243] Tr. 1590. See also Tr. 1388.

[244] Tr. 1562, 1565.

[245] CX's 279B, 280B, 282B, 290B, 292B, 294B; Tr. 1561–62, 1639–40, 1642–43, 1649.

require a different level of skill to produce than commercial bearings.[246]

[91] 140. Precision bearings of ABEC–1 quality or better bearings are not generally interchangeable with commercial bearings. With rare exceptions, it is not possible to substitute less than ABEC–1 bearings in an application in which ABEC–1 or above are required. Besides, precision ball bearings are too expensive to use in applications where a precision bearing is not required. On the other hand, the buyer who has an application requiring an ABEC–1 bearing will not choose a less than ABEC–1 on the basis of price.[247]

141. Nice and SKF essentially sold to different customers in 1960. In general, the pattern of the bearing industry is that precision bearings of ABEC–1 quality or better are used in applications where load, speed, precision, and longevity requirements are severe. Commercial grade ball bearings are used wherever these requirements are less important.[248]

[92] 142. Complaint counsel introduced no evidence of actual cross-elasticity of demand between precision and commercial ball bearings in 1960.[249]

143. While entry into the bearings industry is generally difficult to achieve,[250] it is easier to enter the production of commercial grade bearings than precision bearing manufacture.[251]

[93] 144. Both Nice and SKF sold generator bearings to Ford Motor Co.[252] This is the only record proof of interchangeability of ABEC–1 bearings with less than ABEC–1. Sales of generator bearings to Ford by Nice represented between 1.92 percent in 1958 to 3.66 percent in 1960 of Nice's total sales.[253] In 1960, Ford switched from generators to alternators. Since alternators required a bearing designed to accommodate higher speeds, Nice could not meet Ford's requirements and lost the business.[254]

145. No witness was called by complaint counsel who identified

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[246] Tr. 788–89, 1106, 1386–88, 1564, 1642–43, 1646–48, 1654–57, 2572–73.

[247] Tr. 1022, 1082, 1100, 1386–88, 1561–63, 1646.

[248] Tr. 787–89, 1022, 1100, 1386–88, 1557–58, 1563, 1648–49.

[249] Tr. 1592–93 merely indicates that at a hypothetically identical price, the prudent buyer would prefer ABEC–1 over commercial bearings.

[250] As in the case of TRB (Finding 110), entry barriers include scale economies, absolute capital requirements, the need to obtain and train highly skilled workers and technicians, long lead time, the need for custom-designed machinery, and the requirement that extensive research, engineering, and warehouse facilities be maintained. CX's 28P, 250G–H (Nos. 21–22), 250i–J (No. 28), 250M (No. 41b), 250N (Nos. 43b, 44b), 250"o" (No. 46b), 250Q (Nos. 51c, 52c), 250S (Nos. 56b, c), 250T (Nos. 60a, b, 61), 250V (No. 65b, c), 250W–X (Nos. 69, 70b, c), 250Z–10 (No. 110), 250Z–88 (Nos. 382–83), 250Z–90 (No. 390), 250Z–186 (Nos. 700–01), 250Z–191 (Nos. 703–04), 251B (No. 11), 252A (Nos. 3–4), 252B (Nos. 10,11), 352H (Nos. 77, 78); Tr. 531–33, 567, 750–58, 761–64, 840, 1007–11, 1012–13, 1090–92, 1116, 2769–70, 2835.

[251] Tr. 789–90.

[252] Tr. 1564, 1586–88. This information was reported to the FTC in 1960. RSX 59Z–18. Both SKF and Nice were minor factors in the auto aftermarket in 1960. Tr. 2859.

[253] RSX 59Z–18.

[254] Tr. 1564–65.

Nice and SKF as competitors in 1960. To the contrary, all the testimony indicates that industry representatives, including officers of SKF and Nice, who **[94]** made precision bearings did not consider Nice a competitor, while those who made commercial bearings did not consider SKF a competitor.[255]

146. Because complaint counsel did not call any bearings users as witnesses, it is impossible to tell on this record whether the perceptions at trial of a few sellers (*i.e.*, Finding 145) are valid. There is evidence that at least in some applications commercial radial bearing sellers, with various degrees of success, have attempted to convince precision bearing users that commercial bearings are suitable.[256] The extent and result of such competition between Nice and SKF in 1960 is not shown on this record, except for the evidence relating to Ford.[257]

### [95] Federal Trade Commission Investigation of Nice Acquisition

147. In 1961, the Federal Trade Commission investigated SKF's 1960 acquisition of Nice including the extent of competition between the two companies, and informed respondent SKF in 1963 that no action would be taken.[258]

148. On the basis of FTC clearance, between $5 and $6 million were invested in Nice by SKF between the period 1960 to date to construct new manufacturing facilities and to purchase new equipment.[259]

### Nice Role in FM-SKF Arrangement

149. There is no evidence that Nice presently has any connection with the FM-SKF "arrangement". Nice previously sold clutch release bearings and kingpin thrust bearings to the automotive aftermarket and the arrangement contemplated that FM would purchase these bearings after the shutdown of APD.[260] Nice made no clutch release bearings after 1974 **[96]** and Nice no longer manufactures any products sold to the automotive aftermarket.[261]

### AB SKF's Acquisitions of Foreign Bearings Manufacturers

150. Although complaint counsel offered into evidence no reliable

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[255] Tr. 787–88, 913, 1022, 1107, 1565–66. The former President of Nice testified that it was the policy of his company to avoid head-to-head competition with producers of ABEC–1 or better bearings. Tr. 1562, 1583–84.

[256] CX's 92E, 278–299B, 390Z–20; Tr. 1584–85, 1593–94, 2565. See also Tr. 2761–62. CX's 92Z–1–26, 392Z–34–41 show that both SKF and Nice produced thrust bearings, but the SKF bearings had much higher speed and dynamic load ratings.

[257] Finding 144.

[258] RSX's 59A–Z–49, 60. The Commission reserved the right to take action in the future if warranted by the facts.

[259] Tr. 1528.

[260] Findings 69, 73, 78, 85, 90.

[261] Tr. 1566, 2518–19, 2525, 2838. The market for clutch release bearings and kingpin thrust bearings diminished with the development of automotive transmission and ball joint suspension. Tr. 1566–67.

international market share figures, the record shows generally that on a worldwide basis, the manufacture of TRB and ball bearings are highly concentrated industries, and have been concentrated during the entire period 1955 to the present.[262]

### AB SKF's Acquisitions of Foreign TRB Producers

151. Between 1955 to the present the important TRB producers outside of the United States were Timken (U.S.), AB SKF (Swedish), RIV (Italian), SNR (French), FAG (German), and the Japanese firms — NTN, NSK, Koyo Seiko, and Nachi.[263] [97] Essentially, the same group of companies, with the exception of Timken, were the important international manufacturers of ball bearings.[264]

152. During the period 1950 to 1970, AB SKF made acquisitions of TRB producers located in France, Yugoslavia, Italy, Spain, Argentina, and Mexico.[265]

153. Between 1965 and 1968, AB SKF acquired all of the outstanding stock of Ets Rossi Freres, S.A. ("Rossi") a French company which manufactured small quantities of TRB for truck applications.[266] Under AB SKF's ownership Rossi's total sales of TRB have grown from $612,000 in 1965 to over $2,700,000 in 1974.[267]

154. Prior to the AB SKF acquisition, Rossi made no sales to United States customers.[268]

[98] 155. There is no record proof that prior to the AB SKF acquisition, Rossi had any interest, capability, or intent to enter the United States TRB market. Nor was any proof presented that Rossi was ever perceived by any firm in the United States TRB market as a potential competitor, either through exports from abroad or by the creation of production facilities in the United States.

156. On October 1, 1969, AB SKF entered into a joint venture with the Sarajevo, Yugoslavia firm, Preduzece Udruzena Metalna Industrija ("UNIS"), which produced TRB. As of 1972, AB SKF had a 23 percent interest in this Yugoslavia joint venture which is known as "UTL".[269]

157. Prior to the formation of the joint venture, there were no imports into the United States of TRB manufactured in Yugoslavia.[270]

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[262] CX 250Z-86 (No. 376c); Tr. 534, 549-50, 1011-12, 1083-85, 1501.

[263] RAX 256; Tr. 444-45, 549-51, 766-67, 837-39, 898, 897.

[264] Tr. 534, 1012, 1083-85.

[265] Findings 153-169.

[266] CX's 250Z-48-49 (Nos. 238-40). The products manufactured by Rossi have changed little since 1965. CX 250Z-49 (No. 242).

[267] CX's 253Z-Z-2 (Nos. 41-44).

[268] CX 850B *in camera*.

[269] CX's 250Z-78-79 (No. 347C, 349C).

[270] RAX's 252, 253B.

158. There is no record proof that AB SKF's Yugoslavia joint-venture partner, UNIS, ever had any intent, capability or interest to enter the United States TRB market. Nor was any proof presented that UNIS was perceived by any firm in **[99]** the United States market as a potential competitor, either through exports from abroad or by the creation of production facilities in the United States.

159. In 1969, AB SKF obtained an interest in a Mexican firm which produced TRB.[271] There is no proof that this firm ever sold TRB in the United States prior to 1969 and United States government statistics show no imports of TRB from Mexico in 1969.[272]

160. There is no proof that this Mexican firm had any interest, capability or intent to enter the United States TRB market. Nor was any proof presented that the Mexican TRB producer acquired by AB SKF was perceived by any United States firm as a potential competitor in any form.

161. In 1965, AB SKF acquired a controlling interest in RIV Officine di Villar Perosa S.A. ("RIV"), an important Italian producer of TRB and ball bearings.[273]

**[100]** 162. At the time of the acquisition, RIV had total worldwide sales of $72 million which included $15.9 million in exports or approximately 22 percent of its total sales.[274] While from time to time RIV had substantial export sales elsewhere,[275] its shipments to the United States were never significant.[276] Thus, from 1965 to 1974 RIV's total United States sales (TRB and ball bearings) were as follows:

TABLE 7: RIV SALES TO UNITED STATES (1965–74) (Dollars)

| | |
|---|---|
| 1965 | 695,662 |
| 1966 | 755,952 |
| 1967 | 387,250 |
| 1968 | 366,466 |
| 1969 | 313,858 |
| 1970 | 185,496 |
| 1971 | 126,525 |
| 1972 | 695,180 |
| 1973 | 1,244,910 |
| 1974 | 1,413,300 |

Source: CX's 253Z–7–8 (No. 54) *in camera*.

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[271] CX 250Z–77 (No. 343c).

[272] RAX's 252, 253B.

[273] Complaint and AB SKF Answer, ¶ 6; CX 250Z–184 (No. 689).

[274] CX 253Z–5 (No. 50) *in camera*.

[275] CX's 250Z–56 (No. 268c), 348D (No. 32), 393A–395D; RAX's 262A–B; Tr. 1268–69.

[276] RIV's share of the U.S. market in 1959 was too small to be measured. In 1960, its U.S. market share was .017%. RAX 262A.

[101] 163. By 1974 RIV's total sales, including exports, had grown to $217.3 million.[277]

164. The only record proof respecting the competitive significance of any of the foreign TRB companies acquired by AB SKF relates to RIV. The evidence, which mainly consists of the testimony during the defense case of Dr. Augustino Canonica, former head of RIV, was in no way rebutted by complaint counsel, and shows the following:

(a) The Agnelli family, which controlled both FIAT and RIV prior to 1965, was primarily concerned with RIV's ability to supply FIAT's requirements, rather than participation in the export trade.[278]

(b) RIV's costs for producing bearings prior to 1965 were greater than the prices it charged in the United States. Productivity of RIV workers was low and while wage costs were lower than those in the United States, this did not offset lower productivity.[279]

[102] (c) During the period 1959–65, the Italian economy was booming, creating a more than adequate internal demand for RIV bearings in Italy.[280]

(d) RIV's pre-acquisition attempt to penetrate the United States market failed. The United States operation, which consisted of a sales office and an inventory in Chicago, was unprofitable and was closed in 1964 prior to the AB SKF acquisition.[281]

(e) RIV's ability to sell in the United States may have been hampered by its production of through-hardened TRB instead of the case-hardened products preferred by OEM accounts.[282]

(f) The high rate of inflation in Italy since 1965 has had the effect of discouraging exports. Moreover, beginning in the late 1960's to the present, Italy has had political and economic unrest, as well as long periods of labor-management strife. These conditions are not conducive to the creation of the stable business atmosphere necessary to establish a foreign firm as a dependable source.[283]

[103] 165. There is no evidence that RIV was perceived in 1965 as a potential entrant into the United States TRB market, either through exports from abroad or by the creation of facilities in the United States. To the contrary, all of the evidence affirmatively indicates that RIV was not so perceived.[284]

166. As part of the RIV acquisition in 1965, AB SKF acquired a

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[277] CX's 2532–6 (No. 52) in camera.

[278] Tr. 1251, 1254–56, 1269, 1302–04, 1318–20.

[279] RAX 261; Tr. 1257–59, 1288–89, 1327, 1332–33. See also Tr. 2821–23.

[280] RAX 263; Tr. 1269, 1274–76.

[281] Tr. 1276–80, 1291.

[282] Tr. 1277, 1325. See, however, Finding 174.

[283] CX 4N; Tr. 575, 1327. See also Tr. 2821.

[284] Tr. 573–75, 1012.

TRB manufacturing facility in Argentina and a 50 percent interest in SA Fabrica de Rodiamentos RAS ("RSA")[285] a Spanish manufacturer of ball bearings and TRB, as well as ownerships of Commercial de Rodamientos RSA ("RODSAR"), a Spanish sales company which dealt in bearings.[286] Through a process of consolidation of SKF's Spanish interests, RSA and RODSAR were eventually formed into SKF Espanola SA in which AB SKF has a 50% interest and the Spanish government has a 50% interest.[287] Contrary to the allegation in Complaint Paragraph 34, there is no proof that SKF has acquired "four Spanish bearings companies." **[104]**

167. RSA made no sales to United States customers prior to 1965.[288] There is no evidence that RODSAR made sales to United States customers in 1965.

168. There is no evidence that RIV's Argentinian subsidiary made sales to United States customers prior to 1965.

169. There is no record proof that RIV's Argentinian subsidiary, or its Spanish affiliates, RSA or RODSAR, or SKF Espanola had any interest, capability or intent to enter the United States TRB market prior to the AB SKF acquisitions. Nor was any proof presented that any of the companies acquired by AB SKF in Argentina or Spain were perceived by any firm in the United States bearings market as potential competitors.

170. While the record is almost completely blank with respect to the impact of AB SKF's foreign affiliates on the United States TRB market, there is ample evidence about the Japanese companies which were *not* acquired by AB SKF. The record shows that imports of TRB into the United States **[105]** have grown during the period 1955 to present due mainly to the aggressive pricing policies of the Japanese producers:

TABLE 8: TRB IMPORTS INTO THE UNITED STATES FROM JAPAN (1970–74) AS PERCENT OF TOTAL FOREIGN IMPORTS[289]

| | *(Percent of $)* | *(Percent of lbs.)* |
|---|---|---|
| 1970 | 79 | 94 |
| 1971 | 82 | 92 |
| 1972 | 85 | 93 |
| 1973 | 78 | 91 |
| 1974 | 80 | 90 |

Source: RAX 257.

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[285] CX 250Z–51 (No. 251c).

[286] CX 250Z–52 (No. 253c).

[287] CX 250Z–52 (No. 253c).

[288] CX 350B *in camera*. In 1975, SKF Espanola sold $29,660 worth of ball bearings and $14,190 worth of TRB to U.S. customers. CX's 253R–S (Nos. 28–29) *in camera*.

[289] Japanese share of ball bearing imports was slightly less than the TRB figures: 1970–70.6%, 1971–70.7%, 1972–69%, 1973–65%, 1974–66%; RAX's 255A–E; see also CX 28Q.

171. The success of the Japanese importers is due to the following factors:

(a) Within Japan, economies of scale are achieved since each of the four Japanese bearings firms produces high volume items, medium volume bearings are typically produced by two or three companies, and only one firm is engaged in the production of any given low volume bearing.[290]

**[106]** (b) Post World War II production facilities in Japan incorporate the most advanced engineering developments. The productive facilities of the Japanese are the equal of any in the world.[291]

(c) Wage rates are lower in Japan than in the United States.[292]

(d) The Japanese firms have an export policy which concentrates on selling a few high volume items (for example, front and rear wheel passenger car TRB) at low prices. According to the Treasury Department Japanese firms have sold bearings at prices which are 15 to 50 percent below domestic prices and by a 3–2 vote the Tariff Commission found that the Japanese firms have injured the domestic TRB industry by reason of sales at less than fair market value.[293]

**[107]** 172. Even the success of the Japanese firms is confined to OEM sales. There is no evidence that any foreign exporter has ever been successful as a supplier to the United States auto aftermarket, and the requirements of the domestic market create for all practical purposes an insurmountable barrier to export competition.[294]

173. The only other foreign producer which has made even a limited impact on the United States TRB market as an exporter is the German company, FAG. However, officials of the American affiliate of FAG described the following factors as limiting the ability of FAG to make a more substantial impact on the United States OEM markets.

(a) The pricing practices of the Japanese and the overall domination of Timken.[295]

(b) The unfavorable rate of exchange of currency which exists between the United States and Germany.[296]

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[290] RSX's 76A–78P; RAX 256; Tr. 1020–21, 2826.

[291] Tr. 1379, 2826.

[292] CX 28R.

[293] RSX's 39A–D; RAX's 258A–W, 259. One of the Tariff Commission dissenters noted "that whatever injury which might be alleged by the smaller domestic producers was due more to their competitive disadvantage against the dominant producer than it was to sales at LFTV [less than fair value]." RAX 258W. Timken, which in 1974 had about 90% of the 0" to 4" TRB sales, prepared the statistical data in support of the claim of injury from "dumping". RFX's 158A–Z–27.

[294] Finding 25.

[295] CX 346 *in camera*; Tr. 1019–21, 1024, 1345–46, 1348–49.

[296] Tr. 1342–43.

[108] (c) The cost of duty, insurance, and freight.[297]

174. An additional influence which may impact unfavorably on European exporters is the fact that European manufacturers produce through-hardened TRB instead of case-hardened TRB which is common in the United States.[298] The most that the record will allow on this point is that United States [109] OEM manufacturers have preferred case-hardened TRB,[299] but there is no convincing evidence that case-hardened TRB is required for the auto aftermarket[300] or that conversion from through-hardened to case-hardened is a process which is so difficult as to be beyond the financial or technological capability of large multinational firms.[301] In general, respondents claim far too much for the case-hardened-through-hardened distinction as a barrier to entry by European firms. Thus respondents have never reconciled the inconsistency of complaining, on the one hand, to the United States Tariff Commission about the adverse impact of Japanese imports (made from both through-hardened and case-hardened steel)[302] while, on the other hand, they tell the United States Federal Trade Commission that through-hardened TRB cannot be sold in the United States market. [110]

175. As indicated in Findings 164, 173 and 174, the success of the Japanese in the OEM market does not prove that other foreign producers will necessarily succeed. But by the same token the failure up to this point of European TRB producers to make an impact on the American market does not establish the inevitable failure of any future attempts. The conditions described in Findings 164, 173, and 174 are not of such an order that changes in the internal policies of countries or companies or in the conditions of the export trade may not produce different results. The most that can be claimed on the basis of

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[297] Tr. 1344, 1407–08. Respondents obviously claim too much on this point since none of these factors seemed to have deterred the Japanese. Besides, bearings are small parts which do not carry high duty, insurance, or freight costs. CX's 249J–K, 250Z–24–25 (Nos. 153–54); Tr. 853–54.

[298] Case-hardened TRB (Commission Physical Ex. C), which are traditionally preferred by United States OEM buyers, are produced by a two-step metallurgical process in which carbon is injected into the surface. This produces a hard outer surface and a softer inner core which is said to dissipate "spalls" or cracks. European produced through-hardened TRB (Commission Physical Ex. B) are of uniform consistency since the carbon is not injected in a separate process. Through-hardened TRB are thought to be superior in the sense that the uniform interior allows for some grinding error. Tr. 413–17. There is no evidence of any price distinctions based upon the case-hardened – through-hardened difference (See CX 352A (No. 5); Tr. 418), nor is there any evidence that actual experience with through-hardened in the U.S. has been unfavorable. CX 190K, 249H.

[299] Tr. 779, 1021, 1098–99, 1277, 1344, 1452, 2536, 2845. But see CX 190M for evidence that some OEM users do not require case-hardening.

[300] See Tr. 2845. The FM-SKF arrangement includes the importation of through-hardened TRB from European plants of AB SKF. Tr. 809–10, 2526. FM has received no complaint about through-hardened TRB. Tr. 2581. See also Tr. 1452.

[301] See Finding 123, Note 223 (f). A separate problem may exist because of the European use of metric sizes (Tr. 467, 1325, 1344), but this particular problem is bound to diminish as American firms adopt metric measurements. See Tr. 466, 1407. In addition, the record shows that the most popular TRB are produced worldwide on a completely interchangeable basis. Tr. 2289.

[302] CX 249H; RFX's 158A–Z–27.

current experience is that European producers may not be able to compete in the United States on the basis of foreign imports alone.[303] There are, however, other possibly successful forms of European entry including joint ventures in the U.S. or investment in new manufacturing facilities here.[304]

176. From 1972 to the filing of the complaint in 1975, bearings imported by SKF from companies acquired by AB SKF, like RIV, have not played the major role in supplying FM's automotive aftermarket needs. The principal foreign source of supply of bearings sold to FM was the United Kingdom plant of AB SKF at Luton, England, which was built by a [111] company formed by AB SKF in 1911.[305] Presently, with exception of a few Volkswagen parts, FM no longer purchases foreign-made bearings from AB SKF.[306]

## AB SKF's Acquisitions of Foreign Ball Bearings Producers

177. In the period 1955 to 1974, AB SKF acquired interests in ball bearing producers located in Australia,[307] [112] West Germany,[308] France,[309] and Yugoslavia.[310] There is no proof that any of these companies ever exported bearings to the United States prior to the AB SKF acquisitions or had any interest, capability, or intent to enter any United States bearings market. Nor was any proof presented that any of these companies was ever perceived as a potential entrant into any United States markets, either through exports from abroad or by the creation of production facilities in the United States. [113]

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[303] Tr. 785, 1024.

[304] Tr. 1340A, 1353, 1402.

[305] Tr. 2175, 2479.

[306] Tr. 2483.

[307] The United Bearing Corporation, Pty. Ltd. ("UBCO"), Echuca, Australia plant was built by the Australian government during World War II. AB SKF acquired a 55% interest in 1960. This was expanded to a 100% interest in 1974 when the name of the company was changed to SKF Australia (manufacturing) Pty. Ltd. The company makes single row deep groove ball bearings. Sales have grown from $811,680 in 1960-to $5,741,462 in 1974. Practically all exports are to New Zealand and South Africa. The company has never sold bearings in the United States. Contrary to the allegations of Complaint Paragraph 34, there is no proof that UBCO ever manufactured TRB. CX's 250Z-46-48 (Nos. 228-37), 253X (No. 37) *in camera*, 350B *in camera*.

[308] In 1960, AB SKF acquired from one Hans H. Baumgarten a bearings plant and machinery located at Etzenhofen, W. Germany. Its sales at that time were $985,911. In 1974, sales had grown to $8,756,151. The company, which produced a limited series of deep groove ball bearings, has never had sales to the United States. CX's 250Z-59-61 (Nos. 273-81), 350A *in camera*.

[309] Compagnie Generale du Roulement was acquired (a 99.7% interest) between 1969 and 1972. It has concentrated on commercial-type plastic ring bearings for special applications. Its sales have grown from $1,411,992 to $4,811,518. Prior to 1969, it made no sales to the United States. In 1975, it received an order valued at $104,000 from a United States firm for a special bearing. CX's 250Z-50-51 (Nos. 245-50), 350A *in camera*.

[310] In 1969, AB SKF acquired a small interest (expanded to 28% in 1972) in Industrija Kotrljajuch Lezaja, Beograd, Yugoslavia. This company produced ball bearings in the range of 32-110 mm and had sales of approximately $5 million in 1971. United States government statistics show no imports from Yugoslavia of ball bearings during the period 1969-1971. CX's 22H-i, 23H-i, 250Z-80 (Nos. 352-53), 253Z-20-21 (No. 78) *in camera*.

## III

## Discussion

### The FM-SKF "Arrangement"

The complaint in this case ranges far and wide, but there is no question that the central issue is the so-called "arrangement" between FM and SKF. According to the record, the arrangement developed as follows:

Because of declining profits brought about by its inability to compete in TRB sales to various OEM markets, FM management decided to shut down its Detroit plants which manufactured 0" to 4" TRB.[311] Although it decided to drop the manufacture of 0" to 4", FM wanted to continue to sell a reasonably full line of 0" to 4" TRB to the auto aftermarket. FM was by far the largest seller of all bearings to the auto aftermarket, and it shared with Timken market domination over the distribution of TRB to the automotive warehouse distributors. Moreover, FM management believed that it needed TRB in its bearings line in order not to jeopardize its profitable sale of products other than bearings.[312]

After the decisions were made to close down its Detroit plants and to continue aftermarket distribution of TRB, FM executives explored various alternative sources of supply. [114] One possible source of supply, Timken, flatly refused to sell.[313] Still another, General Motors' New Departure-Hyatt Division, refused to commit itself to FM as a regular supplier.[314] Several other ways of obtaining a supply of TRB were considered by FM including a joint venture with the Japanese manufacturer Koyo Seiko, but at all times FM's options were limited because of the concentrated nature of the TRB industry in the United States and abroad.[315]

Between March 1971 and December 1972, FM actively pursued two potential avenues of supply — (1) the joint venture with Koyo Seiko for a limited number of high-volume TRB to be assembled in the United States from components imported from Japan or purchased in the United States, and (2) a supply arrangement with SKF.[316] During the FM-SKF negotiations over a supply agreement these two competitors discussed the problems and future of SKF's own aftermarket division, APD, which had a history of poor earnings — in only one year since 1965 (1971 the very year when the arrangement occurred) — did it make a profit.[317] Despite [115] APD's unimpressive performance before 1971, it was the third-ranking firm in the distribution of bearings to the auto aftermarket.[318] Moreover, APD had a few large accounts which not only purchased bearings but were also a potential source of new business to a company like FM which sold automotive products other than bearings. The attractiveness of this business is cited in FM documents which reveal generally that during the negotiations with SKF, FM was simultaneously contemplating both the beginning of an FM-SKF supply arrangement *and* the additional sales to be had with the end of APD.[319] The nature of the negotiations is intimated in a memorandum written about the November 3, 1971 meeting which indicates that at this meeting these two competitors discussed the prospect of SKF supplying the bearings which were to be produced by the Koyo Seiko joint venture as well as the possibility that "SKF goes out of APD."[320]

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[311] Findings 27-35, 39-40.

[312] Findings 36-38.

[313] Finding 50.

[314] Finding 50.

[315] Findings 48, 108, 150.

[316] Findings 47-82.

Finally, on November 24, 1971, FM offered to designate SKF as the supplier of a full range of automotive TRB as well as certain automotive bearings. This was the first time that FM actually offered SKF the high volume items [116] which were to be produced by the Koyo Seiko joint venture. It was also at the November 24 meeting that SKF told FM that APD would be closed.[321]

Both FM and SKF officials testified during the hearings herein that the full line supply arrangement was neither contingent on the closing of APD, nor was the offer of the supply contract inspired by a promise by SKF to close APD.[322] SKF officials testified that APD was closed because higher profits could be realized by selling through FM.[323] But the same officials conceded that notwithstanding its poor performance prior to 1971 APD would not have been closed but for the fact that SKF was designated as the full-line supplier to FM.[324] Moreover, an FM official acknowledged that he was aware of the connection made by SKF between the full line supply contract and the closing of APD.[325] And, [117] most importantly, there is no question whatsoever that the closing of APD was openly considered in the negotiations between the two firms.[326]

As outlined thus far, it is apparent that with respect to at least one crucial decision made by FM — the closing of the Detroit plant — no inference of agreement between SKF and FM is even remotely possible. The record shows overwhelmingly that FM would have closed its Detroit TRB plants no matter what SKF did with APD. There is simply no proof that FM's decision to shut down Shoemaker and Hart was based on anything but independent and legitimate business considerations which are well documented in complaint counsel's own exhibits.

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[317] Findings 41-46.

[318] Finding 23.

[319] Finding 59.

[320] Finding 60.

[321] Findings 71-73.

[322] Finding 79.

[323] Finding 78.

[324] Finding 77.

[325] Finding 72.

[326] Findings 68, 69, 72, 76.

As for the closing of APD, *and* the designation of SKF as a full line supplier, *and* the termination of the FM-Koyo Seiko joint venture, I infer from the record facts cited above that there was an agreement between FM and SKF about all three events. This inference is drawn from evidence showing (1) that the condition and future of APD was discussed in the context of the supply negotiations; (2) APD would not have been closed, notwithstanding its poor performance, unless a satisfactory supply arrangement had been reached with FM for the high volume items; (3) at the November 3 meeting FM and SKF recognized that the Koyo Seiko high-volume [118] TRB was "critical to the arrangement" and they discussed the possibility of sourcing the high-volume TRB with SKF *and* closing down APD; and (4) at the November 24 meeting FM designated SKF as the full line supplier (thus for all practical purposes ending the prospects of the joint venture) *and* SKF told FM that APD would be closed. In addition, as I indicated earlier, there is evidence that FM officials recognized that SKF linked the closing of APD with a contract for the high-volume items. Finally, internal FM documents show that the closing of APD was part of FM's assessment of the desirability of the supply arrangement with SKF. It follows inescapably from these facts that the closing of APD as well as the future of FM as a producer (whether through a joint venture with Koyo Seiko or otherwise) were decisions arrived at by an understanding between competitors.

As it happens, the arrangement is one of those rare instances in which the elements of the agreement were reduced to writing: two contracts were drawn up by FM (one for supply, the other for SKF's cooperation in transferring the APD accounts) but neither was signed by SKF.[327] That the agreement was not expressly incorporated in a signed contract is, of course, of no moment in establishing [119] an unlawful conspiracy. *Norfolk Monument Co., Inc.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946). The entire record ineluctably points to such an agreement and the courts have had no difficulty in inferring a "meeting of minds" or "mutual understanding" from circumstances which have been less compelling than the documents and behavior present in this case.[328]

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[327] Findings 83-86.

Respondents, of course, argue that it is improper to draw any inference that an agreement existed since it is claimed that each firm had valid reasons independently for (1) selecting SKF as the full line supplier, (2) not going forward with the joint venture, and (3) closing APD. Under this rationale it was just fortuitous that these allegedly **[120]** independent reasons were discussed as possibilities on November 3 and just happened to coalesce on November 24 at a meeting between the two firms in which SKF told FM that it had come to a decision to close APD and for the first time FM offered SKF an opportunity to supply the high-volume TRB which were supposed to be included in the joint venture with Koyo Seiko.

Contrary to the position urged by respondents, the trier of the facts is not required to ignore the singular coincidence of the November 3 and November 24 events as well as all the other facts pointing toward an agreement, simply because there may have been independent reasons for each event. To take an example: one such possibility of independent decision making is that the joint venture was terminated not as a result of the conspiracy but because FM officials came to the realization that in order to obtain a full range of 0" to 4" TRB it would be necessary to offer SKF the high-volume items, too. But then again if FM's ultimate decision had been made in a different environment — one, for instance, which divorced the supply contract from a discussion of the closing of APD — FM could have reached a different result, say a decision to go forward with the joint venture, construct a new plant for assembling high-volume TRB, and produce the low-volume items at its own Hamilton plant. Besides, the very statement of the "independent" reason for ending the joint venture — that **[121]** a firm like SKF would not be a party to a full-line contract unless high-volume items were included — is not inconsistent with the conclusion which I draw from the record that there was an understanding between these competitors about all the conditions for granting SKF such a full-line contract, including the closing of APD in the very year (1971) when it first showed a profit.

That the choice actually made — a supply agreement with SKF and no joint venture — may have been rational at the time (although later it proved to be a mistake) is not relevant. Nor is it particularly relevant that SKF has made more profits operating as a supplier to FM than it did prior to 1971 from APD. Obviously, the decisions of all rational businessmen (including price-fixers) are consistent with their own self-interest, but neither the Commission nor the courts have said in *A&P*[329] or elsewhere that the business rationalizations for conduct can be used to explain away direct proof of an illegal agreement. See, *e.g.*, *United States* v. *Masonite Corp.*, 316 U.S. 265, 276 (1942). What the Commission held in *A&P* was that strained inferences of agreement are improper when there exist plausible independent reasons for the conduct. This does [122] not mean that strained inferences of independent conduct are to prevail over clear proof of collusive decision-making.

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[328] See, *e.g.*, *Interstate Circuit Inc.* v. *United States*, 306 U.S. 208 (1939) (inference of agreement drawn from the nature of the proposals made to raise prices and from the manner in which the proposals were made); *Esco Corp.* v. *United States*, 340 F.2d 1007 (9th Cir. 1965) (agreement inferred when trade discounts were reduced by competitors following a meeting in which largest firm announced its plans to reduce discounts); *Continental Baking Co.* v. *United States*, 281 F.2d 137 (6th Cir. 1960) (agreement inferred from meetings followed by price increase although participants denied that formal agreement had been reached).

In short, the crucial factor in this case is not whether the decisions of respondents can conceivably be justified as profit-maximizing or rational, but rather how they are made. *Nash* v. *United States*, 229 U.S. 373, 378 (1912). The record shows convincingly that they were made through a process of negotiation between competitors which included an understanding that APD would be closed if a full-line contract were granted. Once the decision-making process of competitors includes a joint calculation and mutual commitments, the assumption of the antitrust laws is that the results are not inevitably the same as independent decisions. To the contrary, self-serving "arrangements" between competitors are condemned for the very reason that this is a form of private regulation which is contrary to our basic belief that the competitive market should control decision-making. *Northern Pacific Railroad Co.* v. *United States*, 356 U.S. 1, 4–5 (1958); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396–98 (1927). Certainly the government had no burden to show that not only was APD eliminated but also that the joint venture with Koyo Seiko would have gone forward or FM would have expanded its own TRB facilities but for the conspiracy. It is enough that the record shows that in their discussions respondents considered all three events (*i.e.*, end of APD, end of joint [123] venture, and full-line supply contract) as interrelated acts and the negotiations produced an understanding which, at one and the same time, closed APD, gave SKF the full-line contract, and put an end to the joint venture.

For competitors to agree in such a manner about their participation at any level of competition is a conspiracy to allocate markets and illegal per se. *White Motor Co.* v. *United States*, 327 U.S. 253 (1963);

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[329] *The Great Atlantic and Pacific Tea Co., Inc.*, Dkt. 8866, 87 F.T.C. 962, *aff'd as to Robinson-Patman Count*, 557 F.2d 971 (2d Cir. 1977).

*United States* v. *Timken Roller Bearing Co.*, 341 U.S. 593 (1951); *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899); *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563 (2d Cir. 1961); *United States* v. *General Dyestuff Corp.*, 57 F. Supp. 642 (S.D.N.Y. 1944); *Johnson* v. *Joseph Schlitz Brewing Co.*, 33 F. Supp. 176 (E.D. Tenn.) *aff'd*, 123 F.2d 1016 (6th Cir. 1941). No showing of effects is necessary. Nor is it a defense that prices may not be perfectly fixed at the distribution level because FM's aftermarket division must still compete against Timken, and more importantly, against other firms which offer a full line of automotive parts including bearings. FM's dominant position as a distributor of bearings to the auto aftermarket is manifest. Entry by foreign firms into aftermarket distribution is for all practical purposes blockaded. Elimination of APD increased FM's market share to near the 50% level, and FM may already have effective control over the pricing [124] of bearings in the aftermarket.[330] Thus in the aftermarket distribution of TRB, in which FM's market share even exceeds Timken's, the record shows that because FM offered a "package" of automotive items it was able to charge a substantial premium over the price charged by a single-line firm like Timken.

But even if FM does not have the power to fix the prices of bearings in the aftermarket, an agreement eliminating one of the few remaining competitors violates Section 5 of the Federal Trade Commission Act. A market does not have to be perfectly allocated nor prices firmly fixed before the Commission may eliminate an arrangement which at the very least violates the policy of the antitrust [125] laws[331] and is an incipient violation of the antitrust laws.[332] Reliance, however, on the more flexible Section 5 rubric of "unfairness" is unnecessary and probably improper in this case.[333] The "arrangement"

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[330] While the record (Finding 22) shows that distribution to the independent auto aftermarket meets the definitional criteria of the merger and monopolization cases, see, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), both sides make too much of the market definition problem. If the practice involves a restraint, such as an agreement to close APD, the courts and the Commission take as the market the "field" of business at which the action was directed. It is assumed that the "field" sufficiently describes a market, for otherwise what would be the point of an agreement to allocate. See *Washington Crab. Ass'n*, 66 F.T.C. 45, 119 (1964).

[331] *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357 (1965); *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

[332] *Fashion Originators Guild of America, Inc.* v. *FTC*, 312 U.S. 457 (1941); *FTC* v. *Brown Shoe Co.*, 384 U.S. 316 (1966).

[333] As a fall-back position to their arguments for the applicability of *per se* concepts of market and customer allocation, complaint counsel say that the FM-SKF arrangement should also be examined under the *S&H* concept of an "unfair practice." *Sperry & Hutchinson Co.* v. *FTC*, 405 U.S. 233 (1972). Complaint counsel, however, have never identified the "practice" for which *S&H* is being invoked. If a nonconspiratorial decision had been made by SKF to drop out of the auto aftermarket it would be no more an actionable "practice" than the non-conspiratorial closing by FM of its Detroit plants, although the latter decision may very well have had some adverse effects, not the least of which was to eliminate one of Timken's few United States TRB competitors. Those adverse effects notwithstanding, complaint counsel now concede that they "do not contest FM's decision to close the Detroit facilities." Complaint Counsel's Reply To Respondents' Proposed Findings of Fact and Conclusion of Law, p. 14.

Nor is the transfer of APD accounts to FM an "acquisition," as complaint counsel urge, and subject to the strict prohibitions of the horizontal merger law. While I have no difficulty with the notion that Section 5 may apply to the acquisition of intangible assets (See, *e.g.*, *Columbia Broadcasting System, Inc.* v. *FTC*, 414 F.2d 974 (1969), *cert. denied*,

*(Continued)*

was a conspiratorial [126] scheme to allocate markets. It is a violation of Section 1 of the Sherman Act[334] and hence violates Section 5 of the Federal Trade Commission Act.[335]

The Relief

As I will note later in this discussion, complaint counsel have advanced theories of relief based on divestiture which I do not accept. Short of divestiture, however, the government is entitled to whatever relief will rid the bearings industry of the effects of this illegal conspiracy. See *United States* v. *Ford Motor Co.*, 405 U.S. 562, 575 (1972); *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957). I believe this can be accomplished by terminating all dealings between respondent firms and thereby creating incentives [127] conducive to the restoration of competition. One year after the date of a final order, the contract signed on December 14, 1974 should be cancelled, and thereafter SKF and AB SKF should be prohibited from supplying any 0" to 4" TRB to FM.[336]

With all dealings between the conspirators at an end, SKF may be encouraged to reenter the auto aftermarket since it will need an outlet for its TRB. There is evidence that after 1976 SKF acquired a firm (McQuay-Norris) which produces automotive products which are complimentary to bearings and there is expert opinion that reentry by SKF is now feasible.[337] While SKF cannot be compelled to reenter the auto aftermarket, it can at least be compelled to make a decision about its role without the assistance of FM which already happens to control nearly 50% of the market. Regrettably, there is no feasible way of returning the former APD accounts to SKF beyond creating conditions which may encourage SKF to compete for them. These non-respondent WD's may be opposed to being forcibly handed over to SKF, and their future [128] is best left to the market even though they were arbitrarily allocated to FM as part of a conspiracy.

One final point on the question of relief: FM argues that the effects of a termination of the FM-SKF supply arrangement may be seriously anticompetitive since if FM does not develop either internally or externally a supply of TRB for its WD's, the beneficiary may be

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397 U.S. 907 (1970)), the concept of "assets" cannot embrace every new customer or group of customers obtained by a firm. No matter what the market share of a company may be, surely the anti-merger laws were never intended to prevent a company from obtaining new business, and but for the conspiracy between FM and SKF, the "acquisition" by FM of APD accounts would be no more unlawful than Timken's "acquisition" of FM's OEM accounts upon the closing of the Detroit plants.

[334] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. 1 (1970 & Supp. 1975).

[335] Section 5 minimally registers all violations of the Sherman Act. *FTC* v. *Cement Institute*, 333 U.S. 683 (1948).

[336] The one year time limit is more than adequate. FM has indicated that 180 days is a realistic time period to obtain a supplier should SKF no longer be able to sell to FM. CX 79A.

[337] Finding 101.

Timken which has always dominated TRB manufacturing. It may turn out that the beneficiary is a rejuvenated APD which may take SKF's bearings as well as SKF's newly acquired line of auto products, and challenge FM's entire auto aftermarket business. In any event, the parade of horribles depicted by FM is not convincing. As matters now stand in the bearings aftermarket, FM (with the elimination of APD) has consolidated a huge share of the auto aftermarket market which it has been able to exploit by charging supra-competitive prices.[338] It is hard to imagine how a worse result could ensue if the tidy FM-SKF "arrangement" is annulled. Certainly respondents have presented no proof in support of the notion that a further cartelization of the bearings industry may somehow be desirable as a counter-balance to Timken's **[129]** overall market share. Furthermore, FM made a convincing showing that it needs TRB to maintain its high profits on other auto products. Unhampered by its conspiratorial agreement with SKF, FM can review the present-day feasibility of either looking elsewhere for bearings, or forming a new joint venture, or expanding its own facilities in order to meet this perceived need.[339]

## Liability of AB SKF

The order just described should run against AB SKF to insure strict compliance. I reach this conclusion despite the fact that the evidence on day-to-day control by AB SKF over SKF is inconclusive, and both respondents and complaint counsel claim too much from the record on the question of AB SKF's general policy respecting control. On the one hand, **[130]** AB SKF relies heavily on the so-called "voting trust agreement" as proof of SKF's isolation from the foreign parent. But respondents have not explained how the trust agreement, which simply vests trustees with power to vote the AB SKF-owned SKF common stock, accomplishes anything beyond the separation of legal and equitable ownership. Thus the voting trust agreement does not even instruct the voting trustees to vote the stock in such a way that the corporate boundaries of parent and subsidiary are kept separated. Since the voting trustees are undoubtedly well aware that the voting trust agreement is extended at AB SKF's pleasure, the trust agreement hardly establishes the trustees' independence, and the record does not reveal exactly what patterns the trustees have followed in their voting. For instance, we do not know whether the trustees have voted in favor of management selected by AB SKF and, as a matter of fact, we know nothing about AB SKF's role in the selection of SKF management.[340]

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[338] Findings 97-99. See also CX 255D which shows that FM is able to charge these high prices despite the poor job it does as a supplier of TRB to the aftermarket.

[339] The Board Chairman of FM (Russell) testified that "without a more detailed study of the effect on any of our other product lines" he would recommend against the investment of some $20 million to produce a line of 0" to 4" comparable to Tyson's. Tr. 2185. A more detailed study may indeed produce a different result and may even lower the estimated cost or lead to a new joint venture partner. It is noteworthy that a pre-conspiratorial calculation of the efficiency of a joint venture had earlier led Russell to the conclusion that such an undertaking would result in economies of scale and low costs. See Finding 58. Moreover, since FM is now producing low-volume TRB at its Hamilton plant, it may want to reconsider the feasibility of importing low-cost high-volume TRB from Japan (See CX 340) and dropping some of its earlier demands on Japanese producers. See Note 168.

Complaint counsel, on the other hand, set great store to a reference in one exhibit to AB SKF's policy of "geocentric" control. But nowhere is this policy fleshed out, and all we have are some fragments relating to (1) certain ancient loans, (2) the fact that AB SKF supplies steel and on occasion expertise to SKF, and (3) advice which AB SKF gave SKF about [131] the "Nadella Affair," an obscure incident not involving any issue germane to this case. As for acquisitions which *are* involved in this case — the Tyson and Nice acquisitions by SKF and the foreign acquisitions by AB SKF — there is no showing that either SKF or AB SKF played any role in each other's acquisition decisions beyond a passing reference to a visit paid by AB SKF officials to the Tyson plant before the acquisition.[341]

While the evidence relating to general control by AB SKF over SKF is not convincing for either respondents' or the government's point of view, the proof respecting AB SKF's participation in the conspiracy is a different matter entirely. Thus the record shows that negotiations preceding FM and SKF's market allocation contemplated that AB SKF would supply the low-volume (*i.e.*, full-line items) since SKF's own line was limited.[342] This point is crucial since it is inconceivable that a subsidiary could bind a parent's production without the parent knowing all the premises of the underlying arrangement, including the direct relationship [132] between the closing of APD, a division of an AB SKF subsidiary, and the full-line supply contract which still other divisions of AB SKF were expected to fill.

That the role of the AB SKF subsidiaries was not merely incidental to the conspiracy is shown by (1) the importance attached to AB SKF in the FM-SKF negotiations and (2) the reaction by FM to the failure of certain AB SKF subsidiaries, particularly Luton, to meet its supply responsibilities. As it happens, the role of AB SKF was so vital that FM officials took it upon themselves to visit the Luton works in England in an attempt to improve performance.[343] Moreover, FM's decision to produce certain TRB at its Hamilton plant was brought about by the failure of AB SKF's foreign subsidiaries to deliver as originally planned.[344]

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[340] Findings 15–16.

[341] Finding 16.

[342] Findings 52, 74, 85, 91, 92, 94.

[343] Finding 91.

From the facts recited above, it is plain that AB SKF must have known about the market allocation before the arrangement was consummated. In addition, since SKF and FM were dependent upon the production of the European plants, AB SKF could have at the very least, withdrawn its support for the agreement, and more importantly, it could have put a stop to the illegal arrangement altogether. In short, "voting [133] trust agreement" and "geocentric policy" aside, in the case of the arrangement AB SKF had the power to veto SKF's participation in the conspiracy by simply not supplying the bearings. By supplying the bearings AB SKF ratified the agreement, and made it possible. Indeed the facts described above point conclusively to direct involvement of AB SKF in the conspiracy and theories of vicarious liability may be superfluous. In any event, it is settled law that if the parent has latent power to halt the illegal practices of its subsidiary, and instead even tacitly approves, the parent is liable. *P.F. Collier & Son Corporation* v. *FTC*, 427 F.2d 261 (6th Cir. 1970) *cert. denied*, 400 U.S. 926 (1970); *Beneficial Corp.*, 86 F.T.C. 119 (1975). *P.F. Collier* is especially pertinent since the Sixth Circuit affirmed the Commission's conclusion on the liability of the parent on two grounds — actual control and tacit approval. After first reaching the conclusion that the parent dominated and controlled the acts of its subsidiaries, the court went on to say:

> In the alternative, however, the law is clear that where a parent possesses latent power, through interlocking directorates, for example, to direct the policy of its subsidiary, where it knows of and tacitly approves the use by its subsidiary of deceptive practices in commerce, and where it fails to exercise its influence to curb the illegal trade practices, [134] active participation by it in the affairs of the subsidiary need not be proved to hold the parent vicariously responsible. Under these circumstances, complicity will be presumed.[345]

*P.F. Collier* is not limited, as respondents claim, to instances in which the parent has intentionally and systematically erected shadow subsidiaries for the purpose of defrauding the consuming public. *Jim Walter Corp.*, 3 Trade Reg. Rep. ¶ 21,379, FTC Dkt. 8986 (Dec. 20, 1977) [90 F.T.C. 671]. Nor, as *P.F. Collier* makes plain, is the Commission bound by common law rules relating to "piercing the corporate veil." 427 F.2d at 267. Besides, in this case it is respondent AB SKF who is using the corporate veil for the purpose of concealing its own very direct involvement in a conspiracy.

That an order should run to AB SKF is not only appropriate but necessary. The order seeks to prevent purchases and sales between FM and SKF as well as between FM and AB SKF. Given the fact that AB SKF has already shown some proclivity for ignoring the United States antitrust laws,[346] I would [135] not leave open any avenue for evasion.[347]

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[344] Findings 94, 95.

[345] 427 F.2d at 270.

While I have concluded that the FM-SKF "arrangement" is an illegal market allocation, there is no proof that the challenged acquisitions, either domestic or foreign, have any logical connection with the proven conspiracy or are illegal for valid reasons independent of the FM-SKF arrangement. [136]

## The Tyson Acquisition

According to complaint counsel, the 1955 acquisition of Tyson by SKF may not have been illegal when it occurred, but it became illegal when SKF entered into the 1971 conspiracy with FM. While it is true that Tyson (with the aid of AB SKF's foreign affiliates) supplied the TRB which was at the heart of the FM-SKF arrangement, the nexus between the conspiracy and the acquisition has never been satisfactorily explained. Complaint counsel seem to be suggesting that if Firm A and Firm B fix prices, and the record shows that B was acquired some 20 years before the price-fix, then the later-day price-fixing makes the acquisition more questionable than it would have been if only the usual structural criteria are considered. Under this theory acquired companies are placed on perpetual parole to be revoked at any time and no matter how slight the connection between the act of acquiring and the subsequent acts of misconduct.

This sort of extreme, attenuated construction of the merger law finds no support in the cases. As it happens, complaint counsel's economic expert more or less conceded that the government had its eye on Tyson not so much because the acquisition was illegal at *any* time but in order to accomplish what it regarded as effective relief in undoing [137] the FM-SKF agreement.[348] Apparently, the government believes that the best remedy in this case would be to create a new

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[346] See *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284 (N.D. Ohio), *aff'd*, 341 U.S. 593 (1951).

[347] The presence in the United States of SKF gives the Commission adequate means of assuring compliance by the parent. W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS § 3.9 (2d ed. 1973). As for the argument that the laws of European countries like France "requires sales to all comers" (Proposed Findings of Facts, Conclusions of Law and Main Brief of AB SKF, p. 69), there is nothing in the French statute which mandates sales to antitrust violators in the United States. To the contrary, there is a specific exemption in the statute for those cases in which the sale of goods is forbidden by law or regulation. See Ordinance No. 45-1483 (June 30, 1945) amended by Article 37-1a. 3 CCH Common Mkt. Rep., ¶ 23,023. Besides, French statute is an expression of internal policy intended to prevent resale price maintenance in France and is in no way inconsistent with a valid decree aimed at ending an antitrust violation in the United States. C. EDWARDS, TRADE REGULATION OVERSEAS 21 (1966). In any event, there is no evidence that any French affiliate of AB SKF is a viable source of supply of TRB to FM. See, *e.g.*, Findings 153-155.

[348] Tr. 2786-98.

TRB company (one combined with Nice, see discussion below), the assumption being that a divested Tyson and Nice would manufacture and distribute TRB to the automotive aftermarket (including FM) and thus restore the full complement of competitors which existed in the automotive aftermarket prior to the FM-SKF arrangement. Actually, it is quite clear that what the government really wants out of this case is the creation of additional TRB competition in the auto aftermarket beyond that which existed in the pre-FM-SKF arrangement days. This additional competition would come about by (1) the creation of a new company in the form of a divested SKF-Nice which would sell to FM and others and (2) the reentry of SKF, on its own, with a new facility to replace the loss of divested Tyson and Nice and then its possible subsequent reappearance in the bearings aftermarket.[349] While I do not disagree with the notion that in tightly concentrated markets the addition of a new competitor is desirable, complaint counsel **[138]** seem to have lost sight of the fact that an economist's "wish list" does not determine the outcome of antitrust litigation — first, there must be a showing of a connection between the violation and the proposed remedy, and in this case there is none.

Apart from its "contribution" to the FM-SKF conspiracy, complaint counsel do not strenuously attack the 1955 Tyson acquisition. There are ample reasons for such restraint. All that the record will allow on the acquisition as of 1955, or for that matter as of 1977, is the following:

1. The TRB market was highly concentrated in 1955 and 1977. Entry into TRB manufacturing is difficult.[350]

2. SKF (either on its own or with the assistance of AB SKF) was one of the few likely potential entrants, de novo or by "toehold" acquisition into the United States TRB market but complaint counsel failed to prove that in 1955 SKF was perceived as a potential entrant and that such perception in fact tempered behavior in the TRB market.[351]

**[139]** 3. Prior to the SKF acquisition, Tyson was an expiring homunculus, hanging on by its finger nails in the TRB industry. It made a product of limited application which was not competitive with Timken's TRB. It was in desperate financial straits. It had exhausted a list of potential acquirers. And for all practical purposes it was awaiting bankruptcy.[352]

The Federal Trade Commission investigated the SKF-Tyson acquisition and informed SKF that no action would be taken.[353] Not a scintilla of evidence was presented during this case indicating that the Commission's earlier judgment was in error. Relying on the Commission's 1955 clearance, substantial sums were invested by SKF in the acquired company, including the construction of a new plant.[354] If the legality of the acquisitions as of 1955 were still a serious issue in this **[140]** case, I would have concluded that the SKF purchase in 1955 was justified as a pro-competitive "toehold"[355] acquisition of a failing company.[356]

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[349] Tr. 2790-91, 2807-08.

[350] Findings 106-111.

[351] Finding 123. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).

[352] Findings 112-122.

[353] Finding 124.

The Nice Acquisition

The 1960 acquisition of Nice by SKF is challenged in the complaint as an independent violation of Section 7, as well as part of the "mix" involving the FM-SKF arrangement, the Tyson acquisition, and the foreign acquisitions. Since the record does not show that Nice contributed anything to the supply of automotive bearings destined for FM after 1975, its connection with the "arrangement" is peripheral at best. If there is any connection, it would seem to lie again in the area of relief. Because the government is convinced that the only viable relief for the illegal "arrangement" is to form a new bearing company, the most likely candidate (in addition, of course, to Tyson) is *any* other bearing company that was acquired by SKF and is, therefore, conceivably subject to the traditional Section 7 relief of divestiture.[357] Nice nicely fills the bill **[141]** although the Commission cleared this acquisition, too, when it took place in 1960. As in the case of Tyson, not a single fact was uncovered which indicates that the earlier determination by the FTC was in error. The facts are:

The ball bearings market was concentrated in 1960, but exact market shares are unknown. SKF apparently had about eight percent of the market and Nice had about two percent. Entry into the bearing industry is difficult.[358]

The direct pre-acquisition competitive overlap between SKF and Nice was slight. SKF manufactured precision ball bearings while Nice made non-precision commercial-grade ball bearings.[359] While it is possible that all bearings constitute a relevant market, complaint counsel have not adequately reconstructed the bearings industry as it existed in 1960 to the point where an informed market definition decision can be made.[360]

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[354] Finding 125.

[355] *Bendix Corporation*, 77 F.T.C. 731, *vacated*, *The Bendix Corp.* v. *FTC*, 450 F.2d 534 (6th Cir. 1971); *The Budd Co.*, 86 F.T.C. 518 (1975).

[356] *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969); *International Shoe Co.* v. *FTC*, 280 U.S. 291 (1930).

[357] Tr. 2804-05.

[358] Findings 129-132, 143.

[359] Findings 133-145.

[360] Finding 146.

[142] With the go ahead from the FTC, SKF invested substantial sums in Nice and it is today what it was in 1960, an important, successful bearing company.[361]

On the facts cited above, it is arguable that under the strict standards of the horizontal merger cases, the 1960 acquisition is at least questionable and if the government had presented a more thorough picture of the 1960 bearings market it could conceivably be successfully challenged. There are, however, extenuating circumstances. Although the doctrine of equitable estoppel usually does not apply to the sovereign,[362] *S&H* at least intimates that the Commission must be equitable. Hence commonplace fairness alone would seem to dictate that the Commission not challenge the Nice acquisition unless there are especially compelling reasons for doing so which were not apparent in 1960. Even [143] the cases which have not applied the estoppel doctrine, such as *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947), suggest that although an agency may indeed change its mind, it should at least be required to show that its earlier decision was based on incomplete or erroneous facts, and that an overriding public interest requires a change in a position taken earlier. Here, there is not a single fact which was developed during the hearings which was not known to the FTC staff in 1960 when the Commission gave its go-ahead and respondent invested substantial sums in improving Nice.

As for *United States* v. *duPont & Co. (General Motors)*, 353 U.S. 586 (1957), which is heavily relied upon by complaint counsel, this case merely allows the government to challenge an acquisition when the effects become apparent. The Supreme Court held that:

> The Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce.[363]

This was said in the context of a stock acquisition in 1917 which had not been approved by the government, and which was challenged 30 years later when it became clear that stock ownership was being used by duPont to secure General Motors' auto finishes and fabrics business. A horizontal merger, such as the case at hand, presents very different considerations. Here the central issue is the degree of actual [144] competition which existed between the acquiring and acquired firms. Since the firms no longer compete the only relevant time for resolving

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[361] Findings 147-148.

[362] Davis, Administrative Law §§ 17.01-17.03 (1970) discerns a trend in the opposite direction. See also *United States* v. *Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970); *Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894 (D. Colo. 1977). In *United States* v. *American Greetings Corp.*, 168 F. Supp. 45, *aff'd*, 272 F.2d 945 (6th Cir. 1959), the estoppel doctrine was not applied, but failure of the FTC's officers and employees to speak out against a known order violation were circumstances to be considered in ascertaining the amount of the civil penalty.

[363] 353 U.S. at 597.

*that* issue is the period just prior to the acquisition. Certainly (as this record shows), the state of actual competition between acquired and acquiring firms is not likely to be answered with any more clarity with the passage of time. Furthermore, unlike *duPont (General Motors)* this is not a case in which the anticompetitive effects of the acquisition have only slowly surfaced as the leverage derived from stock ownership is applied over many years. Complaint counsel have not cited a single fact which makes this acquisition any more or less anticompetitive in 1978 than it was in 1960. It is being challenged now solely for the purpose of putting together a new bearing company as a form of relief for events ("the arrangement") which took place twelve years after the acquisition and which had no causal connection with the acquisition.

Foreign Acquisitions by AB SKF

In contrast to the Nice acquisition which raises a question as to when the sovereign should be held to the same standards as other litigants, the AB SKF foreign acquisitions involve the issue of the very power of the **[145]** sovereign — namely, under what conditions can the antitrust laws of the United States be invoked to challenge acquisitions outside of the territorial limits of the United States. We do not reach the more intriguing legal aspects of this issue, however, because (a) the Swedish respondent has agreed to submit to the in personam jurisdiction of the Federal Trade Commission for purposes of this case and (b) even if the subject matter — foreign acquisitions by a foreigner — is judged in this case by the *same* standards as would apply to any domestic acquisitions, the government has no case. Note the following points:

1. Some of the mechanical facts alleged in the complaint respecting certain foreign acquisitions are simply dead wrong. Thus contrary to the allegations in Complaint ¶ 34, four Spanish companies had not been acquired and the Australian company (UBCO) manufactured no TRB.[364]

2. None of the foreign companies acquired by AB SKF was ever a significant exporter to the United States.[365]

**[146]** 3. There is no evidence that any of the companies acquired by AB SKF were perceived as potential entrants into the United States by anyone, or that their prior existence (independent of AB SKF) affected the American bearings market, or that their acquisition insulated or entrenched the competitive position of SKF or FM in any United States bearing market in any way whatsoever, or that they had any real connection with the FM-SKF "arrangement" which took place six years *after* the only significant merger, the acquisition of RIV.[366]

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[364] Findings 166, 177.

[365] Findings 154, 157, 159, 162, 167, 168, 177.

Quite apart from these gaping holes in the record, the charges in the complaint respecting AB SKF's foreign acquisitions raise difficult questions of conflict between antitrust policy and international law which may have required the use of unique legal standards in order to reconcile considerations of competition, conflicts of law, and comity.[367] This is illustrated by *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) which involved a conspiracy [147] in Honduras that allegedly affected lumber imports into the United States. The Ninth Circuit's discussion of the extraterritorial application of U.S. antitrust laws, which would limit their use only to those situations involving substantial adverse effects, may apply with equal or greater force to foreign acquisitions since ordinarily an elaborate showing of actual effects is not required in a conspiracy case. The court, in reversing a summary decision, adopted the following tripartite analysis:

> We conclude, then, that the problem should be approached in three parts: Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it of such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?[368]

[148] It is at least arguable under *Timberlane* that the potential competition theory should not be applied to acquisitions by foreign firms of companies outside of the United States, and that the extraterritorial reach of Section 7 should be confined to horizontal cases in which substantial actual competition in the United States is at stake. We reach none of the deeper policy implications of *Timberlane*, however, because on the facts of this case there was such a total failure of proof that under any standard of antitrust law applicable to a domestic acquisition, including the "potentiality" doctrine, the foreign

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[366] Findings 155, 158, 160, 164, 165, 169, 176, 177.

[367] The conflicts problem may arise, for example, in those circumstances in which foreign acquisitions were cleared by Common Market authorities. Several of the AB SKF acquisitions in Europe fall within this category. Of course, none of these problems apply to the participation, directly or indirectly, of a foreign corporation in a restraint of trade in the United States, such as a conspiracy to allocate U.S. markets. Once *in personam* jurisdiction is obtained (here, conceded) the full array of United States antitrust law applies to acts committed in the United States. *United States* v. *Scophony Corp. of America*, 333 U.S. 795 (1948).

[368] 549 F.2d at 615. *Timberlane* is consistent with earlier statements of extraterritorial jurisdiction. In *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (Hand, J.) acts committed outside of the United States were said to be within the subject matter jurisdiction of the courts under the Sherman Act "if they were intended to affect [foreign commerce] and did affect [it]." 148 F.2d at 444. See also RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 18(b) (1965) (a nation may adjudicate under its own laws controversies that arise from external conduct producing a significant effect inside its territories). Cf. *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909) (territorial and comity principles were applied to limit jurisdiction in case in which there was no proof of effect on U.S. commerce and act complained of had been committed by the foreign sovereign itself).

acquisitions of AB SKF do not even come close to being anticompetitive.

## IV

## CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondents and the subject matter of this complaint relating to the Tyson and Nice acquisitions and the arrangement between FM and SKF. Because there is no proof that the AB SKF foreign acquisitions had anticompetitive effects in the United States (and thus the first two steps of the tripartite analysis of *Timberlane* are not satisfied) I conclude that the Commission lacks jurisdiction to challenge these foreign acquisitions by a foreign firm. **[149]**

2. There was a total failure of proof that the SKF acquisition of Tyson was anticompetitive when it occurred or that the Commission's judgment in giving its clearance to this toe-hold acquisition of a failing company in 1955 was in error.

3. There was a total failure of proof that the all bearing market is an economically viable market or that the Commission's judgment in giving its approval to the Nice acquisition in 1963 was in error.

4. There was a total failure of proof that the bearings acquisitions made by AB SKF outside the United States had any effect whatsoever on any United States market.

5. The FM-SKF arrangement was a conspiratorial agreement to allocate markets in the United States. The act took place in commerce and affected commerce within the meaning of the Federal Trade Commission Act. This conspiracy constitutes an unfair method of competition, and an unfair act and practice in violation of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Section 45).

Accordingly, the following order should be issued: **[150]**

## ORDER

## I

## PREFACE

This order shall be binding on Federal-Mogul Corporation, SKF Industries, Inc., and Aktiebolaget SKF; their subsidiaries, any concern controlled by a respondent, including joint ventures; their successors and assigns, and their officers, agents, representatives, and employees.

## II

*It is ordered*, That respondent Federal-Mogul Corporation shall not purchase from, and respondent SKF Industries, Inc. and respondent Aktiebolaget SKF shall not furnish and sell to respondent Federal-Mogul Corporation, tapered roller bearings having an outside diameter of zero to four inches after the contract and other agreements identified in Paragraph III below, are cancelled.

## III

*It is further ordered*, That the agreement signed by SKF Industries, Inc. and Federal-Mogul Corporation on December 17, 1974, and any similar arrangements between SKF Industries, Inc. and Federal-Mogul Corporation shall be cancelled effective one year from the date this order shall become final. [151]

## IV

*It is further ordered*, That each respondent shall notify all persons having sales and policy responsibilities in its organization of the terms of the order and publish same in at least two major trade journals or periodicals twice annually for each of two years from the effective date of this order.

## V

*It is further ordered*, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in said respondent which may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or joint ventures.

## VI

*It is further ordered*, That within sixty (60) days after the effective date of this order, each respondent shall file with the Federal Trade Commission a written report setting forth in detail the manner and form of its compliance with this order.

## OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

This case principally concerns an arrangement among the respondent corporations which, it is alleged, constitutes an illegal allocation of markets. The peculiar facts of the case are susceptible to analysis under several different antitrust rubrics. Respondents contend that the arrangement in question is merely a slightly embellished vertical supply contract, the effects of which upon competition, if any, must be measured by the rule of reason standard and thereby be declared lawful. Complaint counsel, however, argue that the arrangement constitutes a *per se* unlawful market division.

Administrative Law Judge Morton Needelman ("the ALJ") found that respondents Federal-Mogul Corp. ("FM") and SKF Industries, Inc. ("SKF") had agreed to a conspiratorial scheme to allocate markets within the United States. He held that the challenged arrangement constituted a violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (1976), and therefore of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (1976). He determined that [2] the appropriate relief was to compel SKF and its parent company to cease dealing with FM within one year. The ALJ dismissed a series of other charges, which had alleged that several acquisitions by respondents SKF and its parent Aktiebolaget SKF ("AB SKF") were either unlawful or were part of a pattern of unlawful conduct.

Both complaint counsel and respondents have appealed from the ALJ's determinations. After establishing the setting, we will first consider complaint counsel's appeal.[1]

## I

## BACKGROUND

### A. The Parties

FM, a Michigan corporation, manufactures and distributes in the United States a range of automotive products, including ball bearings and some tapered roller bearings ("TRB"). (IDF 1, 4) AB SKF, a Swedish corporation, is the world's largest bearings producer and one of the world's three largest producers of TRB. (IDF 7) SKF, a Delaware corporation, is beneficially owned by AB SKF under the terms of a voting trust agreement. (IDF 10, 15) Since 1955, SKF has manufactured and sold bearings, including TRB, in the United States. (IDF 11, 14) In 1972, however, SKF shut down its Automotive Products Division subsidiary ("APD"), which, in competition with FM, had distributed bearings and other automotive products to "warehouse dealers" who resold those products in the U.S. automotive aftermarket. (IDF 44, 87 & n.155) The circumstances surrounding the termination of APD are among those central to the disposition of respondents' appeal.

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[1] The following abbreviations are used in this opinion:
ID - Initial Decision, Page No.
IDF - Initial Decision, Finding No.
CX - Complaint Counsel Exhibit No.
RSX - Respondent SKF Exhibit No.
RAX - Respondent AB SKF Exhibit No.
RFX - Respondent FM Exhibit No.
Tr. - Transcript of Testimony, Page No.
TROA - Transcript of Oral Argument, Page No.
CAPB - Complaint Counsel's Appeal Brief, Page No.
RSAPB - Respondent SKF's Appeal Brief, Page No.
RFAPB - Respondent FM's Appeal Brief, Page No.
CAB - Complaint Counsel's Answering Brief, Page No.
RSAB - Respondent SKF's Answering Brief, Page No.
RSRB - Respondent SKF's Reply Brief, Page No.
RFRB - Respondent FM's Reply Brief, Page No.

## B. The Products

Many kinds of bearings are sold in the U.S. aftermarket, including ball bearings, cylindrical, needle, and spherical roller bearings, and TRB. (IDF 21; Tr. 2752) Each type of [3] bearing has a distinct vehicular or non-vehicular application, although all bearings are used to absorb loads and reduce friction between rotating machine parts.

TRB manufacture is sophisticated, expensive, and requires special machinery. (ID 67 n.183) TRB have unique performance characteristics and are not sensitive to price changes among other types of bearings. (*Id.*) Once a product has been designed to require use of TRB, another type of bearing cannot be substituted without effecting basic design changes, an expensive and infrequently undertaken process. (*Id.*) Ninety percent of the TRB used in passenger car automotive applications are in the 0" to 4" outer diameter range. (IDF 21; Tr. 1347, 2863)

The ALJ found, and we agree, that the manufacture of TRB, and the distribution of bearings generally, including TRB, to the U.S. independent automotive aftermarket are distinct, relevant lines of commerce.[2] (IDF 20–22, 104) Each of these markets is highly concentrated, and barriers to new entry in each are substantial. (IDF 23, 24, 25, 105, 110) It is undisputed that the proper geographic market in each instance is the United States as a whole. (IDF 19) In 1971, FM had the largest share of the distribution market, holding 36%, while SKF ranked third with 8%.[3] (IDF 23) The ALJ did not find that the record established the existence of an overall "all ball bearings" market, including both precision and commercial grade ball bearings. (ID 141)

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[2] This latter market should be distinguished from the sale of bearings to automobile manufacturers for use as original equipment in new vehicles. This so-called OEM market, as distinguished from the market for replacement bearings, is not directly pertinent to the instant case. The OEM market for TRB is dominated by The Timken Co., the largest U.S. manufacturer of such bearings. (IDF 30 & n.62, 108; CX 190H) The ALJ also found, and respondents do not challenge his conclusion on appeal, that sales of replacement bearings to the independent automotive aftermarket were properly distinguished from sales of replacement bearings to the "OE (original equipment) service market," the sole purchasers in which are car dealers franchised by the automakers. (IDF 22)

[3] With respect to distribution to the independent automotive aftermarket of TRB specifically, the Initial Decision indicates that FM was responsible for 48% of all sales and SKF for 5%. (IDF 24)

### C. Contentions of Counsel Supporting the Complaint

Complaint counsel charge that since 1955, acting alone or in concert, respondents have engaged in a pattern of anticompetitive conduct which has reduced competition in three U.S. bearings markets: manufacture and sale of TRB, manufacture and sale of ball bearings, and distribution of bearings generally, including TRB, to the independent automotive aftermarket. [4]

As elements of this pattern, complaint counsel challenge two domestic acquisitions by SKF, that of Tyson Bearing Corp. ("Tyson"), a manufacturer of TRB, in 1955, and that of Nice Ball Bearing Company ("Nice"), a manufacturer of ball bearings, in 1960. Complaint counsel also contest a series of acquisitions by AB SKF of TRB and ball bearing manufacturers located outside the United States, the purpose or effect of which, supposedly, was to insulate SKF from foreign competition, both actual and potential. Finally, and most importantly, complaint counsel attack an "arrangement," allegedly consummated in early 1972, between FM and SKF. Pursuant thereto, SKF purportedly agreed that it would continue to manufacture automotive bearings, including TRB, but would withdraw from the distribution of all bearings to the aftermarket and would attempt to transfer its distribution accounts to FM. FM, in turn, allegedly agreed to continue to distribute bearings to the aftermarket, but to cease manufacture of 0"–4" TRB and to source its product needs from SKF. (Complaint, Paragraphs 15, 16, 17, 34 & 35) In furtherance of the arrangement, FM allegedly terminated discussions concerning a proposed manufacturing joint venture with a Japanese concern ("Koyo Seiko") and forebore from reentering the manufacturing sector for 0"–4" TRB on its own. Through this alleged division of markets, competition between FM and SKF was eliminated at both the manufacturing and distribution levels.[4]

Elements of this "plan of anticompetitive behavior" (CAB 7) are challenged both individually and as a part of an overall scheme. (Complaint, Paragraphs 34, 35)

### D. Respondents' Defenses

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[4] In their post-trial brief, complaint counsel explicitly raised for the first time the contention that FM's agreement to service the aftermarket accounts of SKF's distribution subsidiary constituted an unlawful acquisition under Section 5 of the FTC Act. No violation of Section 7 of the Clayton Act was alleged. The theory was premised principally upon the claim that FM unlawfully "acquired" intangible assets from SKF. *See United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 182 & n.4 (S.D.N.Y. 1960); *Farm Journal, Inc.*, 53 F.T.C. 26, 48–49 (1956). While the market share and concentration data arguably could have supported such a theory, *but see* ID 125 n.333, we think it wisest not to consider this allegation. At best, the complaint and trial dealt with an acquisition theory only ambiguously, by addressing competitive issues that are also relevant to a Clayton Act Section 7 (or related FTC Act Section 5) charge. In view of this circumstance and of our disposition of respondents' appeal, we refrain from reaching this issue.

Respondents contend principally that the 1955 acquisition of Tyson by SKF was a toehold acquisition by a new entrant of a failing company and was therefore lawful; and that the 1960 acquisition of Nice was lawful, because Nice and SKF were not actual competitors in any market. Respondents also contend, and the ALJ found, that there was a failure of proof with respect to any anticompetitive effects manifested in the United States as a result of AB SKF's overseas acquisitions. [5]

With respect to the allegations concerning the 1972 FM-SKF "arrangement," respondents contend principally that proof of an agreement was insufficient and that even if the Commission finds an agreement, its legality must be measured against a rule of reason standard, under which it should be adjudged to be lawful.

### E. The ALJ's Findings

The ALJ separately considered each element of respondents' alleged course of conduct and concluded that no unlawful pattern had been established. He did, however, find a distinct law violation springing from the FM-SKF "arrangement." Because we concur generally in the findings of fact made by the ALJ and because those findings are set out in detail in the Initial Decision, we will simply relate certain of the more central findings in connection with our discussion of the merits of the case.

## II

## COMPLAINT COUNSEL'S APPEAL

The record shows the following with respect to the facts underlying complaint counsel's appeal:

### A. Tyson Acquisition

Tyson Bearing Corp., before its acquisition by SKF, had manufactured a cageless-type TRB, which was not a suitable commercial alternative to the cage-type TRB manufactured by the dominant firm in the industry, Timken Roller Bearing Co. (now known as "The Timken Co."). (IDF 114) As a result, Tyson had suffered a significant competitive disadvantage. Its conversion process to cage-type bearings, once undertaken, was expensive and sorely depleted Tyson's already scarce capital. (IDF 114; CX 421B) Tyson was also handicapped by the fact that it offered only a limited line of products. (IDF 115; CX 352H; Tr. 1466)

Tyson had a lengthy history of operating losses, and repeatedly teetered on the brink of collapse. (IDF 116, 117) From 1948 to 1950 the company borrowed heavily from the Reconstruction Finance Corporation ("RFC"), but it was unable to make payments on these loans on a timely basis. (IDF 117) After several defaults, RFC, which had a security interest in virtually all the assets of the company, demanded that Tyson be sold or merged into another firm with assets adequate to retire or substantially reduce the indebtedness to RFC. (IDF 117; CX 16G, H; RSX 30F; RSX 23A-I) By December 1954, Tyson had made sale or merger overtures to a dozen companies and had been rebuffed by each. (IDF 119, CX 315A-B; RSX 11A-B, 12, 24A-B; Tr. 1432) By the time it approached SKF, any other form of debt or equity financing was foreclosed. (IDF 121; CX 421C (No. 15); Tr. 1437-38) SKF agreed to acquire Tyson, which then had about 2% of the market for TRB production, in March 1955. (CX 421C (No. 15)) Federal Trade Commission approval of [6] the acquisition was sought, and the Commission informed SKF in 1956 that no action would be taken. (IDF 124; CX 16A-V; RSX 4) Thereafter, SKF remodeled Tyson's existing factory and constructed a new facility in 1965. (IDF 125) Since 1955, SKF has invested $27 million in its Tyson division. (Tr. 1462-64, 1524)

Complaint counsel no longer challenge the Tyson acquisition independently, but concede that it was lawful when consummated. Rather, they argue that the acquisition was part of a pattern of conduct, including the foreign acquisitions by AB SKF of TRB producers and the alleged market division agreement between SKF and FM, which unlawfully restricted competition in violation of Section 5 of the FTC Act.

### B. Nice Acquisition

In 1960, SKF acquired Nice Ball Bearing Company, which manufactured ball bearings at plants located in Pennsylvania. (IDF 126-127) In an "all ball bearing" market, as alleged by complaint counsel, SKF's pre-acquisition market share, measured by shipment volume, was 8.3% and that of Nice was 2.2%. (IDF 132) Four-firm concentration in this "market" in 1958 was 66%, and eight-firm concentration was 81%. (IDF 130; CX 3B) At the time of the acquisition concentration, though still high, was trending downward. (*Id.*) In 1961, the Federal Trade Commission investigated the Nice acquisition and re-investigated the Tyson acquisition. (IDF 124, 147; RSX 59A-Z-49, 60) It informed SKF in 1963 that no action would be taken with respect to either unless subsequent developments so warranted. (RSX 60) Thereafter SKF invested $5-$6 million in Nice to construct new facilities and purchase new equipment. (IDF 148; Tr. 1528)

SKF contests the existence of an "all ball bearing" market. It claims that in 1960 Nice produced non-precision, commercial grade bearings of less than ABEC–1 quality, while SKF made only precision bearings of ABEC–1 or better quality.[5] According to SKF, its bearings and those manufactured by Nice were not realistically interchangeable for end use and were purchased by distinct customers for distinct applications.[6] SKF also contends that re-examination of both the Tyson and Nice acquisitions is barred by the doctrines of laches and estoppel. [7]

The issues with respect to the Nice acquisition are principally two: whether SKF and Nice were competitors in an "all ball bearings" market and, if so, whether the acquisition substantially lessened competition in that market. Complaint counsel also raise separately the issue of whether a distinct Section 5 violation was made out by reason of a combination of the Nice acquisition with AB SKF's subsequent acquisitions of foreign ball bearing manufacturers constituting a "systematic course of conduct . . . to eliminate actual and potential competition in the United States ball bearing market . . . ." (CAPB 42)

### C. AB SKF's Acquisitions of Foreign Bearings Manufacturers

During the last 30 years, AB SKF has acquired a large number of TRB manufacturers that were located outside of the United States and that exported little or no TRB to the United States. (IDF 152–169) Complaint counsel allege that these acquisitions, even if not distinct violations of § 5 of the FTC Act, are part of a pattern of AB SKF conduct that has had an adverse impact on the domestic bearings market by eliminating foreign firms that otherwise could have competed against SKF's Tyson division by exporting TRB to the U.S. market. By eliminating this potential competition, AB SKF allegedly insulated SKF's position in the U.S. market. A precisely analogous claim is made with respect to AB SKF's acquisitions of a lesser number of foreign ball bearings manufacturers following SKF's acquisition of Nice. (IDF 177)

Between 1950 and 1970, AB SKF acquired TRB producers located in France, Yugoslavia, Italy, Spain, Argentina, and Mexico. (IDF 152) Prior to their acquisition by AB SKF, none of the acquirees, save for the Italian firm, had ever exported any TRB to the United States. (IDF 154, 157, 159, 162, 167, 168) With respect to each, the ALJ found that these firms lacked the interest, capability and intent to enter the

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[5] Bearings range in increasing quality from unground, to ground, to ABEC–1 to ABEC–9.

[6] Generally, better quality bearings can be substituted for and can perform the functions of poorer bearings, but the opposite is untrue. Hence, SKF contends that Nice realistically could not have and, in fact, did not compete for the same accounts as did SKF in 1960.

U.S. market or to become a viable factor in that market. (IDF 155, 158, 160, 169) Similarly, with respect to each, the ALJ found that no proof was presented that the acquired firms were perceived by any domestic firms as potential competitors in any form. (*Id.*; IDF 165) The same conclusions were reached with respect to the acquired ball bearings firms. (IDF 177)

The Italian firm ("RIV"), which previously had maintained a U.S. sales office, did export a modest amount of TRB to the United States prior to its acquisition by AB SKF in 1965. (IDF 164; RAX 262A; Tr. 1276–80, 1291) Such exports, which increased between 1965 and 1974, exceeded pre-acquisition levels, but amounted to less than one percent of RIV's sales in both 1965 and 1974. (IDF 162, 163; CX 253Z–5 (No. 50) *in camera*, 253Z–6 (No. 52) *in camera*, 253Z–7–8 (No. 54) *in camera*) The ALJ found that AB SKF had not squelched RIV's latent export potential, but that RIV held no promise of ever becoming a major factor in the U.S. market, and that there was no evidence that any domestic producer perceived it as a potential entrant into the U.S. on a meaningful scale. (IDF 165)

Generally, bearings imported by SKF from companies acquired by AB SKF, including RIV, have not played a major role in [8] supplying FM's needs under the SKF-FM arrangement.[7] (IDF 176) Thus, even given an assured buyer, SKF apparently has not found it economically sound to import any substantial volume of TRB from the foreign companies acquired by AB SKF.

### D. Disposition of Complaint Counsel's Appeal

We are persuaded that complaint counsel's contentions, though imaginative, are without merit.[8]

As complaint counsel seem to recognize, the Tyson acquisition, when viewed independently, is not susceptible to any serious legal attack. Even under the most stringent application of the failing company doctrine, Tyson qualified at the time of its 1955 acquisition as a failing company. The firm was on the brink of bankruptcy, had a negative cash flow, had pledged virtually all of its assets, had no remaining debt or equity opportunities to raise cash, and had been rebuffed by a dozen other companies which it had approached in the hope that one would acquire it. Moreover, even apart from any failing company defense, the acquisition of Tyson, with a 2% market share, by a potential entrant into the U.S. TRB market clearly constituted a legitimate toehold acquisition. Indeed, putting aside the question of other effects resulting from the subsequent foreign acquisitions by AB SKF and the SKF-FM arrangement, it can be argued that the acquisition had a potentially beneficial impact by injecting a significant competitive stimulus into the U.S. TRB market. In fact, following the acquisition, Tyson's share of the aftermarket for TRB rose from 2% to 6% and that market did not become further concentrated. [9]

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[7] The principal foreign source of bearings sold to FM, until such imports were terminated after 1975, was the United Kingdom plant of AB SKF at Luton, England, which was built by a company formed by AB SKF in 1911. RIV was a significant source of bearings sold to FM only in 1973. (CX 258B–H *in camera*)

[8] We reach the merits of complaint counsel's appeal because we disagree with respondents that any aspect of this appeal is necessarily barred by the doctrines of estoppel and laches. It is well established that the doctrine of equitable estoppel does not apply against the government, *e.g.*, *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408–409 (1917), and in any event, the "clearances" given to SKF to proceed with the Tyson and Nice acquisitions were properly qualified, and did not bar future action by the Commission.

It is equally clear that laches is not a defense to an action brought by the government in the public interest. *Times-Picayune* v. *United States*, 345 U.S. 594, 623–624 (1953); *United States* v. *Firestone Tire & Rubber Co.*, 374 F. Supp. 431, 433 (N.D. Ohio 1974). The parties disagree sharply about the proper interpretation of *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597–598 (1957), but it is at least clear from that case that the government may challenge a merger at whatever time its anticompetitive effects become apparent. Thus, we do not believe that laches flatly bars a challenge to these acquisitions.

At issue, then, is whether the Tyson acquisition served as the springboard for SKF's parent, AB SKF, not only to enter the U.S. market but to take further steps to insulate and enhance its market position by systematically buying up potential foreign entrants. Ultimately, complaint counsel assert, the anticompetitive effects of these practices were clearly manifested in the dealings between SKF and FM. By cutting off access to other possible sources of supply, it is contended that SKF was in a position to negotiate the kind of arrangement it did with FM. Before addressing this issue, however, we will first discuss the separate legal implications of the Nice acquisition and then turn to the similar questions raised by the acquisitions of foreign ball bearings and TRB firms.

With respect to the Nice acquisition, which complaint counsel do independently challenge, much ink is spilled by counsel debating the accuracy of Judge Needelman's conclusion that SKF and Nice were not actual competitors in 1960 because separate product markets existed for commercial grade and ABEC-1 or better ball bearings. Counsel have submitted lengthy dissertations on the meaning of quality and on the interchangeability of use among different quality ball bearings.[9] After reviewing the evidence, we believe that while SKF and Nice competed principally in different submarkets, both firms also were part of a broad overall ball bearings market, in which all ball bearings may be arrayed along a continuous spectrum of quality. *Cf. Coca-Cola Bottling Co. of New York,* Dkt. 8992, issued Jan. 23, 1979, 3 Trade Reg. Rep. (CCH) ¶21,514 [93 F.T.C. 110]. **[10]**

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[9] We are left feeling something like the author of *Zen and the Art of Motorcycle Maintenance* (Bantam Books 1975), Robert M. Pirsig, who wrote, at p. 178:

> Quality . . . you know what it is, yet you don't know what it is. But that's self-contradictory. But some things are better than others, that is, they have more quality. But when you try to say what the quality is, apart from the things that have it, it all goes poof! There's nothing to talk about. But if you can't say what Quality is, how do you know what it is, or how do you know that it even exists? If no one knows what it is, then for all practical purposes it doesn't exist at all. But for all practical purposes it really does exist. * * * Obviously some things are better than others . . . but what's the "betterness"? . . . So round and round you go, spinning mental wheels and nowhere finding anyplace to get traction. What the hell is Quality? What is it?

We express no opinion on whether Mr. Pirsig would have gotten better traction had he employed bearing [illegible] ABEC-1 or better quality when spinning his mental wheels.

SKF's position may be summarized as follows: Better quality bearings (made of better materials or ground and polished with greater precision) can almost always be substituted for lesser precision bearings of the same dimension, but the reverse is not true. Rational businessmen, however, will not and do not use a higher quality (and more expensive) bearing if a lesser quality bearing is adequate for the job. For all practical purposes, therefore, Nice (which made only lesser precision bearings) was ordinarily foreclosed from competing with SKF for customers, since SKF's customers were compelled to use only high quality bearings (which SKF made to the exclusion of all others). While the record does show some potential overlap for end use between SKF's and Nice's bearings in the marginal range of quality near ABEC–1, and while Nice did make efforts to convince Ford Motor Co. and possibly others that its lower quality bearings could satisfactorily be substituted for the ABEC–1 bearings then used by those companies, SKF and Nice were not substantial, direct competitors.

We agree with SKF that the record shows that in 1960 SKF and Nice generally sold different quality bearings (Tr. 787) to different customers[10] for different applications.[11] We also agree that there is little evidence of significant cross-elasticity of demand or price sensitivity among most precision and commercial ball bearings. On the contrary, distinct prices, which are a function of quality and specialized use, generally seem to prevail. Finally, precision and commercial bearings typically are manufactured on different (albeit similar) equipment, and manufacture of the former requires a greater level of skill than does manufacture of the latter.

Complaint counsel contend vigorously that this evidence does no more than establish that SKF and Nice competed principally in different submarkets of an overall "ball bearings" market. They assert that all ball bearings serve the same general functions, irrespective of the quality of any given product. *Cf. Liggett & Myers Inc.,* 87 F.T.C. 1074 (1976), *aff'd,* 567 F.2d 1273 (4th Cir. 1977) (Both premium and economy dog food fulfilled same essential purpose and were part of a broad, overall dog food market). Complaint counsel allege also that the existence of a spectrum of quality and prices does not negate the fact of competition among some firms in the overall market, including SKF and Nice. *See, e.g., Brown Shoe Co.* v. *United States,* **[11]** 370 U.S. 294, 326 (1962); *United States* v. *Phillipsburg National Bank,* 399 U.S. 350, 360 (1970) ("[S]ubmarkets are not a basis for the disregard of a broader line of commerce that has economic significance"). They contend that while bearings at different ends of the quality spectrum do not compete with one another, bearings at adjacent levels of precision may compete, even if they are not necessarily interchangeable for use in a given application that requires the better quality bearing. (Tr. 2762, 2764) The record shows that Nice, for example, made strenuous efforts to persuade ABEC–1 users to switch to commercial grade bearings, contending that ABEC bearings were frequently "over engineered" for their common, less severe needs. (CX 278B, 280B, 298B; Tr. 1592–94). And while Nice's success in this exercise was somewhat limited, other commercial grade ball bearings manufacturers also found opportunities to induce product substitutions. (CX 390Z–26–29; Tr. 1387, 2557–61, 2564–65). Complaint counsel assert too that SKF, which manufactured a line of ABEC–1 bearings, monitored the market for sales of bearings of below ABEC–1 quality, and that Nice, in turn, before its acquisition, closely monitored sales of ABEC–1 standard bearings, including those of SKF. Complaint counsel contend, therefore, that the manufacture and sale of all ball bearings is a market "sufficiently inclusive to be meaningful in terms of trade realities." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357 (1963), citing *Crown Zellerbach Corp.* v. *FTC,* 296 F.2d 800, 811 (9th Cir. 1961), *cert. denied,* 370 U.S. 937 (1962).

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[10] Ford Motor Company, which bought generator bearings from both SKF and Nice, is the only common customer evealed by the record. (IDF 144, 146; Tr. 1564–65)

[11] Precision bearings of ABEC–1 quality or better are used in applications where load, speed, precision and ongevity requirements are severe. Commercial grade bearings are used wherever these requirements are less mportant. (IDF 141)

We believe, on balance, that the record supports the existence of an overall "ball bearings" market.[12] In particular, the overlap or potential interchangeability of use of SKF and Nice ball bearings in the range of quality near ABEC–1 suggests the existence of a spectrum of ball bearings products reposing within a broad market. *Cf. United States* v. *Continental Can Co.,* 378 U.S. 441 (1964). Because this market is so fragmented, however, a finding that the Nice acquisition was unlawful would have to be predicated upon statistical or non-statistical evidence of anticompetitive effect in this overall market that is rather more compelling than in the ordinary case, where substantial cross-elasticity of demand, interchangeability of use, or production flexibility may be presumed to exist. Such evidence, however, is rather meager. The statistical market shares (8.3% for SKF and 2.2% for Nice), while held sufficiently great in the two cases principally relied upon by complaint counsel (CAPB 42–43), *United States* v. *Von's Grocery Co.,* 384 U.S. 270

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[12] All parties agree that such a market should, in any event, exclude so-called miniature bearings.

(1966); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966), are, nonetheless, not high and in this case do not reflect substantial, direct competition between SKF and Nice in the sale of ball bearings. The only concentration trend data in the record is post-acquisition, and it reveals a significant decrease in both 4-firm and 8-firm concentration in this weak, overall market in the years following [12] the merger.[13] Thus, absent compelling evidence pointing to subsequent anticompetitive developments or effects associated with the acquisition, to which we turn next, we will not disturb the merger.

With respect to AB SKF's acquisitions of foreign ball bearings and TRB manufacturers, it should be noted at the outset that the theory of the complaint, while imaginative, might be more convincing had SKF, which allegedly was to be insulated from foreign competition, held a more dominant position in the U.S. market. The prospect of a foreign parent systematically acquiring foreign potential entrants in order to protect its subsidiary's monopoly profits in the U.S. market is rational only if that subsidiary has substantial domestic market power. But SKF's market share of TRB production has never exceeded 6.1% (IDF 108), and, though higher, its market share of the "all ball bearings" market has hovered at about 15% in recent years (IDF 131). In neither case is it seriously contended that SKF has the power to influence substantially the market price of these products. It ranks no higher than fourth in either market. By contrast, it is universally conceded that in the market for TRB manufacture both domestic respondents herein labor in the shadow of a giant domestic roller bearings concern, The Timken Co., which, the ALJ found, has "overwhelming dominance" in the domestic market for TRB production (ID 68–71). Indeed, at the time of AB SKF's earliest challenged acquisitions in the 1950's, when it is alleged to have embarked upon a scheme to "insulate" SKF from competition, Timken's domestic TRB production market share ranged between 60% and 80%. (IDF 107) In 1971, Timken's TRB market share was 55%; by 1976, it approached 70% (ID 70 & n.190).

More importantly, no satisfactory competitive nexus has been shown by complaint counsel between the AB SKF acquisitions and either the Tyson or Nice acquisitions. The record simply fails to reveal any linkage or special market factors connecting these widely scattered events from which a reasonable inference of anticompetitive purpose or effect could be drawn. Each of the acquisitions, when analyzed separately, exhibits few characteristics suggesting any significant competitive impact in the U.S. market. Many of the firms acquired were relatively small and demonstrated no real capability or potential for penetrating the U.S. market. In addition, some of the acquisitions were, in fact, joint ventures or acquisitions of new minority interests. Even RIV, probably the most significant of the acquired firms, showed no likely potential for entry into the domestic [13] market in a substantial way. Though it did ship some bearings to the U.S. prior to being purchased by AB SKF, and later supplied some TRB to FM after the SKF-FM arrangement was consummated, these exports constituted only a tiny fraction of RIV's business. Moreover, as we have noted previously (*see* note 7 *supra* and accompanying text), RIV supplied FM to any degree only on a temporary basis. Thus, but for the fact of these limited exports, there is no persuasive evidence that the firm could reasonably have been expected to become a viable presence in the U.S. market.

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[13] Four-firm and 8-firm concentrations fell from 60% to 57%, and 81% to 72%, respectively, between 1958 and 1972 (IDF 130; CX 3B), notwithstanding the allegedly anticompetitive acquisitions of foreign ball bearings manufacturers by AB SKF during this same time period. SKF's market share, however, did increase after the merger to roughly 15%.

Likewise, the record provides little clue about the combined effect of AB SKF's acquisitions. While the cumulative impact of many such acquisitions could injure domestic competition to such an extent as to violate Section 5, inadequate proof was offered. We simply cannot discern from this record any adverse synergistic effects from the multiple acquisitions that would warrant finding liability. For example, there is no proof that FM, or any other domestic bearings distributor, could have feasibly turned to some combination of these foreign firms to procure its needs. Nor is it clear that these firms could otherwise have effected significant entry into the U.S. market through some joint endeavor or less anticompetitive acquisition.

In short, we must agree with the conclusion reached by the ALJ that:

> There is no evidence that any of the companies acquired by AB SKF were perceived as potential entrants into the United States by anyone, or that their prior existence (independent of AB SKF) affected the American bearings market, or that their acquisition insulated or entrenched the competitive position of SKF or FM in any United States bearing market in any way whatsoever, or that they had any real connection with the FM-SKF "arrangement" which took place six years *after* the only significant merger, the acquisition of RIV. (ID 146) (Emphasis in original)

Because of the failure of proof, complaint counsel's appeal is dismissed.

## III

## RESPONDENTS' APPEAL

### A. Statement of Facts

In 1971 FM, which had total sales of $270 million, manufactured TRB at two plants located in Michigan and one [14] in Illinois. (IDF 1, 2) The latter plant, which is still open, is of little significance in this case, since it produces only straight roller bearings and TRB with an outer diameter of 8" or more. (IDF 3) The two Michigan plants, however, manufactured TRB of 0" to 4" outer diameter, and these facilities had suffered sharply declining profits from 1964 to 1970. (IDF 28, 31)

A consulting firm had advised FM in 1970 that it should withdraw from both production and distribution of 0"–4" TRB. (IDF 32, 33) In the spring and summer of 1971, FM decided to close the Michigan facilities, but to remain in the TRB business as a distributor to the aftermarket, procuring its supply needs elsewhere. (IDF 35) FM feared that withdrawal from TRB distribution would have an adverse impact on its sales of other products, since its customers, so-called warehouse distributors, preferred to obtain a full line of products from a single supplier. (IDF 36, 38) Following a board of directors meeting, FM announced in October 1971, that the Michigan facilities would be shut down.[14] (IDF 39)

In anticipation of the board decision to close the Michigan plants, FM had begun exploring alternative sources of TRB as early as February 1971. (IDF 47) Discussions with NDH, a division of General Motors, were unfruitful, because NDH produced TRB primarily for General Motors' captive use and lacked adequate capacity to service FM's needs also. (IDF 50; Tr. 1203–04, 2156–57) The Timken Co. simply refused to sell TRB to FM, although it had ample capacity; upon the advice of counsel it asserted a right to refuse to deal. (Tr. 496–497, 2154–56) Other domestic and foreign bearings firms apparently were also unable to fill FM's product requirements.

Two possibilities remained, other than continuing production at the Michigan plants. First, a Japanese company, Koyo Seiko, which was an actual potential entrant into the U.S. [15] market,[15] was interested in a proposed joint venture to manufacture certain fast-moving, high volume TRB. (IDF 48, 53) Second, FM could try to source some or all of its TRB needs from SKF. (IDF 52)

SKF was well situated to respond to an overture from FM. In addition to its Tyson facilities in the U.S., which at that time lacked sufficient capacity to meet FM's requirements, it theoretically could

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[14] The two plants in fact operated until June 1973 and March 1974, respectively. Prior to shutdown, FM manufactured an "all-time" (five-year) inventory of 200 slow moving, low volume 0"–4" TRB part numbers. (CX 107; Tr. 2388, 2470–71)

[15] After the joint venture discussions with FM terminated, Koyo Seiko in fact made a *de novo* entry into the U.S. manufacturing market, opening a facility in South Carolina, which assembles 0"–4" TRB from parts imported from Japan. (ID 55 n. 48)

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call upon its parent's overseas capacity, since AB SKF was one of the three largest TRB producers in the world.[16]

Simultaneous discussions with Koyo Seiko and SKF began in May 1971 (IDF 52, 53), and over the next several months the advantages and limitations of dealing with each became apparent. Koyo Seiko could agree to the assembly of only seven out of thirty high volume TRB part numbers (ID 40 n.98), meaning that even if (as appeared likely) the joint venture could result in the lowest cost to FM for these items (see IDF 53; Tr. 2127–28), the problem of sourcing the other parts would remain, and it would be difficult to find a manufacturer willing to supply those parts while foregoing production and sale to FM of the more profitable, higher volume items. (Tr. 2135–37) SKF, on the other hand, offered the prospect of a full line of supply, albeit perhaps at a higher price. (IDF 52 & n.97, 62, 74) It was also apparent that SKF would be dependent in part upon an overseas source if it was to fulfill all of FM's TRB requirements. (IDF 52 & n.97, 74) FM did not initially offer SKF the opportunity to supply a full TRB line, including the seven high volume numbers. (IDF 71; Tr. 2475; CX 103, 264A) [16]

During a September 1971 meeting between SKF and FM concerning TRB supply, principals of the two corporations also discussed the future of SKF's distribution subsidiary, APD. (IDF 63; Tr. 2161–69) APD offered but a single line of products, bearings, for distribution to the automotive aftermarket. (IDF 42) APD's line included clutch release bearings, front wheel ball bearings, needle and cylindrical roller bearings, and TRB. (*Id.*) Its 1971 sales volume was $4.5 million. (IDF 43) APD and FM's aftermarket distribution division were competitors in the sale of bearings to the automotive aftermarket. (IDF 44; Tr. 2405, 2421)

APD had lost money each year from 1965 through 1970, principally because of its limited product line. (IDF 45; RSX 80A) In 1971, however, APD was profitable, having gradually expanded shipments and decreased its relative costs. (See CX 45B)

At the September meeting, SKF and FM considered the possibility of FM taking over APD's accounts and integrating them into its distribution business. (IDF 63; CX 263; Tr. 807) Shortly thereafter, SKF officials commissioned a study which showed that, depending upon the terms to be negotiated, it might be more profitable to SKF if FM took over APD's accounts than if APD remained a part of SKF. (IDF 65; Tr. 774–775) As it happened, FM had already considered internally the possibility of taking over the APD accounts as part of an overall deal with SKF. (IDF 59; ID 118; CX 261C) FM apparently perceived this as a "plus" (CX 261C), albeit a marginal one, of concluding a deal with SKF, rather than with Koyo Seiko. Nonetheless, FM officials continued to meet with their counterparts at Koyo Seiko during the fall of 1971 and, having earlier signed a letter of intent (see CX 206A–D), they informed Koyo Seiko that the joint venture was still being considered. (IDF 66; Tr. 2131–32)

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[16] The president of SKF testified that he relied upon his ability to obtain the necessary TRB from AB SKF's overseas subsidiaries when he negotiated the arrangement with FM. (Tr. 806, 809) The limits of SKF's domestic TRB line were also well-known to FM since, prior to culmination of the arrangement in 1972, FM had supplied TRB to SKF for sale by its APD subsidiary to the aftermarket. (Tr. 1469)

Meetings with SKF became more frequent and intense following FM's October 27, 1971 announcement of its decision to shut down its Michigan TRB plants. SKF may have perceived that the announcement had weakened FM's bargaining position by eliminating one of its options. (IDF 68; Tr. 2328; RSAPB 15) FM, for its part, vigorously contends that after the announcement SKF was in a position virtually to dictate the terms of any SKF-FM transaction. (RFAPB 12–13) In late November, FM offered for the first time to buy from SKF all of its requirements for TRB, including those high-volume items which would have been covered by the joint venture with Koyo Seiko. (IDF 71; Tr. 2330, 2334, 2475) SKF then agreed to discuss further the specifics of APD's product line. (IDF 72) An FM officer testified that he felt that SKF's improved attitude toward disposing of APD was a function of FM's willingness to source the full line of its TRB needs with SKF. (Tr. 2334)

As an overall agreement neared, SKF, perhaps sensing FM's vulnerability, demanded that as a part of the arrangement it become FM's aftermarket source of automotive ball and clutch throw out bearings, notwithstanding that FM itself already manufactured the same bearings. (IDF 73 & n.133; CX 35Z–6–7, 51A; Tr. 807–808) FM acceded to the demand, apparently accepting SKF's rationale that it needed to have an outlet for these bearings in order to be able to close APD. (IDF 73) Once the total [17] supply understanding was reached, SKF's closing of APD followed automatically. SKF contends that the termination of APD was a unilateral decision which required no acquiescence by FM. It concedes, however, that only the full-line supply agreement with FM made possible the closing of APD. (IDF 72, 73, 77)

In January 1972, the two competitors reached final agreement. (IDF 75; CX 47A–E; Tr. 1481, 2172, 2339–40, 2479–81) Nominally, only two formal contracts were prepared: a buy-sell supply agreement between SKF and FM and an undertaking between SKF and FM to fill the requirements of APD's customers through FM. (IDF 84–85; CX 48B–D, 48E–L; Tr. 2480–81) Even these contracts, in fact, were not signed by both parties. (IDF 86; Tr. 2481, 2340) Immediately thereafter, however, SKF closed APD and began to shuttle all of its accounts over to FM.[17] (IDF 87) And, within the same year, FM also formally cancelled the joint venture with Koyo Seiko.[18] (IDF 81; CX 213–214B)

## B. Holdings of the ALJ

On the basis of the above evidence, the ALJ concluded that an agreement had in fact been reached between FM and SKF, encompassing (1) FM's termination of the Koyo Seiko joint venture agreement, (2) a full line of supply by SKF to FM, and (3) SKF's termination of APD and removal of its accounts to FM. (ID 117) He held that such an agreement among competitors constituted a *per se* illegal allocation of markets. (ID 123)

The ALJ also held AB SKF liable, noting as a predicate that both FM and SKF had understood from the outset that AB SKF would supply many of the needed parts to SKF for resale to FM. (ID 131–132; IDF 52, 74, 85, 91, 92, 94) The law judge found that AB SKF thereafter unlawfully ratified and participated in the illegal allocation and that, contrary to its contentions (which he found to be "inconceivable"), AB SKF also had advance knowledge of the agreement. (ID 131–133) Finally, he noted that AB SKF had [18] at no time exercised its latent power to terminate the arrangement by refusing to supply further parts.[19] (ID 132–133)

As relief, the ALJ ordered that the supply contract be cancelled and that SKF and AB SKF cease all sales of TRB to FM within one year; the order banning such sales extends in perpetuity.[20] [19]

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[17] FM in fact received 90–95% of APD's former business (IDF 97), although each APD customer was, of course, free to go elsewhere.

[18] Respondents dispute the ALJ's finding that FM discussed with SKF the proposed joint venture with Koyo Seiko. They contend that the documentary evidence upon which the ALJ relied may be satisfactorily explained by another, innocent means. Because we do not believe that the existence of such discussions between FM and SKF is a necessary condition precedent to the result we reach in this case, we do not arbitrate this particular disagreement.

[19] The ALJ rejected, however, one of the grounds for liability asserted by complaint counsel, *viz.*, that AB SKF employed "geocentric" control of its far flung international empire, including SKF; he found the evidence with respect to control to be "inconclusive." (ID 129)

[20] In order to describe the nature of the arrangement more fully and to place the issue of relief in proper perspective, some elaboration of post-agreement events is necessary.

Although the parties nowhere explicitly delineated their agreement as one of exclusive dealing, it was in fact FM's practice to purchase its requirements of TRB from SKF under blanket purchase orders, the first of which was issued in May 1972.

On December 17, 1974, a formal, non-exclusive supply agreement, which is presently extant, was executed by SKF and FM. This contract was prompted in part by FM's dissatisfaction with AB SKF as a supplier. Parts to be supplied by AB SKF's European subsidiaries had been delivered late or not at all, and FM's customers grumbled as their orders were, in turn, filled late. The situation deteriorated to the point that an FM officer visited AB SKF's plant in Luton, England, to register personally his displeasure.

The formal contract was not a panacea, and in 1975 FM considered either reentering 0"–4" TRB manufacturing or withdrawing from TRB distribution. It cast about without success for a supplier to replace AB SKF, since overseas shipments had remained unreliable. After exhausting all prospects, FM decided in late 1975 to reenter 0"–4" TRB production for the limited purpose of supplanting the slow-moving, low volume parts which AB SKF had supplied. An Alabama plant, which manufactured 4"–8" TRB, was retooled for this purpose and began producing low volume 0"–4"

*(Continued)*

## C. Contentions of the Respondents on Appeal

Respondents SKF and FM (1) dispute the ALJ's conclusion that the supply agreement and the closing of APD were interdependent parts of a package agreement, and (2) contend that even if there was such an overall agreement, it was not unlawful under the rule of reason standard.

With respect to respondents' first argument, FM in particular stresses the testimony of its own officials and those of SKF to the effect that the closing of APD was not a *quid pro quo* for the execution of a full line supply agreement, nor was FM's offer of a full line inspired by an SKF promise to close APD. FM contends that this testimony was uncontradicted and that the ALJ had to rely upon documentary evidence and inference to reach a contrary conclusion. The ALJ, it is argued, also impermissibly relied on inference when he chose to disbelieve SKF testimony to the effect that APD was closed simply because higher profits could be realized by selling a full line through FM.

FM and SKF also ask us to overturn the inference of a package agreement because, they say, the facts demonstrate that there was no need for such an agreement. Respondents insist that once the full line SKF-FM supply contract had been negotiated, the decision to close APD (and transfer its accounts to FM) followed as a "natural consequence" (RSAPB 18) of the supply agreement. SKF, it is contended, simply made a rational business decision to close down an historically unprofitable subsidiary in light of changed circumstances. For its part, FM's cancellation of the joint venture with Koyo Seiko is alleged to have been an equally rational business response, since it had secured a full line supplier.

Even if the Commission concludes that there was an overall agreement, respondents assert error in the ALJ's conclusion that that agreement constituted a *per se* illegal conspiracy to allocate markets. Respondents prefer to characterize the agreement as basically one of vertical dealing, which must be analyzed under the rule of reason and, given the record in this case, found not to be an unreasonable restraint of trade.

FM, in particular, claims that it had desired no more than a simple

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TRB in 1977. The balance of the TRB line, including all the high volume parts, continues to be purchased by FM from SKF. Operating under the arrangement with FM, SKF's domestic TRB plants, which were expanded to meet FM's needs, have operated at close to 100 percent capacity and have supplied FM exclusively.

In 1976, SKF purchased the assets of a manufacturer and distributer of automotive parts ("McQuay-Norris"). McQuay-Norris' product line does not include bearings, but it may be complementary to the SKF bearings line. The McQuay-Norris sales force and distribution system, the ALJ found, may represent a vehicle for SKF to reenter the business of distribution of bearings to the auto aftermarket.

TRB supply contract, but that it was practically coerced into acceding to SKF's broader demands if it wanted to obtain a source of 0"-4" TRB. Accordingly, says FM, it agreed to buy ball and clutch throw out bearings from SKF, even though it didn't need them, and agreed to take APD, a perennial money loser, off of SKF's hands, even though it only barely wanted APD's business. (TROA 30-31) Its overriding objective, FM says, was to gain a secure source of supply for the 48% of the TRB distribution business it already had; picking up an additional 5% (APD's) share would be at most a secondary objective. (RFAPB 10) The antitrust laws, FM argues, cannot reasonably operate to compel a company like FM to reject the demands of a company like SKF, and thereby risk the loss of the only available source of product. (RFRB 8) Because FM views the agreement as in essence [20] an embellished vertical supply contract, it argues that the rule of reason must apply, and that under the circumstances, its conduct cannot be declared unreasonable or unlawful. (TROA 31-34)

SKF protests, too, that if rule of reason analysis were applied, it would be evident that SKF was motivated by legitimate business concerns and not by anticompetitive designs. APD was closed, SKF says, because it had been unprofitable and became expendable. To prove the point, SKF alleges that APD's 1971 profit was merely an accounting fluke; it contends that it made more money from the arrangement with FM than it ever did from APD. (RSAPB 9, 25-26) While SKF concedes that it assisted in the transfer of accounts to FM, it says that it did so primarily (1) to protect customer goodwill, *i.e.*, businesses which had purchased SKF bearings from APD could continue to get the same bearings from FM, without interruption of supply, and (2) to insure the collectibility of certain marginal warehouse distributors' accounts payable to SKF. (RSRB 10) Also, of course (though unstated by SKF), as a result of sending APD's business to FM, and given its new full line supply arrangement with FM, SKF could continue to make the manufacturing level profit on that 5% of the TRB distribution market which APD had controlled, as well as on the ball and clutch throw out bearings that had previously been sold through APD.

Finally, AB SKF appeals from the ALJ's determination to hold it liable. AB SKF puts as much distance as possible between itself and SKF, downplaying evidence proffered by complaint counsel of its "geocentric" control of SKF and emphasizing the ALJ's finding that the evidence, on balance, was "inconclusive" with respect to control. It protests strongly that proof of its advance knowledge of the FM-SKF arrangement was insufficient, and complains that the ALJ relied on inference to find the contrary.[21]

### D. Disposition of Respondents' Appeals

#### 1. The "Arrangement"

We infer from the record that there was an overall agreement between SKF and FM, at least insofar as the two companies assented to a full line supply contract and the termination of APD and transfer of its accounts. Indeed, we find this conclusion to be inescapable, given the intense discussions in November, 1971, during which both topics were discussed, and given the written form of agreements drafted and exchanged on January 27, 1972. Any doubt as to the connection between these events is dispelled by the facts that: (1) FM, by letter to SKF of January 13, 1972, [21] "confirm[ed] our mutual understanding," an understanding which, that letter makes clear, encompassed the closing of APD and removal of its accounts to FM[22] as well as the full line supply agreement for FM's bearings requirements; and (2) the two formal agreements of January 27, 1972, were drafted and considered in concert by the parties and, indeed, sent by FM to SKF for execution under the same cover. Also, the companies concede, as they must, that the two agreements were inextricably intertwined, and were negotiated and agreed upon simultaneously. In light of the history of the developments in this case, any further express statement of the interdependency of these events is unnecessary. *Norfolk Monument Co., Inc.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809–810 (1946); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226–227 (1939). Respondents' contentions that the events were simply a "natural consequence" of each other (RSAPB 18),[23] or that they were merely akin to "the toppling of dominoes" (RFAPB 28), cannot be credited. The courts have not hesitated to infer an agreement on the basis of evidence considerably more slender than that found here, notwithstanding exculpatory, self-serving testimony. *See United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395–396 (1948); *Milgram* v.

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[21] The ALJ had inferred advance knowledge because, he said, it was inconceivable that SKF could have purported to bind AB SKF's production without the latter company's concurrence. (ID 131–132)

[22] FM's argument, RFAPB 21 n.2, that the letter should be construed merely as FM's acknowledgment of SKF's unilateral intention to close APD cannot be sustained. Had SKF done no more than terminate APD's existence, such an inference might be permissible, but, as FM must concede, the letter also confirms that "you [SKF] . . . have asked us [FM] to supply your present customers," CX 47C, an undertaking which plainly contemplates a broader agreement between FM and SKF.

[23] This argument is among the unluckiest that SKF could have advanced in any event, having been rejected almost *in haec verba* by the Supreme Court forty years ago. *Interstate Circuit, Inc.* v. *United States*, *supra* at 227; and *see Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 612 (1914) (inferring unlawful conspiracy to accomplish that which followed as a "natural consequence").

*Loew's, Inc.*, 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952); *United States* v. *National City Lines, Inc.*, 186 F.2d 562, 570–571 (7th Cir.), *cert. denied*, 341 U.S. 916 (1951).

We find SKF's arguments about the circumstances surrounding the closing of APD to be especially unconvincing. Contrary to the assertion of SKF's counsel, the record does not establish that APD's 1971 profit was an accounting fluke, attributable only to diminished inventory on hand at year end. The diminution in value of the inventory, using SKF's own figures (RSX 80A, 80C; RSAPB 9), amounts to no more than a fraction of the difference between APD's 1970 losses and 1971 profits. SKF's allegedly independent reason for shutting down APD thus lacks force. [22]

Even if one assumes (contrary to the evidence; see IDF 46, CX 45B) that APD was destined for red ink in perpetuity, it would not follow that as a "natural consequence" of the supply agreement SKF would shuttle APD's accounts over to FM. Under this circumstance, it would have made more sense to shut down APD altogether and terminate its accounts as soon as legally possible. SKF may have had significantly more bargaining power than FM, but it is illogical to assume that SKF would have utilized that power to compel FM to absorb losses in perpetuity, when both parties could have saved money simply by shutting down operations. Evidently (and FM's internal documents establish the point; see CX 259A, 261C), FM, at least, believed that it had something to gain by acquiring APD's accounts. FM evidently hoped that integration of APD's limited line into FM's broader business would enable the former APD accounts to be profitably served after all and would "open the door" to several new customers, including one of the largest purchasers of bearings among warehouse distributors. (See IDF 56, 59 & n.110; CX 259A, 261C; Tr. 2343–44) Viewed from this perspective, and given APD's 1971 profit, the parties' actual conduct makes more sense. This conclusion is further strengthened by SKF's insistence that FM agree to purchase ball and clutch throw out bearings, despite the fact that FM already produced these products. By allocating the distribution market so as to service all of APD's former customers out of FM, each party to the arrangement could gain by doing exclusively what it did most profitably, *i.e.*, SKF manufacturing, and FM distributing.

Finally, the ALJ found that FM's cancellation of the joint venture with Koyo Seiko was an express part of the overall agreement. The evidence suggests that FM, at least, made a conscious decision in November 1971, to throw over the joint venture as the price of dealing with SKF, which apparently insisted upon a full line supply agreement, including the TRB to be manufactured by the joint venture. (IDF 70–

71; ID 117–118) But, as indicated above, we need not determine whether the decision to cancel the joint venture with Koyo Seiko was specifically agreed to by both FM and SKF. Indeed, were it necessary to our disposition, we might be justified in finding that, whether by forsaking Koyo Seiko or otherwise, FM effectively agreed with SKF, as one part of the overall package, that it would forebear from reentering significant production of 0"–4" TRB.[24] This decision, otherwise wholly lawful, [23] should not be divorced from the circumstances in which it was made; the question of the existence of a conspiracy must be examined by considering all the pertinent facts as a whole, not broken down into distinct parts. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 698–699 (1962); *United States* v. *Patten*, 226 U.S. 525, 544 (1913). Nonetheless, we will refrain from inferring a conspiracy at the manufacturing level and will analyze the legality of this arrangement by focusing on its effects in the distribution market.

2. The Standard of Liability

The ALJ concluded that the agreement between SKF and FM constituted a *per se* unlawful horizontal allocation of markets. Accordingly, he did not analyze the reasonableness of the resulting restraints. We agree, on balance, that a *per se* approach is proper, but the nature of the challenged arrangement complicates this question.

Courts have frequently recognized that a given set of facts may be susceptible to analysis under numerous different antitrust rubrics. *See, e.g., Dougherty* v. *Continental Oil Co.*, 579 F.2d 954 (5th Cir. 1978). Even the seemingly straightforward determination of whether a restraint is principally horizontal or vertical may be troublesome. *See United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967); *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Dougherty* v. *Continental Oil Co., supra* at 958–959 ("Entities in a seemingly vertical relationship may be deemed capable of horizontal restraints if they are actual or potential competitors.") The question is one of signal importance, for the proper characterization can suggest much about the competitive and legal significance of the restraint, including whether application of a *per se* or rule of reason standard is appropriate.

The parties' contentions plainly frame the issue. Respondents assert vigorously that the challenged arrangement is one of vertical dealing and that as a non-price restraint it must, therefore, be tested against the rule of reason standard. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977). They urge that we should be guided in particular by a line of exclusive dealing cases, including *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) and *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir.), *cert. denied*, 439 U.S. 946, 99 S. Ct. 340 (1978), which have found the termination of one dealer in favor of an exclusive supply arrangement with another not to be inimical to the antitrust laws in the absence of an anticompetitive effect or design. Relying on this line of cases, SKF argues that "[t]he nature of [its] relationship with FM is one of supplier and customer entered into as a result of arms-length discussions . . . . [T]he most that can be said about the arrangement is that FM has been given an exclusive distributorship for the sale of SKF bearings to the automotive aftermarket. It is quite clear that such an exclusive arrangement is not a *per se* violation of Section 1." (RSAPB 22) [24]

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[24] Under the terms of the formal TRB supply contract agreed to by FM and SKF in December 1974, FM's assurance is effectively given for a rolling five-year period, five years being the minimum notice necessary for cancellation. (CX 80B; RSAPB 32) By effectively agreeing not to reenter production, FM forfeited the exercise of any restraining influence over price which, in a highly concentrated market, could have followed had the industry perceived FM as a potential (re)entrant. Although FM later undertook to produce certain slow moving, low volume 0"–4" TRB at its Alabama plant, due to dissatisfaction with SKF's overseas supply, n.20 *supra*, that action did not fundamentally change the character of the transaction. SKF continues to supply FM exclusively and FM purchases the bulk of its needs from SKF. It is clear that neither party has any intention of backing away from the arrangement.

By contrast, complaint counsel urge that respondents' conduct amounts to a *per se* illegal horizontal allocation of markets, relying on such authorities as *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899), and *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1953). For the most part, these cases and others cited by complaint counsel are classic instances of horizontal competitors agreeing to stay out of one another's sales territories in order to restrict supply and, therefore, limit competition in given geographic markets. Such cases may also be characterized by additional egregious anticompetitive conduct among the companies concerned, including price-fixing (*Addyston Pipe & Steel Co.* v. *United States*, *supra; Timken Roller Bearing Co.* v. *United States*, *supra*), and pooling of patents and exchange of technical information (*United States* v. *National Lead Co.*, 332 U.S. 319 (1947)).

The ALJ agreed with complaint counsel that the market division cases most closely describe respondents' conduct. (ID 123) He concluded, after a recitation of the facts, that, "[f]or competitors to agree in such a manner about their participation at any level of competition is a conspiracy to allocate markets and illegal *per se*. [cits] . . . No showing of effects is necessary." (*Id.*)

While the arrangement among the respondents has vertical as well as horizontal elements, we are not persuaded that the rule of reason is applicable. Cases using the rule of reason to analyze the merits of suits brought by terminated distributors are surely plentiful, and respondents cite a number of them including *Seagram*, *Oreck*, and *Ace Beer*

*Distributors, Inc.* v. *Kohn, Inc.*, 318 F.2d 283 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963),[25] but these authorities addressed strictly limited, vertical conduct for which legitimate business justifications might be advanced. A great deal more than an exclusive dealing contract is in controversy here. FM and SKF were direct horizontal competitors in the markets for distribution of bearings and manufacture of TRB at the moment of consummation of their supply contract (although FM had independently announced plans to withdraw from the TRB manufacturing market), a salient feature without parallel in any of the cases cited by respondents.[26] And as a part of their arrangement, SKF, in exchange for a full line supply contract, shut down APD and exercised its best efforts to transfer [25] that subsidiary's accounts to FM. This agreement to transfer existing customers from one horizontal competitor to another also is without parallel in any of the cases relied upon by respondents.

On the other hand, complaint counsel's contentions relate to a factual context that differs somewhat from more traditional market allocation cases. In cases such as *Timken Roller Bearing Co., supra*, and *National Lead Co., supra*, horizontal competitors actually divided or allocated geographic territories among themselves, *i.e.*, each continued to operate within the relevant product market following the agreement. The geographic allocation assured each competitor a relatively fixed percentage of the total universe of business in that product market which the competitors shared. The instant case does not fit comfortably within this classic mode, because here the product market (distribution of bearings) has been "allocated" with 100% of the shared total going to FM and 0% to SKF. Also, of course, not all competitors in the market are parties to this division. As a result of the allocation, one of two vertically integrated horizontal competitors has abandoned a market to the other and entered into what amounts to a mutual exclusive dealing arrangement to fulfill the function it formerly performed itself.

Nevertheless, despite the unique characteristics of this arrangement and the absence of precedent squarely on point, it does not follow that *per se* treatment is inappropriate. In light of the facts that respondents were direct horizontal competitors in the distribution market at the time of their agreement, that one of these competitors, SKF, was eliminated from the distribution market and its accounts expressly allocated to FM, and that SKF (by reason of the requirements contract) effectively was precluded from reentering the distribution market (*see* note 20 *supra*), we believe that their conduct is most fairly judged to be a *per se* violation of the antitrust laws. As we shall show more fully below, the overall course of dealing here, while containing elements ordinarily weighed individually under the rule of reason, is most closely analogous to market division and customer allocation, practices held in other cases to constitute *per se* violations.

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[25] *But see Cernuto, Inc.* v. *United Cabinet Corp.*, No. 78-1872 (3d Cir. March 16, 1979).

[26] In *Oreck, supra*, the court refused to infer the existence of a horizontal conspiracy between a manufacturer and a very large distributor as a part of a challenged vertical arrangement. 579 F.2d at 131. But the court's rejection of plaintiff's claim that the manufacturer and distributor effectively operated on the same level of the distributive chain can be of little assistance to the instant respondents, for it is clear beyond peradventure that FM and SKF were direct horizontal competitors at the time of their agreement.

It is true that even the horizontal aspects of the arrangement, when viewed separately, could be susceptible to analysis under other than a *per se* standard. Thus, for example, if FM's assumption of the APD accounts were analyzed as an acquisition, as complaint counsel alternatively contend (*see* note 4 *supra*), well established principles would require that the rule of reason be applied. And notwithstanding that such a substantial acquisition by the number one firm in a highly concentrated market would raise a heavy presumption of illegality, respondents nonetheless would be afforded an opportunity to advance rule of reason defenses in rebuttal. Inasmuch as SKF in fact terminated distribution of bearings to the aftermarket following the agreement with FM, an [26] argument could be advanced (although respondents apparently disagree (RSAB 19)) that this element of the arrangement was, in effect, an acquisition of intangibles.

Similarly, the vertical full line supply agreement, *in vacuo*, could qualify for rule of reason examination. As noted above, respondents have pressed this argument and have proffered evidence intended to suggest a legitimate justification for the agreement, one not springing from an anticompetitive design.

We are not persuaded, however, that the transaction, in the aggregate, warrants such indulgence. After completing the arrangement, respondents had effectively restructured a portion of the bearings industry in an anticompetitive manner. To begin with, the agreement eliminated one competitor, SKF (APD), and transferred nearly all of its accounts to another competitor, FM. Further, because of the overall arrangement between the parties, including the supply agreement, FM could be reasonably assured that it would not face competition from its former competitor's parent, at least in the foreseeable future. Similarly, that parent could be assured of continuing to make the manufacturing level profit on sales to its subsidiary's former customers, an eventuality that would not have transpired had those customers purchased bearings from a different firm. (See ID 115–117) In short, FM became SKF's distribution arm to the aftermarket and, because of the total understanding with SKF, it was effectively insulated from any further competition, actual or potential, from its former competitor. SKF, in turn, was assured a substantial share of the manufacturing business, enhanced in value by the likelihood that FM would be the distributor to APD's former customers and by FM's agreement to purchase its requirements from SKF. The upshot was, in essence, an agreement between the firms not to compete in the domestic distribution of bearings. The reasonable inference to be drawn from this arrangement is that it had the probable effect (and purpose) of restraining competition rather than promoting it. This type of arrangement, we believe, is so plainly anticompetitive in its nature and necessary effect that no elaborate study of the industry is needed to establish its illegality. *See National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); *Northern Pac. Ry.* v. *United States*, 356 U.S. 1 (1958).

Any contract between such competitors affecting price or output is inherently suspect and may not be saved, we believe, by the fact that the effect of the agreement, after implementation, was to create a strictly vertical relationship between the parties. To analyze the exclusive dealing agreement *in vacuo*, as respondents urge, would be to ignore the competitive impact of the total arrangement, which encompassed a market division scheme and an allocation of customers inuring to the benefit of both parties. It is well established that agreements alleged to create a restraint of trade should be examined as a whole, and not merely be broken down into distinct parts. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra* at 698–699. [27]

The overall arrangement between the parties closely approximates those in related cases that have been held to be *per se* illegal. Thus, under a long line of decisions beginning with *Addyston Pipe*, *supra*, and culminating with *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972), the Supreme Court has condemned horizontal market allocations as violations of the Sherman Act. In none of those Supreme Court cases did competitors agree to divide the product market in the 100%/0% manner utilized in this case, but in none of those cases was there a composite of facts affording competitors an incentive to do so, and we do not believe the distinction is dispositive. We think it is the fact of a market allocation agreement between horizontal competitors, rather than the specific terms of the division agreed upon, which led the Court to find *per se* violations.

This conclusion finds support in the case of *United States* v. *American Smelting and Refining Co.*, 182 F. Supp. 834, 859–860 (S.D.N.Y. 1960) in which an arrangement, with parallels to this case, was struck down under *Addyston Pipe*, notwithstanding that the market division was accomplished through an agreement creating a vertical relationship between the competitors. In that case two competitors had divided the national market in lead (east and west of the 95th meridian) by agreeing that one would thereafter be the exclusive sales agent for the other in the territory that was reserved for the first. Thus, one seller had left a significant portion of the market (accounting for about 80% of lead consumption) by agreement with a competitor in favor of an arrangement whereby it continued to sell its product, but only through a vertical relationship with its former competitor rather than directly. The formerly shared sales market in the East became divided 100%/0%. As a result, in that part of the market some actual competition was lost, potential competition was foreclosed, and the parties altered their relationship from one that was horizontal to one that was primarily vertical.

In *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 120 (3d Cir. 1975), the court held that a hotel franchisor, which also owned and operated hotels under the franchised name, had engaged in unlawful conduct by reason of a number of distinct agreements with its franchisees, the combined effect of which was to allocate markets. A ban on defendant's franchisees operating any other nonfranchised hotels, coupled with defendant's practice of permitting only company-owned inns to be established in specified cities, restraints which might otherwise have been evaluated under the rule of reason, were held to be *per se* unlawful when considered in the aggregate because the overall effect was a market allocation in the specific cities. 521 F.2d at 1253–54.[27] [28] The instant case is, if anything, more pernicious than *American Motor Inns*, since, as in *American Smelting*, the market division here operated to eliminate actual competition, whereas the *American Motor Inns* allocation was primarily prophylactic and was used by the defendant to eliminate the threat of potential competition.

The fact that SKF and FM together controlled less than all of the distribution market for bearings at the time of their arrangement does not create a defense either, for it is clear that absolute power to control market price or output is not a requisite to a finding of illegality in these circumstances. To be sure, the anticompetitive effects of an industrywide market division, or cartel, may be greater than they are in this case, where the agreement involved only two of the top four firms in the market, including the leading firm. Yet, it is clear that the Supreme Court has not drawn the *per se* line to proscribe only industrywide agreements or agreements among industry members having collective market power. While cases such as *National Lead*,

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[27] Defendant urged that the restraints agreed to by its franchisees operated vertically and should have been judged against the rule of reason, but the court found that defendant competed horizontally with its franchisees in the hotel market generally and that the restraints were therefore horizontal. *Id.* at 1243–44, 1254.

*Timken* and *Addyston Pipe* involved arrangements among all or a significant portion of the industry members, other cases such as *Topco* and *Sealy* involved groups of firms with far smaller combined shares of the overall market. Less than the entire industry conspired to divide markets in *American Smelting*, though the two firms involved were leading producers of lead, and considerably less than the entire market participated in the arrangements struck down in *American Motor Inns*. In so doing, the courts have properly focused on the likelihood that such agreements, as a class, will result in net harm to competition, rather than attempting to weigh the competitive tradeoffs in each case.[28]

A related argument is that our disposition of this case takes insufficient account of the efficiencies realized by FM and SKF as a result of their arrangement. Some efficiencies may, of course, result from almost any market allocation scheme as the courts have recognized in uniformly rejecting this proffered justification for horizontal market or customer allocations. **[29]** Geographic market division can eliminate cross hauling and thus save expenses. Product market allocation may allow each competitor to concentrate on the specialized production at which it is most efficient. But these are efficiencies that a competitive market is likely to force upon a firm in the long run in any event. More importantly, the means of achieving these efficiencies in this case—agreement between horizontal competitors—is competitively dangerous. Even if substantial efficiencies might conceivably result from a given agreement of this type, it seems fair to presume, without analyzing each arrangement, that the anticompetitive effects are likely to outweigh the benefits in most instances. Indeed, as noted above, precisely this judgment has already been made by the courts with respect to the market division and customer allocation characteristics of respondents' plan. *See also* *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 574–575 (2d Cir. 1961) (customer allocation *per se* illegal); *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1087–90 (5th Cir. 1978).

Thus, while the arrangement here involves the complete removal of one horizontal competitor from the market, rather than the more typical division of ongoing business among competitors, we believe the analogy to customer allocation and market division cases is sound. Though SKF withdrew from distributing TRB and other bearings in the U.S. market, that withdrawal was part of an overall understanding with FM whereby SKF would serve as the exclusive supplier to its former competitor. In essence, then, the arrangement had much the same effect as a more traditional market division, though on a slightly different scale, since SKF not only stopped competing with FM at the distribution level but also agreed to refrain from doing so on an ongoing basis, at least for the length of the supply contract.

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[28] In reaching our decision here, it should be noted, as the Supreme Court has recognized, that some scrutiny short of a full-blown rule of reason analysis may be required to determine whether application of an existing *per se* rule is appropriate in a particular case. *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 99 S. Ct. 1551, 1562, n. 33 (1979). As previous market allocation cases indicate, proscribed conduct does not invariably follow a fixed pattern. Rather, the cases have parallels because of the overall character of the conduct. We believe such parallels can be found in the pending matter.

We hold, therefore, that respondents have violated Section 5 of the FTC Act based upon application of Sherman Act Section 1 principles.[29]

As a postscript, we cannot accede to FM's argument that even if it was a party to an otherwise unlawful agreement, the degree of compulsion or economic coercion to which it was subjected somehow relieves it of liability. We are not unsympathetic to FM's plight, although we believe it to have been overstated, but the authorities are clear that alleged coercion is not a defense to a *per se* antitrust violation. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948); *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674, 682 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); *Otto Milk Co.* v. *United Dairy Farmers Cooperative Ass'n*, 261 F. Supp. 381, 385 (W.D. Pa. 1966), *aff'd*, 246 F.2d 368, 375 (9th Cir.), *cert. denied*, 355 U.S. 835 [30] (1967). The law does not impose an obligation upon FM to "slit its own throat," as that company contends, but the cited cases suggest there is a duty to resist unlawful, ancillary proposals advanced as the price of dealing by a supplier with substantial market power. Had FM, after independently quitting manufacturing, simply substituted SKF as an exclusive supplier (*cf.* RFAPB 27), it would be open to FM in an antitrust context to demonstrate the reasonableness of its contract and the efficiencies realized thereby. But by expanding its overall agreement with SKF to accomplish a great deal more, whether it was coerced or did so by design,[30] FM became a party to a *per se* unlawful agreement.

### 3. Liability of AB SKF

Although the ALJ could not find that AB SKF exercised day-to-day control over SKF, he found it "inconceivable" that AB SKF could not have had advance knowledge of the SKF-FM arrangement, since the negotiations proceeded on the assumption that AB SKF would supply some of FM's TRB requirements. Relying on this and other evidence that FM officials later traveled to Europe to discuss supply problems they were having with AB SKF, the law judge concluded that the parent was directly involved in the conspiracy. Alternatively, the ALJ determined that liability should attach on the grounds that AB SKF, while having latent power to halt the illegal practices of its subsidiary, instead at least tacitly approved those practices, citing *P.F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261, 770 (6th Cir.), *cert. denied*, 408 U.S. 926 (1970); *Beneficial Corp.*, 86 F.T.C. 119, 159 (1975), *aff'd in part and rev'd in part on other grounds*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

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[29] Because of our holding, we do not reach and express no opinion on whether that conduct standing alone also constitutes an independent, non-derivative violation of Section 5 of the FTC Act as an unfair method of competition, an alternative ground for affirmance urged by complaint counsel. (See CAB 22)

[30] At least one FM officer, whose responsibilities placed him in competition with APD, had designs upon that SKF subsidiary from the start of negotiations. He viewed a takeover of APD's accounts as a "definite plus," and enthusiastically supported that course. (*See* IDF 56, 59; CX 259A, 261C)

AB SKF contests these holdings, claiming that the evidence is insufficient to show that it had knowledge of the arrangement. The parent contends such knowledge cannot be inferred from mere delivery of TRB by its European subsidiaries to FM. In any event, AB SKF argues, its subsidiaries, including SKF, enjoy considerable organizational autonomy and any knowledge of the arrangement attributable to those entities cannot be imputed to AB SKF. Finally, AB SKF raises a number of procedural and due process objections to the entry of an order against it and suggests that the ALJ's remedy can be adequately enforced simply by precluding FM from purchasing TRB from AB SKF.

While the record is clear that both SKF and FM contemplated that access to AB SKF's European production would be a necessary part of the arrangement, we find it unnecessary to resolve the issue of parent liability in this instance.[31] Irrespective of [31] whether liability should be imposed, we agree with AB SKF that effective relief can be obtained without binding AB SKF. Thus, the order we issue, which is discussed more fully below, restricts FM's purchases of 0"–4" TRB from both SKF and AB SKF.

## IV

## Relief

The ALJ, correctly holding that complaint counsel were entitled "to whatever relief will rid the bearings industry of the effects of this illegal conspiracy" (ID 126), directed that the respondents terminate dealings with each other within one year. He also specifically prohibited SKF and AB SKF from supplying any 0"–4" TRB to FM following the expiration of this one year period. The purpose of this order was twofold: (1) to require FM to procure its bearings requirements from another supplier, or form a manufacturing joint venture, or reenter production on its own (ID 129); and (2) to encourage SKF to reenter the business of distributing bearings to the auto aftermarket as a means of providing the necessary outlet for its TRB. (ID 127) The ALJ evidently hoped that these markets could thereby be restored to their pre-conspiracy status.

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[31] In view of our disposition of the liability issue, we do not reach AB SKF's contentions concerning alleged procedural irregularities.

While we agree that the illegal arrangement, as modified in 1974, should be terminated, we are not persuaded that all business dealings between SKF and FM should be terminated as abruptly or completely as ordered by the law judge. Of course, any order in this case should give SKF every incentive to reenter the bearings distribution business. McQuay-Norris, the parts distributor acquired by SKF in 1976, may indeed be a reentry vehicle, but it will be bucking entrenched competition from The Timken Co. and FM. The long-run prospects for McQuay-Norris' success in such a venture (and thus for increased competition) may be enhanced if SKF is not compelled to dump all of Tyson's output (which supplies the requirements of the leading firm in the auto aftermarket) on the market at once. We think an order allowing the parties to contract on a yearly basis and phasing down supply of TRB to FM by SKF somewhat more gradually will provide sufficient incentive to SKF to find a way to bring its TRB to market. In addition, we will permit SKF to continue to supply up to 25% of FM's needs, a limitation which will remain in force for 10 years.[32]

[32] This approach is also appropriate in view of FM's supply constraints. FM encountered difficulties in securing a reliable full line TRB supplier in the early 1970's because of the concentrated nature of the TRB production industry; there is no reason to believe that that situation has been materially ameliorated. (Tr. 1209–12) If, as FM argues, (1) Timken continues to refuse to supply any TRB to FM, and (2) NDH cannot supply TRB to FM because of a lack of capacity, then if we order (3) an immediate cut-off in dealings between FM and SKF, FM may be faced again with the unpalatable alternatives which it rejected a few years ago, *viz.*, a choice between unprofitable internal production, a speculative supply contract with a Japanese firm (which might supply less than all necessary items), or a combination of both. (Tr. 2185–89) Surely, FM, like SKF, is not entitled to avoid the consequences of its conduct, but to proscribe all dealings, when only a particular agreement has been found to be unlawful, does not necessarily enhance competition, especially within the context of this

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[32] Our order also will be limited to the purchase of 0"–4" TRB for distribution in the United States, and it includes provisions clarifying the manner in which the purchase restrictions are to be calculated. For example, the order requires that any unsold inventories of TRB purchased by FM from SKF or AB SKF prior to the effective date of the order shall be included in the first year's allowable purchases. This provision would prevent circumvention of the order through stockpiling. Other provisions, such as the inclusion of indirect purchases by FM from SKF or AB SKF and the valuation of FM's in-house production of TRB at the lesser of cost or fair market value are designed to make sure that the purchase restrictions are not diluted.

market. FM argues, with some force, that a quickly imposed ban on all dealings with SKF may principally benefit Timken, the industry giant insofar as TRB production is concerned and a major factor in the distribution of TRB to the aftermarket, since Timken would be in a position to capitalize upon the resulting market dislocations to further increase its market shares.

Such concerns are not merely academic but are supported by record evidence of events in 1971–1972 following FM's announcement of the shutdown of its Michigan facilities, *viz.*, Timken moved quickly to replace FM as an OEM supplier to many accounts and significantly increased its overall TRB production market share. (See RFX 153A–B; Tr. 481; RFAPB 29–30) Moreover, Timken increased its share of TRB distribution to the independent auto aftermarket from 23% to 31% between 1973 and 1975. (IDF 24) As the ALJ found (ID 68–71), Timken enjoys "overwhelming dominance" in domestic TRB production, with its share of that market having increased from 55% to 70% between 1971 and 1976 (ID 70 & n.190). Even these percentages understate Timken's dominance, because they include NDH's production for captive distribution to General Motors. (IDF 109) Timken's market share of production of non-captive 0"–4" TRB for use as automotive original equipment exceeded 90% in 1976 (ID 70 n.190) There is also record evidence that Timken's share of TRB sales to the industrial aftermarket exceeds 80%. (Tr. 2837)

On the other hand, Timken is not the dominant force in the distribution of all bearings to the independent auto aftermarket. As of 1975, it ranked third in that market with 11.2%, compared to FM's leading 44.8% market share. (IDF 23) Though Timken's share has been rising, the increase is attributable to its distribution of TRB, since that firm, unlike FM, does not distribute a broad line of bearings and other automotive [33] parts. In fact, as the ALJ found, FM's full line capability enabled it to charge a premium of as much as 15–20% over the price charged by Timken for 0"–4" TRB. (IDF 99) Thus, even though Timken has boosted its TRB distribution in recent years, FM is likely to remain a significant force in both the overall bearings distribution market and the TRB segment of that market, notwithstanding an order restricting its access to SKF supplies. In light of this situation, we believe our modified order adequately balances the need to redress the law violation with the need to take account of the unique market conditions existing in this industry.

Complaint counsel, while now supporting the ALJ's decision to impose a ban on all dealings, did not originally propose this disposition, but instead recommended to the law judge an order limiting FM-SKF dealings, to be coupled with a divestiture of Tyson by SKF.[33] Complaint counsel did not propose any limits on dealings between a divested Tyson and FM. Similarly, FM has proposed to the Commission an alternate form of order which, though containing an unacceptable provision with respect to SKF making a *"bona fide"* attempt to reenter the distribution business, nonetheless propounds a gradual reduction of SKF-FM dealings in order to afford the market an opportunity to adjust to the new situation.[34] We find these proposals to be, in principle, preferable, since a gradual phasing-in of alternative arrangements reduces the likelihood of a sudden market dislocation, which could redound principally to Timken's benefit.

We are resolute in our determination (1) to end the conspiracy by which SKF and FM allocated a market to their mutual benefit and (2) to try to restore the market to some semblance of its pre-conspiracy status. Our adoption of an order less drastic than that proposed by the ALJ reflects our belief that the best way to achieve the second objective is by allowing the parties to continue some, albeit restricted, business dealings.

An appropriate order is appended.

## FINAL ORDER

This matter having been heard by the Commission upon the appeals of complaint counsel and respondents from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the Initial Decision with certain modifications:

*It is ordered,* That the initial decision of the administrative law judge, pages 1-151, as amended, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent indicated in the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

*It is further ordered,* That the following order to cease and desist be, and it hereby is, entered:

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[33] Divestiture is presently urged by complaint counsel only if the Commission grants their appeal.

[34] The specific diminution in dealing offered by FM is also unacceptable—and, indeed, somewhat disingenuous—because the reductions offered are expressed as a percentage of the number of part items to be purchased each year, not as a percentage of the dollar volume of dealing. Since relatively few parts account for the majority of sales, FM's proposed order would only marginally affect respondents.

## I

This order shall be binding on Federal-Mogul Corporation ("FM"), SKF Industries, Inc. ("SKF"), their subsidiaries or any person under the control of FM or SKF, their successors and assigns, and their officers, agents, representatives, and employees. [2]

## II

*It is ordered,* That the agreement signed by SKF and FM on December 17, 1974, and any similar arrangements between or among respondents, including the understandings reflected in the exchange of documents on January 27, 1972, shall be cancelled upon the date this order becomes final.

## III

With respect to tapered roller bearings ("TRB") having an outside diameter of zero to four inches, which are purchased, directly or indirectly, by FM from SKF, Aktiebolaget SKF ("AB SKF"), or any person under the control of SKF or AB SKF for distribution in the United States, *it is ordered,* That the following limitations shall apply during the 12-year period next following the date this order becomes final:

(i) The time period covered by any given purchase order or related agreement shall not exceed 12 months.

(ii) The aggregate dollar value of such purchases by FM during the first twelve months following the date this order becomes final shall not exceed 75% of the total dollar value of purchases of 0"–4" TRB by FM from all sources (including sources owned or controlled by FM). The allowable percentage under this subparagraph shall include any 0"–4" TRB purchased, but not sold, by FM from SKF, AB SKF, or any person under the control of SKF or AB SKF prior to the date this order becomes final.

(iii) The aggregate dollar value of such purchases by FM during the succeeding twelve months shall not exceed 50% of the total dollar value of purchases of 0"–4" TRB by FM from all sources (including sources owned or controlled by FM).

(iv) The aggregate dollar value of such purchases by FM during each of the ten succeeding twelve month periods shall not exceed 25% of the total dollar value of purchases of 0"–4" TRB by FM from all sources (including sources owned or controlled by FM).

(v) For purposes of subparagraphs (ii)–(iv), the value of purchases of 0"–4" TRB by FM from sources which it owns or controls shall be either the cost to FM or the fair market value, whichever is less.

For purposes of this paragraph, direct or indirect purchases by FM shall include (A) purchases of 0"–4" TRB manufactured by SKF, AB SKF, or any person under the control of SKF or AB SKF, and (B) purchases under an arrangement to which SKF, AB SKF, or any person under the control of SKF or AB SKF is a party or from a supplier in which SKF, AB SKF, or any person under the control of SKF or AB SKF has an interest.

## IV

*It is further ordered,* That each respondent shall notify all persons having sales and policy responsibilities in its organization of the terms of the order and publish same in at least two major trade journals or periodicals twice annually for each of two years from the effective date of this order. [3]

## V

*It is further ordered,* That each respondent notify the Commission at least thirty (30) days prior to any proposed change in said respondent which may affect compliance obligations arising out of the order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or joint ventures.

## VI

*It is further ordered,* That within sixty (60) days after the effective date of this order, and within sixty (60) days after the end of each calendar year through and including 1992, each respondent shall file with the Federal Trade Commission a written report setting forth in detail the manner and form of its compliance with this order.

## IN THE MATTER OF

# INTERNATIONAL INVENTORS INCORPORATED, EAST, ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2976. Complaint, July 5, 1979 — Decision, July 5, 1979*

This consent order, among other things, requires an Alexandria, Va. idea promotion firm to cease failing to provide fair and thorough evaluations as to the commercial feasibility of customers' ideas; and misrepresenting that they successfully promote and negotiate with interested manufacturers on clients' behalf; that they secure lucrative contracts for their customers through such efforts; and that the Document Disclosure Program of the United States Patent and Trademark Office protects clients' ideas prior to the filing of a formal patent application. The order requires that prescribed disclosures regarding the financial success of previous clients, the lack of legal protection for ideas, and the advisability of consulting with a patent attorney before signing an agreement be included in contracts and promotional material; and prohibits the company from accepting any fees for promotional services, other than a percentage of royalties earned through its endeavors. Additionally, respondents are required to maintain particular records for a specified period, and institute a continuing surveillance program designed to ensure compliance with the terms of the order.

## *Appearances*

For the Commission: *Richard C. Donohue.*

For the respondents: *Pro se.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that International Inventors Incorporated, East, a corporation, and James H. Haren, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating charges in that respect as follows:

## I. DEFINITIONS

PARAGRAPH 1. For the purpose of this complaint the following definitions shall apply:

(a) The term "idea" shall mean any idea, invention or concept, but does not include a product that has already been manufactured prior to contact with respondents.

(b) The term "client" shall mean any party that has entered into an agreement with respondents for the "promotion" of an "idea."

(c) The term "financial gain" shall mean an amount of money derived by a "client" from respondents' "promotion" of the "client's idea" that is greater than the amount of money paid by a "client" to respondents.

(d) The term "promotion" shall mean the advertising, evaluation, development, manufacturing, marketing or assistance in developing, manufacturing or marketing and/or otherwise contributing to the success or growth of an "idea," but does not include the seeking of legal protection under the patent laws of the U.S.

## II. RESPONDENTS

PAR. 2. Respondent International Inventors Incorporated, East, (hereinafter IIIE), is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at Suite 309, 4900 Leesburg Pike, Alexandria, Virginia.

Respondent James H. Haren is an individual and is the principal owner and officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

## III. NATURE OF TRADE AND COMMERCE

PAR. 3. Respondents are now, and for some time last past have been, engaged in the advertising for, offering to enter into and entering into contracts for present or future services in connection with the promotion of ideas.

## IV. JURISDICTION

PAR. 4. In the course and conduct of their business, respondents cause, and for some time last past have caused, their services and related materials to be offered for sale and sold from their principal place of business in Virginia to clients and prospective clients located in various other States in the United States and the District of Columbia by means of advertisements placed in newspapers of interstate circulation. In addition, respondents now cause, and have caused, their advertising materials, contracts, and various business papers to be transmitted by means of the U.S. mail from their principal place of business in the Commonwealth of Virginia to clients, prospective clients, and potential manufacturers in various other States of the United States and the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents are now, and have been, in substantial competition, in commerce, with corporations, firms, and individuals offering contracts for present or future services in connection with the promotion of ideas.

## COUNT I

PAR. 6. The allegations of Paragraphs One through Five above are incorporated by reference in Count I as if fully set forth verbatim.

## V. ACTS AND PRACTICES

PAR. 7. In the course and conduct of the aforesaid business, and for the purpose of inducing the purchase of their services and related materials, respondents have made numerous statements and representations in advertisements inserted in newspapers of interstate circulation, in letters and other promotional materials, and by the oral statements and representations of their sales personnel to prospective clients. Through such advertising or statements, respondents have represented, directly or by implication, contrary to fact, that:

1. Respondents gave, and still give, clients' ideas a fair and thorough evaluation of their commercial feasibility on which said clients can rely.

2. Respondents could be expected to actively and successfully promote and negotiate, on behalf of their clients, with manufacturers who were interested in acquiring rights to new ideas.

3. The United States Patent and Trademark Office's Document Disclosure Program provides legal protection for clients' ideas prior to the filing of formal patent applications in the United States Patent and Trademark Office.

4. Respondents, in many instances, could and did obtain manufacturing contracts for their clients.

5. Respondents services have resulted and may likely result in financial gain for their clients including, but not limited to, potential income to be derived by their clients from sales, licensing or royalty agreements.

The acts and practices alleged in Paragraph Seven herein are unfair, deceptive and misleading, and therefore, are in violation of Section 5 of the Federal Trade Commission Act, as amended.

## COUNT II

PAR. 8. The allegations of Paragraphs One through Five and Seven above are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 9. Respondents, in the course and conduct of their idea promotion business, have performed and are performing their services in a manner which is not reasonably calculated to produce the results that have been and are claimed by the statements and representations described in Paragraph Seven, *supra*.

PAR. 10. It was and is an unfair or deceptive act and practice for respondents to sell their services in the manner set forth in Paragraph Nine herein, while they know or should know that their services were not and are not reasonably calculated to produce the results represented.

Therefore, the acts and practices of respondents as alleged herein constituted and now constitute a violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 11. The use by the respondents of the aforementioned false, misleading and deceptive acts, practices, statements or representations has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and to induce the purchase of substantial quantities of respondents' products and services and into the execution of contracts with respondents by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of the respondents, as herein alleged, were and are now causing pecuniary losses to persons contracting with respondents and are all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent International Inventors Incorporated, East is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at Suite 309, 4900 Leesburg Pike, Alexandria, Virginia.

Respondent James H. Haren is the principal officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his business address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### I.

For the purpose of this order the following definitions shall apply:

(a) The term "idea" shall mean any idea, invention or concept.

(b) The term "client" shall mean any party that has entered into an agreement with respondents for the "promotion" of an "idea."

(c) The term "financial gain" shall mean the amount of money derived by a "client" from respondents' "promotion" of the "client's idea."

(d) The term "promotion" or "promote" shall mean the advertising, evaluation, development, manufacturing, marketing or assistance in developing, manufacturing or marketing and/or otherwise contributing to the success or growth of an "idea," but does not include the seeking of legal protection under the patent laws of the U.S.

## II.

*It is ordered,* That respondents International Inventors Incorporated, East, a corporation, its successors and assigns, and James H. Haren, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising for, offering to enter into and entering into contracts for present or future services in connection with the promotion of ideas, or any other like or similar services, in or affecting commerce, as it is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Failing, in the normal course of business, to give clients' ideas a fair and thorough evaluation of the ideas' commercial feasibility, upon which said clients can rely.

2. Representing, directly or indirectly, orally or in writing, that respondents, in the normal course of business, can be expected to actively and successfully promote and negotiate, or in any way promote and negotiate, on behalf of their clients, with manufacturers who are interested in acquiring rights to ideas.

3. Representing, directly, or indirectly, orally or in writing, that the United States Patent and Trademark Office's Document Disclosure Program can provide legal protection for clients' ideas prior to the filing of a formal patent application in the United States Patent and Trademark Office. Provided that nothing in this agreement shall prohibit respondents from referring clients to consult a patent attorney or licensed patent agent.

4. Representing, directly or indirectly, orally or in writing, that respondents services can and do result in manufacturing contracts or licensing agreements between manufacturers and respondents' clients that produce financial gain for their clients.

5. Failing to make the following disclosures on any contract or other binding instrument to be executed by prospective clients. Said

disclosures shall be in more conspicuous print than all other language in said instrument other than respondents' name, but in no case shall they be smaller than 12-point uppercase type. Said disclosures and instrument shall be delivered to prospective clients at least 10 days prior to the time prospective clients execute said instrument. The disclosures shall be in the following form set off from the rest of the instrument by a black border and immediately above the line for the prospective clients' signatures:

NOTICE

(A) IN THE LAST FIVE YEARS THAT WE HAVE BEEN DOING BUSINESS, WE HAVE CONTRACTED TO PROMOTE IDEAS, INVENTIONS OR CONCEPTS FOR (NUMBER) CLIENTS. AS A RESULT OF OUR SERVICES:

1. (*number*) (______ %) OF OUR CLIENTS EARNED $0–99.

2. (*number*) (______ %) OF OUR CLIENTS EARNED $100–499.

3. (*number*) (______ %) OF OUR CLIENTS EARNED $500–$1,000.

4. (*number*) (______ %) OF OUR CLIENTS EARNED OVER $1,000.

5. (*number*) (______ %) OF OUR CLIENTS EARNED MORE THAN THEY PAID US.

(B) WITHOUT PATENT PROTECTION, RECOGNIZED BY THE U.S. PATENT & TRADEMARK OFFICE, YOU MAY LOSE THE OPPORTUNITY TO OBTAIN FINANCIAL BENEFIT FROM YOUR IDEA. WE DO NOT PROVIDE ANY LEGAL SERVICES FOR OBTAINING PATENT PROTECTION RECOGNIZED BY THE U.S. PATENT & TRADEMARK OFFICE. YOU SHOULD AND ARE ENCOURAGED TO CONSULT AN INDEPENDENT PATENT ATTORNEY OR AGENT BEFORE YOU SIGN THIS AGREEMENT.

(C) YOU SHOULD TREAT YOUR IDEA AS A CONFIDENTIAL SUBJECT IN ORDER TO AVOID LOSING ANY PATENT RIGHTS YOU MAY HAVE.

(D) TODAY IS (Date). WE CANNOT ASK YOU TO SIGN AN AGREEMENT UNTIL 10 BUSINESS DAYS HAVE ELAPSED WHICH WILL BE ON (MONTH/DAY/YEAR).

I, (Name of Customer), hereby acknowledge receipt of a copy of this agreement on the data specified below.

______________________________

Customer's Signature Date

Accurate disclosures, given without comment, as required by this paragraph of the order, shall not be deemed a violation of Paragraph 4 of this order.

6. Executing contracts or other agreements with a client prior to the expiration of the 10-day period disclosed in accordance with Paragraph 5 herein.

7. Failing to retain executed copies of all disclosures required by Paragraph 5 of this order for a period of five (5) years after such disclosure is made regardless of whether prospective clients ultimately execute contracts with respondents. Respondents shall make accurate statistical disclosures required by this paragraph and maintain records for a period of five (5) years sufficient to verify the accuracy of each disclosure.

8. Failing to include on all contracts or other binding instruments to be executed by prospective clients a schedule detailing the entire amount of any and all fees or other consideration which may be required from or paid by the client during the course of his business relationship with respondents.

*It is further ordered*, That:

1. Respondents shall conspicuously place in all printed advertisements, pamphlets, brochures and other promotional material, the statement below in print at least as large as the largest print in the advertising material other than respondents' name and shall state:

> **(Number)% of our clients have earned more than they paid to us as a result of our efforts to promote their idea.**

2. In all advertisements broadcast by radio, or television, the above-required notice shall be read at the end of the advertisement at a rate of speed at least as slow as the slowest spoken part of the advertisement.

3. Respondents shall maintain for a period of three (3) years after any of respondents' advertisements are disseminated:

(a) Records disclosing the date or dates each such advertisement was published;

(b) Records disclosing the names and addresses of the newspapers, other publications or broadcast media disseminating said advertisement; and

(c) Representative copies or representative scripts of all of respondents' advertisements published or disseminated by any media.

*It is further ordered*, That:

1. At the time respondents submit advertising to any newspaper or other written medium, they shall provide a copy of the following notice to each such medium:

NOTICE

> **The Federal Trade Commission has issued a cease and desist order against (Name of Respondent). A copy of the Commission's News Release is available from (Name of Respondent) upon request.**

2. At the time respondents submit advertising to any radio or television station, they shall provide a copy of the following notice to each such station:

NOTICE

> **The Federal Trade Commission has issued a cease and desist order against (Name of Respondent). A copy of the Commission's News Release is available from (Name of Respondent) upon request. Your attention is directed to an agreement between the Federal Trade Commission and the Federal Communications Commission dated April 27, 1972.**

*It is further ordered,* That respondents shall make all disclosures required by this order accurately, making such disclosures or copies thereof available to the Federal Trade Commission or any member of its staff on request.

*It is further ordered,* That respondents, upon receipt of a complaint from a client alleging facts that indicate this order may have been violated, rescind the contract, refund monies paid and cancel any outstanding obligations where respondents determine, after a good faith investigation, that one or more of the paragraphs of this order may have been violated in connection with such client's transaction with respondents.

*It is further ordered:*

1. That respondents deliver, by hand or by certified mail, a copy of this order to each of their present or future salesmen, independent brokers, franchise owners, employees or any other person who sells or promotes the sale of respondents' products or services;
2. That respondents provide each person so described in subparagraph 1. above with a form returnable to respondents, clearly stating an intention to conform sales practices to the requirements of this order and retain such form for a period of three (3) years after it is executed by said persons;
3. That respondents inform each person decribed in subparagraph 1. above that respondents shall not use any such person, or the services of any such person, until such person agrees to and files notice with respondents to be bound by the provisions contained in this order;
4. That in the event such person will not agree to file such notice with respondents and be bound by the provisions of this order, respondents shall not use such person, or the services or such person;

5. That respondents institute a program of continuing surveillance adequate to reveal whether the sales practices of each of said persons described in subparagraph 1. conform to the requirements of this order; and

6. That respondents discontinue dealing with any person described in subparagraph 1. of this order who engages in the acts or practices prohibited by this order.

*It is further ordered,* That respondents may accept compensation from a client for the promotion of the client's idea only as a percentage of royalties or other financial gain derived through respondents' efforts. Respondents may not accept any other fee or monetary consideration from a client.

*It is further ordered,* That respondents shall not sell, lease, exchange or otherwise alienate a client's idea or disclose a client's name, address, telephone number or other personal data to any party which will or may request such client to pay a fee or other monetary consideration for the promotion of that client's idea.

*It is further ordered,* That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

*It is further ordered,* That:

1. The individual respondent named herein, and every firm, partnership, association, corporation or other business entity which he now or hereafter controls or manages, and which offers, or purports to offer, any service, product, or program, in connection with the advertising, evaluation, development, manufacturing, marketing, or assistance in developing, manufacturing, or marketing, or otherwise contributing to the success of any client's product or service, shall conspicuously place in all printed contracts, agreements, advertisements, pamphlets, brochures or other promotional materials, the statement below in print at least as large as the largest print on the material other than the business entity's name and shall state:

> **(Number)% of our clients have earned more than they paid us as a result of our efforts to (describe service, product, or program sold by such business entity.)**

2. In all advertisements broadcast by radio or television, the above-required notice shall be read at the end of the advertisement at a rate of speed at least as slow as the slowest spoken part of the advertisement.

3. Individual respondent shall maintain for a period three (3) years after any of respondent's advertisements are disseminated:

(a) Records disclosing the date or dates each such advertisement was published;

(b) Records disclosing the names and addresses of the newspapers, other publications or broadcast media disseminating said advertisement; and

(c) Representative copies or representative scripts of all advertisements published or disseminated by any media.

*It is further ordered,* That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of 10 years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising out of this order.

*It is further ordered,* That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered,* That nothing contained in this order shall relieve respondents of any additional obligations respecting idea promotion imposed by any state. When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon a showing of inconsistency, shall make such modifications as may be warranted.

*It is further ordered,* That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## IN THE MATTER OF

# NESTLE ALIMENTANA, S.A., ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9003. Complaint, Jan. 7, 1975 — Decision, July 9, 1979*

**This consent order, among other things, requires a Vevey, Switzerland food processor and an affiliated Panamanian holding company to divest, within one year, the entire frozen prepared foods facility located in Darien, Wisconsin, together with the associated frozen bulk vegetable processing facility and adjoining cold storage warehouse. Additionally, for ten years, effective from January 7, 1975, the date of the complaint, Nestle is prohibited from making any large acquisition in the frozen prepared foods industry without prior Commission approval.**

## *Appearances*

For the Commission: *Raymond L. Hays, Carl J. Batter, Jr.* and *Chauncey Hopkins.*

For the respondents: *Allen F. Maulsby, Cravath, Swaine & Moore,* New York City.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Nestle Alimentana S.A. and its affiliated company, Unilac Inc., have acquired the Stouffer Corporation in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and in violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), hereby issues this complaint pursuant to Section 11 of the Clayton Act, as amended, (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act, as amended, (15 U.S.C. 45(b)), charging in that respect as follows:

### I

### Definitions

1. For the purposes of this complaint, the following definitions shall apply:

(a) *Frozen Prepared Foods* consist of frozen foods which have been cooked or processed in some manner beyond the blanching of vegetables and fruits in the freezing process or beyond the freezing of cut or uncut meats and seafoods. Frozen prepared foods include, for example, frozen (TV) dinners, desserts, meat (pot) pies, baked goods (such as cakes), breaded shrimp, snacks (such as pizzas and hors d'oeuvres), soups, breaded and precooked poultry, prepared vegetables, and entrees.

(b) *Frozen entrees* consist of frozen prepared foods which are usually served as the main dish of the principal meal of the day. Generally served with entrees to complete the meal are other home prepared or separately purchased items such as a salad, vegetable or soup.

(c) *Quality frozen entrees* are those entrees which are advertised and marketed as quality or superior food products and which are generally able to command higher than average per-ounce retail prices.

## II

## Respondents

2. Nestle Alimentana S.A. (Nestle) is a publicly held company organized and existing under the laws of Switzerland. Its principal offices are located in Vevey, Switzerland.

3. Unilac Inc. is a company affiliated and associated with Nestle, organized and existing under the laws of the sovereign Republic of Panama. Its principal offices are located in Panama City, Panama. The shares of Nestle and Unilac are traded together, and the stockholders of the two companies are identical. References to Nestle hereinafter shall be understood to include Unilac Inc.

4. Nestle is a leading processor of food products throughout much of the world, with plants in approximately seventy (70) countries, employing close to ninety thousand (90,000) persons. Nestle is ranked twelfth on Fortune's list of the 300 largest foreign companies for 1972.

5. In 1973, Nestle worldwide sales (in U.S. dollars) were approximately $5.5 billion and its profits were about $230.7 million. Its principal worldwide products include sweetened condensed milk, evaporated milk, pasteurized, skimmed, or sterilized milk and cream, milk powder, cheese, butter, and yogurt, dietetic milk foods, dietetic specialties without milk, cereal foods for infants, strained and junior foods, coffee and tea extracts, instant chocolate drinks, liquid drinks, chocolate, cocoa, and confectionery products, soups, bouillon, seasonings and condiments, prepared dishes, frozen foods and ice cream. In 1971, Nestle purchased approximately 5 percent of the world's total cocoa exports and about 7.7 percent of the world's total coffee exports.

6. Nestle's main United States subsidiary is The Nestle Company (referred to by Nestle as "TNCo"), with its principal offices located in White Plains, New York. In 1972 TNCo had sales of about $487.6

million, primarily in chocolate products and instant coffee and tea drinks.

7. Nestle was a minority shareholder in Libby, McNeill and Libby (Libby), with its principal offices located in Chicago, Illinois, beginning in 1960, and has been the majority shareholder in Libby since 1970. Libby's major product lines include canned vegetables, canned meats, canned fruits, canned juices and drinks, and frozen foods, including frozen vegetables, fruits juices, and prepared foods. Libby's sales worldwide for the year ending June 30, 1973 were about $434 million.

8. Nestle, directly or through its subsidiaries and affiliates, ranks among the nation's leading manufacturers of branded consumer food products, including Taster's Choice freeze dried instant coffee, Nescafe instant coffee, Nestle instant tea, Nestle's Quik, Nestle's Crunch, Libby canned vegetables, canned fruits, and canned meats, Libbyland frozen dinners for children, Maggi bouillon cubes, and Crosse and Blackwell preserved foods. In the United States, Nestle was and is, directly or through its subsidiaries, or affiliates, (i) a company engaged in the manufacture of grocery products, (ii) a company with assets in excess of $250 million, (iii) a company involved in extensive promotional efforts, selling highly differentiated consumer products, and producing a number of products in some of which it holds a strong market position.

9. At all times relevant herein, Nestle, directly or through its subsidiaries or affiliates, sold and shipped and is now selling and shipping products in interstate commerce throughout the United States and in foreign commerce. Nestle was at the time of the acquisition challenged herein and is now engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

## III

## The Acquired Company

10. Prior to 1973, the Stouffer Corporation (Stouffer), a corporation organized and existing under the laws of the State of Ohio, with its principal offices located in Solon, Ohio, was a wholly-owned subsidiary of Litton Industries, which had acquired it in 1967. Prior thereto, Stouffer had been an independent publicly-held corporation, Stouffer Foods Corporation. It was and is a food processor or manufacturer which was and is engaged in the operation of restaurants and inns, and the production and distribution of frozen food products to the institutional and consumer markets. The Stouffer Corporation is the continuation of a family restaurant business started

by Vernon Stouffer and A. E. Stouffer in 1924. It was incorporated in 1929.

11. Stouffer's sales have risen for its fiscal years 1968–1973, from about $95.5 million to about $144.2 million. Its sales of prepared frozen food rose during the same period about $29.4 million to about $66.9 million. Its assets at the time of the acquisition were about $67 million.

12. Stouffer frozen prepared consumer food products include entrees, side dishes, bakery products, and soups.

13. Stouffer has a strong position and is the leading firm in the quality frozen entree market and the second ranking factor in the frozen entree market. Stouffer (i) is and was engaged in the manufacture of grocery products, and (ii) is and was among the top eight producers of one or more important grocery products and has more than a 5 percent share of the frozen entree market.

14. Stouffer is engaged in promotional efforts, and sells highly differentiated consumer products.

15. At all times relevant herein, Stouffer sold and shipped and is now selling and shipping products in interstate commerce throughout the United States. Stouffer was at the time of the acquisition challenged herein and is now engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

## IV

## The Acquisition

16. On or about March 5, 1973, Nestle purchased all the outstanding shares of the Stouffer Corporation, for approximately $105 million cash, from Litton Industries, Inc. This acquisition falls within the criteria set forth in the Commission's May 15, 1968 enforcement policy with respect to product extension mergers in grocery products manufacturing.

## V

## Trade and Commerce

17. The frozen entree market and the quality frozen entree market each has four-firm concentration in excess of 50 percent, high product differentiation, and high barriers to entry.

18. In the food industry generally since World War II there have been trends toward market concentration and dominance by large, multi-product companies with vast financial resources, accompanied by declining trends in the number of competitors. Trends toward concentration are also apparent in the frozen entree market. This market has

been transformed from one composed largely of independent, medium-size companies to one dominated by a small number of multi-product companies of large absolute size which entered the market by acquisition.

## VI

## Effects of the Acquisition

19. The effect of the acquisition of Stouffer by Nestle has been or may be substantially to lessen competition or to tend to create a monopoly or to restrain trade in the manufacture, distribution and sale of frozen entrees and quality frozen entrees, or either of these, in the United States or sections thereof, in violation of Section 7 of the Clayton Act, as amended, and in violation of Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

(a) Nestle has been eliminated as an actual competitor in the frozen entree market.

(b) Nestle has been eliminated as a potential competitor in the frozen entree market and in the quality frozen entree market.

(c) The dominant position of Stouffer in the quality frozen entree market has been, or may be, further strengthened and Stouffer's dominance has been, or may be, further entrenched.

(d) Concentration has been further increased in the frozen entree market, and the segments thereof.

(e) Barriers to entry in the frozen entree market and the quality frozen entree market, already high, have been or may be further raised.

(f) Forbearance of competition in the frozen entree market as well as in the food industry generally has resulted or may result or has been or may be increased.

## VII

## Violation

20. The acquisition of Stouffer by Nestle as alleged herein constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

## Decision and Order

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations of Section 7 of the Clayton Act, as amended, and of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent Nestle, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Nestle S.A. is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its office and principal place of business located at 1800 Vevey, Switzerland, and Unilac Inc., a holding company affiliated with Nestle S.A., is a corporation organized and existing under the laws of the Republic of Panama, with its principal office located in Panama City, Panama.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

### I

*It is ordered*, That, within one (1) year from the date on which this order becomes final, respondent Nestle S.A. (hereinafter respondent), its subsidiaries, affiliates, successors or assigns, shall divest the entire frozen prepared foods facility, together with the associated frozen bulk vegetable processing facility and adjoining cold storage warehouse, located in Darien, Wisconsin, such divestiture to be made by sale to a third party to be approved in writing by the Commission.

## II

*It is further ordered*, That, for a period of ten (10) years from the date of the issuance of the Commission's complaint on January 7, 1975, respondent, its subsidiaries, affiliates, successors and assigns, shall not, without the prior written approval of the Federal Trade Commission, acquire or acquire and hold, directly or indirectly, the whole or any part of the assets or voting securities of any corporation, firm or partnership that manufactures, processes, handles, distributes, sells or brokers frozen prepared foods and which activities are in or affect United States commerce ("Acquired Person"); *provided, however*, that the foregoing provision shall not apply to any merger, acquisition or other such transaction (i) which shall have been publicly announced prior to the date of service upon respondent of this order or (ii) which involves an Acquired Person the gross sales of which of frozen prepared foods in the fiscal year immediately preceding such merger, acquisition or other such transaction shall have been less than $10 million.

## III

*It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

## IV

*It is further ordered*, That, during the period described in Paragraph II, respondent shall notify the Commission of any acquisition of any material assets of, or any equity interest in, any Acquired Person (as defined herein) for which no Commission approval is required under Paragraph II of this order, by the filing, at least sixty (60) days prior to closing any such transaction, of the completed Notification and Report Form as promulgated under Section 7A of the Clayton Act, 15 U.S.C. 18A, and the Rules thereunder, regarding each such transaction; *provided, however*, that this paragraph shall not apply to (i) any acquisition of assets which results in respondent's holding less than $2.5 million of assets of an Acquired Person or (ii) any purchase of any equity interest which results in respondent's holding less than five percent of the outstanding voting securities of an Acquired Person.

## V

*It is further ordered,* That respondent shall, within sixty (60) days from the date of service of this order, and every sixty (60) days thereafter until the divestiture is fully affected, submit to the Commission a detailed written report of its actions, plans and progress in complying with the divestiture provisions of this order. All reports shall include, among other things that may be from time to time required, a summary of all contacts and negotiations with any person or persons interested in acquiring the assets to be divested under this order, the identity of each such person or persons, and copies of all written communications to and from each such person or persons relating to such divestiture. Annual reports of compliance with the remaining provisions of this order shall be submitted to the Commission on the anniversary date of the service of this order.

*It is further ordered,* That the complaint against Unilac Inc., is dismissed.

## IN THE MATTER OF

## AMREP CORPORATION

*Docket 9018. Interlocutory Order, July 12, 1979*

### ORDER DENYING MOTION FOR A STAY OF THE INITIAL DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

On June 14, 1979, respondent, AMREP Corporation, filed a motion with the Commission requesting that the Commission stay the Initial Decision of the administrative law judge so that respondent could have an opportunity to address the Commission on the matter of *ex parte* communications prior to the issuance of the Initial Decision.[1]

Respondent makes two arguments in support of its motion. Respondent first argues that Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(c), and Rule 3.41(c) of the Commission's Rules of Practice, require that the comments regarding *ex parte* communications be made on the record prior to the Initial Decision. Respondent also argues that Rule 3.54(c) limits the Commission's authority to take evidence in that the Commission has no authority to hear evidence regarding the *ex parte* communications unless such evidence is brought up in the hearings below. However, we find nothing in the text of any of these citations to support respondent's arguments.

Indeed, the respondent has previously sought injunctive relief on this same issue from the United States District Court for the District of Columbia. That relief was denied by Judge Gasch on April 9, 1979, for failure of the respondent to exhaust its administrative remedies. In his opinion, Judge Gasch ruled that respondent " . . . will have full opportunity to address the Commission on the matter of the *ex parte* communications. Furthermore, the Commission, if necessary, is empowered to take additional evidence, if indeed the Administrative Law Judge's initial decision goes to the Commission." Opinion at page 8.

We fully agree with the opinion of Judge Gasch. The Commission's appellate procedures provide respondent with an adequate mechanism to address the issue of *ex parte* communications should it be necessary.[2] Under the circumstances, it is unnecessary to stay the Initial Decision.[3] Accordingly,

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[1] Respondent also filed a motion to extend time for filing the Initial Decision because of the unlikelihood that the Commission could decide the motion for a stay before what had been a June 22, 1979 filing date. Inasmuch as that date was extended by the Commission to July 13, 1979, and a decision is now being made on the motion for a stay, the motion for an extension of time is denied as moot.

[2] Moreover, Rule 3.54(a) of the Commission's Rules allows the Commission to hear and take additional evidence on appeal from, or review of, an Initial Decision. *See also* 5 U.S.C. 557(b).

[3] Since our decision not to grant respondent's motion is based on the fact that adequate procedures exist on appeal, we intimate no opinion on complaint counsel's assertion that the motion should be denied as a dilatory abuse of the Commission's Rules of Practice.

*It is ordered,* That the motion for a stay of the initial determination by the administrative law judge be, and the same hereby is, denied.

## IN THE MATTER OF

# RHINECHEM CORPORATION, ET AL.

### DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

*Docket 9116. Complaint,* Aug. 23, 1978 — Dismissal Order, July 12, 1979*

**This order dismisses the August 23, 1978 complaint issued against Allegheny Ludlum Industries, Inc. and its subsidiary, Chemetron Corporation, a producer of organic pigments, for alleged violations of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The complaint was dismissed on grounds that changed circumstances which have occurred since issuance of the complaint have provided the Commission with adequate assurances that the challenged matter will not reoccur, and additional relief will not be necessary.**

### *Appearances*

For the Commission: *Glenn M. Fellman* and *Michael P. Waxman.*

For the respondents: *Thomas L. VanKirk, Buchanan, Ingersoll, Roderwald, Kyle & Buerger,* Pittsburgh, Pa. and *A.F. Maulsby, Cravath, Swaine & Moore,* New York City.

### INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

### MAY 30, 1979

### PRELIMINARY STATEMENT

The complaint in this matter was issued by the Commission on August 23, 1978, alleging that the Commission had reason to believe that the above-named respondents had entered into a merger agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest. Rhinechem Corporation filed its answer to the complaint on October 2, 1978, and Allegheny Ludlum Industries, Inc. and Chemetron Corporation filed their answer to the complaint on September 29, 1978.

On October 20, 1978, Judge Joel M. Flaum, presiding in the United States District Court for the Northern District of Illinois, enjoined consummation of the acquisition "during the pendency of the administrative proceedings and any subsequent judicial review." Following the issuance of the injunction, the parties to the merger agreement announced the proposed sale would not be pursued. On November 20, 1978, Allegheny Ludlum Industries, Inc. announced that it would sell the Chemetron Pigments Division ("CPD") to BASF Wyandotte Corporation ("BASF"). This sale of the Chemetron Pigments Division to BASF was consummated on March 23, 1979. Thereafter, on April 5, 1979, the Commission issued a complaint challenging the sale of CPD to BASF under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act (*In the Matter of BASF Wyandotte Corporation*, Dkt. 9125). Allegheny Ludlum Industries, Inc. was not named as a party respondent in the BASF complaint.

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* Complaint previously reported at 92 F.T.C. 883.

At the prehearing conference held on December 19, 1978, it was stated by complaint counsel that Rhinechem Corporation was desirous of negotiating a consent order and would not be present at the prehearing conference. Such a consent agreement was negotiated and the Commission withdrew this matter from adjudication with respect to respondent Rhinechem Corporation on January 15, 1979.

Allegheny Ludlum Industries, Inc. and Chemetron Corporation subsequently filed a motion to dismiss the complaint as to them on the grounds that the proposed acquisition by Rhinechem Corporation had been abandoned and that there was no public interest in allowing this proceeding to continue. The Commission denied this motion (Order Denying Respondents' Motion For Dismissal of Complaint, February 12, 1979) [93 F.T.C. 233]. [2]

Counsel supporting the complaint, by motion filed pursuant to Section 3.22(a) of the Rules of Practice, have requested dismissal of the complaint for lack of public interest. Complaint counsel state that since the assets of CPD are no longer under the influence or control of Allegheny Ludlum Industries, Inc. and the Commission is presently challenging the sale of those assets to BASF, it is extremely unlikely that the respondents in this matter could return to the challenged acquisition after the complaint herein is dismissed and the injunction dissolved. Complaint counsel further state that the changed circumstances which have occurred have given the Commission the assurances it needs to conclude that the matter will not reappear in a disadvantageous context and that no additional relief is necessary. Counsel supporting the complaint, therefore, move that an order dismissing the instant complaint for lack of public interest be entered.

Section 3.22(e) of the Rules of Practice requires that when a motion to dismiss a complaint is granted with the result that the proceeding before the administrative law judge is terminated, an initial decision in accordance with the provisions of Section 3.51 shall be filed.

Having carefully reviewed the record of this proceeding, the administrative law judge makes the following findings of fact and conclusions and issues the order set out at the end hereof.

## FINDINGS OF FACT

1. This matter has been withdrawn from adjudication as to respondent Rhinechem Corporation ("Rhinechem") (Order Withdrawing Matter From Adjudication With Respect To Rhinechem Corporation, January 15, 1979).

2. Allegheny Ludlum Industries, Inc. ("Allegheny") is a corporation organized under the laws of the Commonwealth of Pennsylvania, with its principal place of business located at 2700 Two Oliver Plaza, Pittsburgh, Pennsylvania (Answer, Par. 9).

3. Chemetron Corporation ("Chemetron") is a corporation organized under the laws of the State of Delaware, with its principal place of business located at 111 E. Wacker Drive, Chicago, Illinois (Answer, Par. 8). Chemetron is a wholly-owned subsidiary of Allegheny (Answer, Par. 9). [3]

4. Chemetron and Allegheny, at all times relevant herein, have been engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affects commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 44. (Answer, Pars. 9, 10, 14).

5. On or about June 12, 1978, Rhinechem entered into an agreement in principle which provided, *inter alia*, for the acquisition by Rhinechem of the assets of Chemetron's Pigment Division (Answer, Par. 15). On August 25, 1978 Rhinechem entered into a written agreement providing that the sale be consummated on August 30, 1978, or such other date as fixed by them. The Commission, on August 25, 1978 issued its complaint alleging that the merger, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act (complaint). The Commission also brought suit to preliminarily enjoin the proposed purchase under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b). The United States District Court for the Northern District of Illinois, on October 10, 1978, issued an injunction prohibiting consummation of the purchase agreement during the pendency of the administrative proceeding and any subsequent review thereof (*Federal Trade Commission* v. *Rhinechem Corporation, et al.*, CCH Trade Cases 1978-2 ¶ 62,350).

6. On October 23, 1978 the purchase agreement between Rhinechem and Allegheny and Chemetron was terminated by mutual

agreement of the parties (Motion For Dismissal Of Complaint, filed by Allegheny Ludlum Industries, Inc. and Chemetron Corporation, December 20, 1978, with attached affidavit of Clayton A. Sweeney, Vice President, Allegheny Ludlum Industries, Inc.).

7. On or about November 18, 1978, BASF Wyandotte Corporation ("BASF") and Allegheny and Chemetron entered into a definitive agreement which provided for the acquisition by BASF of the assets of Chemetron's Pigment Division. On or about March 23, 1979 BASF acquired the assets of Chemetron's Pigment Division (*In the Matter of BASF Wyandotte Corporation*, complaint, Dkt. 9125, April 5, 1979).

## CONCLUSIONS

Since the assets of Chemetron's Pigment Division are no longer under the control of Allegheny and Chemetron, but have been purchased by BASF in a transaction now being challenged by the Commission in another proceeding, it is [4] extremely unlikely that the respondents herein can return to the acquisition which was challenged in this instant proceeding. The changed circumstances which have occurred since issuance of the complaint herein have provided the Commission with adequate assurances that the matter which was challenged in the complaint will not reoccur and no additional relief is necessary. Accordingly, further pursuance of this complaint is not in the public interest.

## ORDER

*It is ordered,* That the complaint in this matter be, and it hereby is, *dismissed* as to respondents Allegheny Ludlum Industries, Inc. and Chemetron Corporation.

## FINAL ORDER

The administrative law judge filed an Initial Decision in this matter on May 30, 1979, dismissing the complaint against respondents Allegheny Ludlum Industries, Inc. and Chemetron Corporation on the ground that changed circumstances which have occurred since issuance of the complaint have provided the Commission with adequate assurances that the matter which was challenged in the complaint will not reoccur and no additional relief is necessary. No appeal from the Initial Decision was filed.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the Initial Decision should become effective as provided in Section 3.51(a) of the Commission's Rules of Practice, [2] *It is ordered*, That the Initial Decision and order contained therein shall become effective on July 12, 1979.

## IN THE MATTER OF

# NORRIS INDUSTRIES, INC.

## MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2946. Decision, Dec. 27, 1978 — Modifying Order, July 12, 1979*

**This order modifies the cease and desist order issued on December 27, 1978, 44 FR 6380, 92 F.T.C. 989, by revising Paragraph "2." of Part II of the original order to require affirmative disclosures and include definitions of "clear and conspicuous" for purposes of print, radio, and television advertising.**

## ORDER MODIFYING ORDER TO CEASE AND DESIST

The Commission on April 25, 1979, issued its Order to Show Cause why this proceeding should not be reopened and its order of December 27, 1978, modified.

Respondents filed an Answer on May 31, 1979, setting forth objections to the Order to Show Cause, and proposing certain amendments. Commission staff interposed no objections and recommended that the respondent's amendments be incorporated into the order,

*Now, therefore, it is hereby ordered,* That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the Order to Show Cause and the Respondent's Answer, without necessity of further action by the Commission, as follows:

## ORDER

## PART I

*It is ordered,* That Norris Industries, Inc., [hereinafter referred to as the respondent], its successors and assigns, either jointly or individually, and its officers, representatives, and agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, distribution or sale of dishwashers in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any dishwasher manufactured or sold by respondent can sterilize or destroy all microorganisms on utensils placed in the dishwasher.

2. Representing directly, or by implication, that the stainless steel parts in any dishwasher manufactured or sold by respondent are rustproof or will not rust under normal household conditions.

3. Representing, directly or by implication, that the disposo-drain in any dishwasher manufactured or sold by respondent will remove all soft food waste from the dishwasher.

4. Representing, directly or by implication, that any dishwasher manufactured or sold by respondent can completely clean dishes, cookware, and other utensils placed in the dishwasher, without prior scraping, scouring, or rinsing.

5. Representing, directly or by implication, that any dishwasher manufactured or sold by respondent can be randomly loaded or that there are no special instructions to follow when loading.

## PART II

*It is further ordered*, That respondent, its successors and assigns, either jointly or individually, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, distribution or sale of major home appliances in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. (a) Making any statements or representations, directly or by implication, concerning the performance of such products unless at the time that the statements or representations are made respondent possesses and relies on a reasonable basis for such statements or representations, which shall consist of a competent and reliable scientific test, as defined in Paragraph One (b) hereafter.

(b) For purposes of this order a "competent and reliable scientific test" is one in which one or more persons with education, knowledge, and experience in the field conduct a test and evaluate its results in an objective manner using testing, evaluation, and analysis procedures generally accepted in the profession and which best insure valid and reliable results. Moreover, the test results must either accurately predict, or be correlated with, the results that a consumer ordinarily would obtain using the product under normal household conditions.

2. Failing to make a "clear and conspicuous disclosure" that product features, depicted or described in advertising for a product, apply only to the model being advertised or, if applicable, only to certain models. Such disclosure shall identify the model(s) by number(s) (and name(s) if applicable) to which the product features do or, at the respondent's option, do not apply. This disclosure shall not be required where the advertisement clearly and conspicuously identifies the model by number (and model name if applicable) to which the product features being advertised apply.

For purposes of this provision:

Television Advertising – clear and conspicuous shall be as set forth in the FTC's Statement of Enforcement Policy of October 21, 1970;

Radio Advertising – the disclosure shall be clear and conspicuous and shall be made with no other sounds including music;

Print Advertising – clear and conspicuous shall mean that the disclosure of the model number and name, if applicable, shall be in no less a type size than that used to describe the product features and shall be in immediate conjunction with the description of the product features.[1]

3. Making any statements or representations, directly or by implication, in connection with the advertisement of any such product, which are inconsistent in any material respect with any statements or representations contained, directly or by implication, in post purchase material(s) supplied to the purchaser of such products.

4. For purposes of this order the term "major home appliances" means the following appliances presently manufactured or sold by the respondent: automatic dishwashers; garbage disposers; trash compactors; and microwave ovens.

## PART III

*It is further ordered,* That respondent, its successors and assigns, either jointly or individually, and its officers, representatives, and agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, distribution or sale of "major home appliances" in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) documentation in support of and on which respondent relied in making any claim included in advertising, sales promotional material, or post purchase materials, disseminated by respondent or by any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, concerning the performance characteristics of any of respondent's major home appliances;

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[1] The provisions of this order in respect to print advertising will be implemented per the following schedule: (1) Reproducible advertising for use by distributors and retail dealers — when stock in existence on June 1, 1979, is exhausted but in any event no later than January 1, 1980; (2) Advertising for placement by respondent – promptly upon the effective date of this modification to the final order; (3) Brochures – when stock in existence on June 1, 1979, is exhausted but in any event no later than January 1, 1980, except, respondent's brochure identified as Exhibit 22 in the Compliance Report dated as of April 12, 1979 – promptly upon the effective date of this modification to the final order.

(b) documentation which contradicts, qualifies or calls into serious question any claim included in advertising, sales promotional material or post purchase materials disseminated by respondent or by any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, concerning the performance characteristics of any of respondent's major home appliances.

Such documentation shall be retained by respondent for a period of three years from the date such advertising, sales promotional or post purchase materials were last disseminated.

## PART IV

*It is further ordered,* That respondent notify the Commission at least 30 days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered,* That the respondent shall forthwith distribute a copy of this order to each of its officers, agents, representatives or employees of the respondent's Thermador/Waste King division who are engaged in the preparation, placement, or review of advertisements for the "major home appliances" defined in this order.

*It is further ordered,* That the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

## IN THE MATTER OF

# TRANS WORLD ACCOUNTS, INC., ET AL.

### MODIFIED ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9059. Decision, October 25, 1977 — Modified Order, July 25, 1979*

**This modified order to cease and desist replaces an order issued on October 25, 1977, 43 FR 2388, 90 F.T.C. 350. To clarify and reformulate the earlier order in accordance with the March 29, 1979 mandate of the Court of Appeals for the Ninth Circuit, 594 F.2d 212, Paragraph 3, which is the subject of further proceeding, has been omitted, but Paragraph 4 has not been renumbered.**

## MODIFIED ORDER TO CEASE AND DESIST

On February 21, 1978, respondents filed in the United States Court of Appeals for the Ninth Circuit a petition to review an order to cease and desist issued herein on October 25, 1977. The Court thereafter rendered its decision and judgment, affirming and enforcing the Commission's order with the exception of numbered Paragraph 3 thereof which was remanded for clarification pursuant to the decision of the Court. The time in which to file a petition for certiorari has now expired without any party having filed such a petition, and, accordingly, the order of the Commission shall be rendered in accordance with the mandate of the Court. See 15 U.S.C. 45(i).

*Therefore, It is ordered,* That the aforesaid order to cease and desist, save for numbered Paragraph "3" (which is the subject of further proceedings), be rendered to read as follows:

## ORDER

*It is ordered,* That respondents, Trans World Accounts, Inc., a corporation, its successors and assigns, and its officers, and Floyd T. Watkins, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the offering for sale, sale or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of, alleged delinquent debts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using or placing in the hands of others for use, envelopes, letters, forms or any other materials which by their appearance,

content, or otherwise, misrepresent that they are telegrams or a telegram.

2. Using or placing in the hands of others for use, envelopes, letters, forms or any other materials which by simulating telegrams or other methods or forms or types of communication misrepresent the nature, import, or urgency of any communication.

4. Placing in the hands of others the means and instrumentalities to accomplish any of the matters prohibited in this order, or which fail to comply with the requirements of this order.

*It is further ordered*, That the respondent corporation shall distribute a copy of this order to each of its operating divisions or departments and to each of its present and future officers, agents, representatives, or employees engaged in any aspect of the offering for sale, sale or distribution of any service or printed matter for use in the collection of, or for inducing or attempting to induce the payment of, alleged delinquent debts, and that said respondent secure a signed statement acknowledging receipt of said order from each person.

*It is further ordered*, That the respondent corporation notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered*, That the individual respondent named herein promptly notify the Commission of the discontinuance of his employment with Trans World Accounts, Inc., and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the individual respondent named herein shall promptly notify the Commission of his affiliation with a new business or employment whose principal activities include the offering for sale, sale or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, alleged delinquent debts, or of his affiliation with a new business or employment in which his own duties and responsibilities involve the offering for sale, sale or distribution of any service or printed matter for use in the collection of, or attempted collection of, or for assisting in the collection of, or for inducing or attempting to induce the payment of, alleged delinquent debts. Such notice shall include individual respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

*It is further ordered,* That the respondents herein shall, within sixty (60) days from the date this order becomes final, and periodically thereafter as required by the Federal Trade Commission, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF

# MACLEOD MOBILE HOMES, INC., ET AL.

## CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9068. Complaint, Dec. 19, 1975 — Decision, July 25, 1979*

**This consent order, among other things, requires a Riverhead, N.Y. mobile homes dealer and its affiliates to cease entering into, or enforcing any arrangement or rule which restricts the availability of mobile home sites to only those parties who purchase, lease or rent mobile homes, accessories and services from MacLeod Mobile Homes, Inc. or other designated sources.**

## *Appearances*

For the Commission: *Elliot Feinberg, Herbert S. Forsmith* and *Henry R. Whitlock.*

For the respondents: *Wayne S. Hyatt, Hyatt & Rhoads,* Atlanta, Ga.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the parties identified in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended, and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

### I. DEFINITIONS

PARAGRAPH 1. For the purpose of this complaint, the following definitions shall apply:

(a) "Mobile home" means a transportable unit or units designed to be placed without a permanent foundation, connected to utilities, and used or capable of being used for year-round living.

(b) "Mobile home park" means a tract of land utilized specifically for the purpose of renting sites for the placement of mobile homes for residential purposes, and in which utility connections and various communal services are commonly provided.

### II. RESPONDENTS

PAR. 2. Respondent MacLeod Mobile Homes, Inc. is a corporation organized under the laws of the State of New York, with its principal office located at 525 Riverleigh Ave., Riverhead, New York.

PAR. 3. Respondent Pashisha, Inc., an affiliate of MacLeod Mobile Homes, Inc., is a corporation organized under the laws of the State of New York, with its principal office located at 525 Riverleigh Ave., Riverhead, New York.

PAR. 4. Respondents Myron T. MacLeod and John J. Couch, individuals, are officers of said corporations. They formulate, direct, approve, authorize and control the acts and practices of said corporation, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondents.

PAR. 5. (a) Respondent MacLeod Mobile Homes, Inc. has been and is now engaged in the advertising, offering for sale, sale and distribution of mobile homes and mobile home accessories. Respondent MacLeod Mobile Homes, Inc. further has been and is now engaged in the development and operation of the MacLeod's Mobile Home Park, located at 525 Riverleigh Ave., Riverhead, New York.

(b) Respondent Pashisha, Inc. has been and is now engaged in the advertising, offering for sale, and distributing of mobile homes and mobile home accessories.

(c) In fiscal year 1975, sales of mobile homes by corporate respondents exceeded $600,000.

## III. JURISDICTION

PAR. 6. (a) In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, advertising to be disseminated to prospective purchasers of mobile homes and prospective mobile home park tenants located in various States of the United States across state lines and in interstate commerce within the United States, as "commerce" is defined in the Federal Trade Commission Act, as amended.

(b) In the course and conduct of their business as aforesaid, respondents have purchased and continue to regularly purchase mobile homes and other products from suppliers in states other than New York for the purpose of offering said products for sale, to maintain an available inventory for sale and to fill special purchase orders received from their customers.

(c) Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 7. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, respondents have been and are in substantial competition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, with persons or firms engaged in the sale of mobile homes and mobile home accessories and with persons or firms engaged in the operation and maintenance of mobile home parks.

## IV. VIOLATIONS

PAR. 8. In the course and conduct of their business as aforesaid, respondents have engaged, and are engaging, in various courses of action, including:

(a) refusing to rent sites in their mobile home park for the accommodation of mobile homes which have not been purchased from them, thereby making the rental of these sites conditional and dependent upon the purchase of mobile homes from said respondents;

(b) refusing to rent sites to persons who have purchased their mobile homes directly from park tenants, unless such tenants or purchasers make substantial payments to respondents;

(c) requiring tenants in their parks to purchase heating fuel and bottled gas from suppliers designated by respondents.

## V. EFFECTS

PAR. 9. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondents, as hereinabove alleged, have, or tend to have, the effect of:

(a) reducing competition in the sale of mobile homes;

(b) foreclosing potential competitors in the sale of mobile homes by raising entry barriers;

(c) foreclosing substantial sales by dealers of mobile homes to actual or prospective tenants of sites in respondents' mobile home parks;

(d) inflating the prices of mobile homes purchased from respondents;

(e) depriving tenants who resell their mobile homes of a substantial part of the value of said homes;

(f) restricting mobile home owners' rights to alienate or freely sell their property;

(g) reducing competition in the sale of heating fuel and bottled gas to mobile home owners;

(h) inflating the cost of heating fuel and bottled gas purchased by tenants of respondents' mobile home park;

(i) depriving consumers of the benefits of competition.

PAR. 10. The aforesaid acts, practices and methods of competition, constitute unreasonable restraints of trade and unfair methods of competition in or affecting commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended, and constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

## DECISION AND ORDER

The Commission having issued its complaint on December 19, 1975, charging that the respondents named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and

Respondents and complaint counsel, by joint motion filed December 9, 1976, having moved to have this matter withdrawn from adjudication for the purpose of submitting an executed consent agreement; and

The Commission, by order issued January 11, 1977, having withdrawn this matter from adjudication pursuant to Section 3.25(c) of its Rules; and

Each of the respondents and counsel supporting the complaint having executed an agreement containing a consent order, which includes an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of one hundred and eighty (180) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules and the recommendation of its staff, and having concluded that the consent agreements should be modified along the lines suggested by staff, with changes; and

Respondents and complaint counsel having thereafter executed and submitted a revised agreement containing consent order dated April 23, 1979, containing modifications agreed to by the Commission; and

The executed agreement dated April 23, 1979, as modified, containing the following consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers as required by the Commission's Rules;

Now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

## ORDER

*It is ordered*, That MacLeod Mobile Homes, Inc. and Pashisha, Inc., corporations, their successors and assigns, and their officers and Myron T. MacLeod and John J. Couch, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale, lease or rental of mobile homes, mobile home sites or any other product, service, real estate or thing, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. The offering, execution, maintenance or enforcement of any lease, agreement, understanding or other arrangement which, directly or indirectly, conditions the lease, rental or sale of a mobile home site upon the lease, rental or purchase of a mobile home from a respondent, or a source designated by a respondent.

2. The offering, execution, maintenance or enforcement of any lease, agreement, understanding or other arrangement, which, directly or indirectly, conditions the lease, rental or sale of any product, service, real estate or thing upon the lease, rental or purchase of any other product, service, real estate or thing from a respondent or a source designated by a respondent.

3. Refusing to offer, enter into, or maintain a lease or any other arrangement relating to the sale, lease or rental of any mobile home site unless or until the prospective tenant leases, rents, acquires or purchases, or promises or agrees to lease, rent, acquire or purchase a mobile home, or any other product, service, real estate or thing, from a respondent, or a source designated by a respondent.

4. Establishing, maintaining or enforcing any rule, practice or arrangement in a mobile home park owned, controlled or operated by a respondent whereby:

a) a mobile home sold, rented or leased by a tenant of a respondent must be removed from its site for the reason that said mobile home was not sold, rented or leased by, through or with the cooperation of a respondent or the designee of a respondent;

b) a mobile home park tenant who sells, rents or leases a mobile home is required to subscribe to or purchase or accept the services of a respondent or person or firm designated by a respondent;

c) a mobile home park tenant or prospective tenant is required to compensate a respondent, or a person or firm designated by a respondent, who has not provided any services in connection with the sale, rental or lease of a mobile home by such tenant or the purchase, rental or lease of a mobile home by such a prospective tenant;

d) a prospective tenant purchasing a mobile home from any tenant of a respondent is not permitted to rent the mobile home site occupied by such mobile home, provided that any such prospective tenant would otherwise qualify for tenancy in such mobile home park under reasonable rules and regulations established for the operation thereof, which rules shall not be inconsistent with state law; or

e) a tenant of a respondent is threatened with or subjected to eviction or any coercive action or detriment for refusal or failure to agree to lease, rent, acquire or purchase any product, service, real estate or thing from a respondent or a source designated by a respondent.

*Provided, however,* that respondents may exercise their lawful rights as businessmen, including the right to set reasonable rules, regulations and standards concerning the appearance of mobile homes and acceptance of tenants in respondents' mobile home parks and the operation, maintenance and appearance of mobile homes, mobile home parks and mobile home sites, except insofar as limited by the provisions of this order; and

*Provided further,* that nothing in this order shall prevent respondents from establishing, maintaining or enforcing reasonable rules or regulations that are necessary to protect respondents' property, or are otherwise explicitly authorized under existing state law.

*Provided further,* that nothing in this order shall exempt any person or firm from the duty to comply with all applicable laws or regulations which are consistent with the provisions of this order.

*It is further ordered,* That respondents shall, within thirty (30) days of service of this order, distribute, and obtain a signed receipt therefor, a copy of this order to each of their operating divisions and respondents' employees engaged in the sale or rental of mobile homes or mobile home sites.

*It is further ordered,* That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment, and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, each individual respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the sale of mobile homes or the rental of mobile home sites or of his affiliation with a new business or employment in which his own duties and responsibilities involve the sale of mobile homes or the rental of mobile home sites. Such notice shall include this respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment.

The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

*It is further ordered,* That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered,* That respondents maintain complete business records relative to the manner and form of their continuing compliance with the terms and provisions of this order. Each record shall be retained by respondents for at least three years after it is made.

*It is further ordered,* That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## IN THE MATTER OF

# MOBILE HOMES-MULTIPLEX CORPORATION, ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9069. Complaint, Dec. 19, 1975 — Decision, July 25, 1979*

**This consent order, among other things, requires a Mt. Holly, N.J. mobile home dealer and its subsidiaries to cease entering into or enforcing any arrangement or rule which restricts the availability of mobile home sites to only those parties who purchase, lease or rent mobile homes, accessories and services from Mobile Homes-Multiplex Corp. or other designated sources.**

## *Appearances*

For the Commission: *Herbert Forsmith, Henry R. Whitlock* and *Elliot Feinberg.*

For the respondents: *John W. Kormes,* Philadelphia, Pa.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the parties identified in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended, and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

## I. DEFINITIONS

PARAGRAPH 1. For the purposes of this complaint, the following definitions shall apply:

(a) "Mobile home" means a transportable unit or units designed to be placed without a permanent foundation, connected to utilities, and used or capable of being used for year-round living.

(b) "Mobile home park" means a tract of land utilized specifically for the purpose of renting sites for the placement of mobile homes for residential purposes and in which utility connections and various communal services are commonly provided.

## II. RESPONDENTS

PAR. 2. (a) Respondent Mobile Homes-Multiplex Corp. is a corporation organized under the laws of the State of Delaware with its principal office located at Mobile Estates, Inc., Route 206, Mt. Holly, New Jersey.

(b) Respondent Mobile Estates, Inc. is a corporation organized under the laws of the State of New Jersey with its principal office located at Route 206, Mt. Holly, New Jersey.

(c) Respondent Mobile Estates of Southampton, Inc. is a corporation organized under the laws of the State of New Jersey with its principal office located at Route 206, Mt. Holly, New Jersey.

(d) Respondents Mobile Estates, Inc. and Mobile Estates of Southampton, Inc. are wholly-owned subsidiaries of respondent Mobile Homes-Multiplex Corp., a holding company, which dominates and controls the acts and practices of said wholly-owned subsidiaries, including the acts and practices hereinafter set forth.

PAR. 3. Respondent Tower Trailer Park, Inc. is a corporation organized under the laws of the State of New Jersey with its principal office located at 26 Dalbert St., Carteret, New Jersey.

PAR. 4. Respondent George R. Searle, an individual, is the president of respondents Mobile Homes-Multiplex Corp., of Mobile Estates, Inc., of Mobile Estates of Southampton, Inc. and of Tower Trailer Park, Inc. He formulates, directs, approves, authorizes and controls the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. His business address is the same as that of corporate respondent Mobile Estates, Inc.

PAR. 5. Hereinafter respondents Mobile Homes-Multiplex Corp., Mobile Estates, Inc., Mobile Estates of Southampton, Inc., and George R. Searle shall sometimes be referred to collectively as "Mobile Estates."

PAR. 6. (a) Respondent Mobile Estates, Inc. is now, and for some time last past has been, engaged in the business of advertising, offering for sale, sale and distribution of mobile homes and mobile home accessories. In fiscal year 1972, sales of mobile homes by respondent Mobile Estates, Inc. were approximately $700,000.

(b) Respondent Mobile Estates of Southampton, Inc. is now, and for some time last past has been, engaged in the development and operation of a mobile home park located at Route 206, Mt. Holly, New Jersey.

(c) Respondent Tower Trailer Park, Inc. is now, and for some time last past has been, engaged in the development and operation of a mobile home park located at 26 Dalbert St., Carteret, New Jersey.

## III. JURISDICTION

PAR. 7. (a) In the course and conduct of their business as aforesaid, respondents "Mobile Estates" now cause, and for some time last past have caused, advertising to be disseminated to prospective purchasers of mobile homes and prospective mobile home park tenants located in various States of the United States across state lines and in interstate commerce within the United States, as "commerce" is defined in the Federal Trade Commission Act, as amended.

(b) In the course and conduct of their business as aforesaid, respondents "Mobile Estates" have purchased and continue to regularly purchase mobile homes and other products from suppliers in states other than New Jersey for the purpose of offering said products for sale, to maintain an available inventory for sale and to fill special purchase orders received from their customers.

(c) In the course and conduct of its business, respondent Tower Trailer Park, Inc. has entered into agreements with respondents "Mobile Estates," which are essential to make effective the restraints on interstate commerce alleged in Paragraph Ten hereof.

(d) Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 8. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, respondents have been and are in substantial competition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, with persons or firms engaged in the sale of mobile homes and mobile home accessories and with persons or firms engaged in the operation and maintenance of mobile home parks.

## IV. VIOLATIONS

PAR. 9. In the course and conduct of their business as aforesaid, respondents "Mobile Estates" have engaged, and are engaging, in various courses of action, including:

(a) refusing to rent sites in their mobile home park for the accomodation of mobile homes which have not been purchased from them, thereby making the rental of these sites conditional and dependent upon the purchase of mobile homes from said respondents;

(b) refusing to rent sites to persons who have purchased their mobile homes directly from park tenants;

(c) requiring tenants desiring to sell their mobile homes to consign their homes to respondents for resale or to have said homes removed from the park upon resale.

PAR. 10. In the further course and conduct of their businesses as aforesaid, respondents Tower Trailer Park, Inc. and "Mobile Estates" have entered into an agreement under which Tower Trailer Park, Inc. refuses to rent its sites for the accomodation of mobile homes which have not been purchased from "Mobile Estates," thereby making the rental of said sites conditional and dependent upon the purchase of mobile homes from "Mobile Estates."

## V. EFFECTS

PAR. 11. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondents, as hereinabove alleged, have or tend to have the effect of:

(a) reducing competition in the sale of mobile homes;

(b) foreclosing potential competitors in the sale of mobile homes by raising entry barriers;

(c) foreclosing substantial sales by dealers of mobile homes to actual or prospective tenants of sites in respondents' mobile home parks;

(d) inflating the prices of mobile homes purchased from respondents;

(e) depriving tenants who resell their mobile homes of a substantial part of the value of said homes;

(f) restricting mobile home owners' rights to alienate or freely sell their property;

(g) depriving consumers of the benefits of competition.

PAR. 12. The aforesaid acts, practices and methods of competition, constitute unreasonable restraints of trade and unfair methods of competition in or affecting commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended, and constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

## DECISION AND ORDER

The Commission having issued its complaint on December 19, 1975, charging that the respondents named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and

Respondents and complaint counsel, by joint motion filed December 9, 1976, having moved to have this matter withdrawn from adjudication for the purpose of submitting an executed consent agreement; and

The Commission, by order issued January 11, 1977, having withdrawn this matter from adjudication pursuant to Section 3.25(c) of its Rules; and

Each of the respondents and counsel supporting the complaint having executed an agreement containing a consent order which includes an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of one hundred and eighty (180) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules and the recommendations of its staff, and having concluded that the consent agreements should be modified along the lines suggested by staff, with changes; and

Respondents and complaint counsel having thereafter executed and submitted a revised agreement containing consent order dated June 7, 1979, containing modifications agreed to by the Commission; and

The executed agreement dated June 7, 1979, as modified, containing the following consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers as required by the Commission's rules,

Now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Mobile Homes-Multiplex Corp. is a corporation organized under the laws of the State of Delaware with its principal office located at Mobile Estates, Inc., Route 206, Mt. Holly, New Jersey.

Respondent Mobile Estates, Inc. is a corporation organized under the laws of the State of New Jersey with its principal office located at Route 206, Mt. Holly, New Jersey.

Respondent Mobile Estates of Southampton, Inc. is a corporation organized under the laws of the State of New Jersey with its principal office located at Route 206, Mt. Holly, New Jersey.

Respondents Mobile Estates, Inc. and Mobile Estates of Southampton, Inc. are wholly-owned subsidiaries of respondent Mobile Homes-Multiplex Corp., a holding company, which dominates and controls the acts and practices of said wholly-owned subsidiaries.

Respondent Tower Trailer Park, Inc. is a corporation organized under the laws of the State of New Jersey with its principal office located at 26 Dalbert St., Carteret, New Jersey.

Respondent George R. Searle, an individual, is the president of respondents Mobile Homes-Multiplex Corp., Mobile Estates, Inc., Mobile Estates of Southampton, Inc. and Tower Trailer Park, Inc. He formulates, directs, approves, authorizes and controls the acts and practices of said corporate respondents. His business address is the same as that of corporate respondent Mobile Estates, Inc.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

## ORDER

*It is ordered,* That respondents Mobile Homes-Multiplex Corp., Mobile Estates, Inc., Mobile Estates of Southampton Inc., and Tower Trailer Park, Inc., corporations, their successors and assigns, and their officers and George R. Searle, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the sale, lease or rental of mobile homes, mobile home sites or any other product, service, real estate or thing, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. The offering, execution, maintenance or enforcement of any lease, agreement, understanding or other arrangement which, directly or indirectly, conditions the lease, rental or sale of a mobile home site upon the lease, rental or purchase of a mobile home from a respondent, or a source designated by a respondent.

2. The offering, execution, maintenance or enforcement of any lease, agreement, understanding or other arrangement, which, directly or indirectly, conditions the lease, rental or sale of any product, service, real estate or thing upon the lease, rental or purchase of any other product, service, real estate or thing from a respondent, or a source designated by a respondent.

3. Refusing to offer, enter into, or maintain a lease or any other arrangement relating to the sale, lease or rental of any mobile home site unless or until the prospective tenant leases, rents, acquires or purchases, or promises or agrees to lease, rent, acquire or purchase a mobile home, or any other product, service, real estate or thing, from a respondent, or a source designated by a respondent.

4. Establishing, maintaining or enforcing any rule, practice or arrangement whereby:

(a) a mobile home sold, rented or leased by a tenant of a respondent must be removed from its site for the reason that said mobile home was not sold, rented or leased by, through or with the cooperation of a respondent or the designee of a respondent;

(b) a prospective tenant purchasing, renting or leasing a mobile home from any tenant of a respondent is not permitted to rent the mobile home site occupied by such mobile home, provided that any such prospective tenant would otherwise qualify for tenancy in such mobile home park under reasonable rules and regulations established for the operation thereof, which rules shall not be inconsistent with state law; or

(c) a tenant of a respondent is threatened with or subjected to eviction or any coercive action or detriment for refusal or failure to agree to lease, rent, acquire or purchase any product, service, real estate or thing from a respondent or a source designated by a respondent.

*Provided, however*, that except insofar as limited by the provisions of this order, respondents may exercise their lawful rights as businessmen, including, for example, the right to advertise and sell their products and services, and the right to set reasonable rules, regulations and standards concerning the appearance of mobile homes and acceptance of tenants in respondents' mobile home parks, and the operation, maintenance and appearance of mobile homes, mobile home parks, and mobile home sites; and

*Provided further*, that nothing in this order shall prevent respondents from establishing, maintaining or enforcing reasonable rules or regulations that are necessary to protect respondents' property, or are otherwise explicitly authorized under existing state law.

*Provided further*, that nothing in this order shall exempt any person or firm from the duty to comply with all applicable laws or regulations which are consistent with the provisions of this order.

*It is further ordered*, That respondents shall, within thirty (30) days of service of this order, distribute, and obtain a signed receipt therefor, a copy of this order to each of their operating divisions and respondents' employees engaged in the sale or rental of mobile homes or mobile home sites.

*It is further ordered*, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order. This paragraph shall not prohibit the individual respondent from discontinuing his present business or employment or from affiliating with a new business or employment.

*It is further ordered,* That respondents maintain complete business records relative to the manner and form of their continuing compliance with the terms and provisions of this order. Each record shall be retained by respondents for at least three years after it is made.

*It is further ordered,* That respondents notify the Commission at least thirty (30) days prior to any proposed change in any corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered,* That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

## IN THE MATTER OF

## JONATHAN LOGAN, INC.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2977. Complaint, July 25, 1979 — Decision, July 25, 1979*

**This consent order, among other things, requires a Secaucus, N.J. manufacturer of wearing apparel to cease establishing, maintaining and enforcing resale prices and sale periods; and recommending resale prices for a period of three years. All price lists disseminated by the firm after that period must note that the prices are merely suggested. Respondent is also prohibited from policing the retail prices of its customers; and threatening or taking adverse action against recalcitrants. Additionally, the order requires the firm to reinstate former customers who were terminated for failing to adhere to established prices; and maintain applicable records for five years.**

### *Appearances*

For the Commission: *Judith Braun.*

For the respondent: *Joshua F. Greenberg, Kay, Scholer, Furman, Hays & Handler,* New York City.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Jonathan Logan, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Jonathan Logan, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 50 Terminal Road, Secaucus, New Jersey.

PAR. 2. Respondent is now, and has been engaged in the manufacture, sale and distribution of wearing apparel including Misty Harbor rainwear. In 1977, Jonathan Logan, Inc. had net sales in excess of $400,000,000.

PAR. 3. Respondent sells and distributes wearing apparel to resellers located throughout the United States who in turn sell to the general public. In connection with the sale of its rainwear, respondent maintains a factory in Baltimore, Maryland and sells its products from showrooms located in New York City, Boston, Chicago, San Francisco, Atlanta, Charlotte, Kansas City and Dallas.

PAR. 4. Respondent maintains and at all times mentioned herein has maintained a substantial course of trade in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended.

PAR. 5. For purposes of the complaint, the following definitions shall apply:

"Reseller" is any person, partnership, firm or corporation which purchases any product from respondent.

"Prospective reseller" is any person, partnership, firm or corporation which requests to purchase any product from respondent.

"Resale price" is any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any reseller for pricing any product.

"Sale period" is any break date, end of season or period for selling or advertising any product at a price other than the suggested, established or customary price.

PAR. 6. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, respondent has been and is in substantial competition with persons or firms engaged in the manufacture, distribution or sale of apparel.

PAR. 7. Respondent unilaterally or in combination, agreement or understanding with some resellers has through its Misty Harbor Division engaged in the following acts or practices, among others:

(a) establishing agreements, understandings or arrangements with resellers or prospective resellers that such resellers or prospective resellers will maintain certain resale prices or sale periods;

(b) informing resellers or prospective resellers, by direct and indirect means, that respondent expects or requires such resellers or prospective resellers to maintain or adhere to certain resale prices or sale periods;

(c) furnishing resellers or prospective resellers with price lists and supplements thereto containing established or suggested resale prices or sale periods for respondent's products and otherwise indicating the resale prices respondent deems appropriate;

(d) entering agreements, understandings or arrangements with resellers or prospective resellers that such resellers or prospective resellers will not advertise respondent's first-line quality products at resale prices other than those established, suggested or deemed appropriate by respondent;

(e) entering agreements, understandings or arrangements with resellers or prospective resellers that such resellers or prospective resellers will refrain from advertising respondent's close-out or promotional products or second-line quality or irregular products as having been manufactured by respondent;

(f) directing, soliciting or encouraging resellers to cooperate and assist in identifying and reporting any reseller or prospective reseller who is engaged in any of the following activities:

(1) offering for sale or selling any product at a resale price other than that which respondent has established, suggested or deemed appropriate.

(2) advertising any first-line quality product at a resale price other than that which respondent has established, suggested or deemed appropriate.

(3) advertising any close-out or promotional product or second-line quality or irregular product as having been manufactured by respondent.

(g) threatening to terminate, terminating or warning resellers engaged in, or suspected of engaging in, any of the activities set forth in subparagraph (f)(1)-(3) above and using various forms of coercion and discipline, including but not limited to delaying order shipments, limiting the frequency of visits by sales personnel and restricting the availability of products, against such resellers;

(h) refusing to deal with certain prospective resellers who may engage in any of the activities set forth in subparagraph (f)(1)-(3) above; or

(i) conditioning allowances or other benefits to resellers upon adherence to established, suggested or customary resale prices.

PAR. 8. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondent, as hereinabove alleged, have the capacity, tendency or the effect of:

(a) fixing, maintaining or stabilizing resale prices for respondent's rainwear;

(b) suppressing or eliminating competition between or among resellers of respondent's rainwear;

(c) depriving resellers of their freedom to function as free and independent businesspersons in connection with the sale of rainwear; and

(d) depriving consumers of the benefits of competition.

PAR. 9. The aforesaid acts, practices and methods of competition constitute unfair methods of competition or unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Jonathan Logan, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 50 Terminal Road, Secaucus, New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

For purposes of this order, the following definitions shall apply:

"Reseller" is defined as any person, partnership, firm or corporation which purchases any product from respondent.

"Prospective reseller" is defined as any person, partnership, firm or corporation which requests to purchase any product from respondent.

"Resale price" is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any reseller for pricing any product. Such term includes but is not limited to any suggested, established or customary resale price.

"Sale period" is defined as any break date, end of season or period for selling or advertising any product at a price other than the suggested, established or customary price.

"Product" is defined as apparel including but not limited to rainwear, coats, dresses and sportswear.

## I

*It is ordered,* That respondent Jonathan Logan, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, offering for sale, sale, distribution or advertising of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Establishing, exacting assurances to comply with, continuing or enforcing any combination, agreement, understanding or arrangement to fix, establish, control, maintain or enforce, directly or indirectly, the price at which any product is to be resold or advertised by any reseller or prospective reseller.

2. Communicating, publishing, circulating, disseminating or providing by any means any resale price or sale period to any reseller or prospective reseller for a period of three (3) years from the date of service of this order.

*Provided, however,* that after said three (3) year period, respondent shall not suggest resale prices or sale periods unless it is clearly and conspicuously stated on those pages of any list, book, advertising or promotional material or other document where any suggested resale price or sale period appears:

THE [RESALE PRICES OR SALE PERIODS] QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN [RESALE PRICES OR SALE PERIODS].

*Provided further, however,* that after said three (3) year period, respondent shall not suggest resale prices on any tag, ticket or comparable marking affixed or to be affixed to any product.

3. Requiring or coercing any reseller or prospective reseller to

establish, maintain, issue, adopt or adhere to any resale price or sale period.

4. Requiring or soliciting any reseller, prospective reseller, or employee or agent of respondent, either directly or indirectly, to report any reseller, prospective reseller, person or firm that does not adhere to any resale price or sale period.

5. Communicating with any reseller or prospective reseller concerning its deviation or alleged deviation from any resale price or sale period.

6. Suggesting or requiring that any reseller or prospective reseller refrain from or discontinue advertising any product at a certain resale price.

7. Stating directly or indirectly that any action may or will be taken against any reseller if it deviates from any resale price or sale period.

8. Threatening to withhold or withholding advertising allowances or any other assistance, payment, service or consideration from any reseller, or limiting or restricting the eligibility of any reseller to receive such benefits because said reseller advertises or sells any product at a certain resale price.

9. Making any payment or granting any other consideration or benefit to a reseller because another reseller has sold any product at a certain resale price.

10. Hindering or precluding the lawful use by any reseller of a brand name of respondent in conjunction with the sale or advertising of any product at any price.

11. Terminating, suspending, delaying shipments to or taking or threatening any action against any reseller because the reseller has, or was alleged to have, sold or advertised any product at a certain resale price or because the reseller may engage in any such activity in the future. Provided that respondent retains the right to terminate any reseller for lawful business reasons not inconsistent with this paragraph or any other paragraph of this order.

12. Attempting to secure any promise or assurance from any reseller or prospective reseller regarding the price at which such reseller or prospective reseller will or may advertise or sell any product; or requesting or requiring any reseller or prospective reseller to obtain approval from respondent for any price at which such reseller or prospective reseller may or will advertise or sell any product.

## II

*It is further ordered*, That respondent, its successors and assigns, shall:

1. Within sixty (60) days after the date of service of this order, mail under separate cover a copy of either this order or the Federal Trade Commission's news release in this matter to every present reseller of Jonathan Logan, Inc. An affidavit of mailing shall be sworn to by an official of respondent verifying that said mailing was completed.

2. Mail a copy of either this order or the Federal Trade Commission's news release in this matter to any reseller that purchases any product from Jonathan Logan, Inc. within five (5) years after the date of service of this order. The mailing required by this paragraph shall occur within thirty (30) days after first purchase by said reseller.

3. Within thirty (30) days after the date of service of this order distribute a copy of this order to respondent's operating divisions and subsidiaries in the United States and to all officers, sales personnel, sales agents and sales representatives and secure from each entity or person a signed statement acknowledging receipt of said order.

4. Upon written request received within six (6) months from the date of service of this order, reinstate any reseller terminated by respondent since January 1, 1974 for failing to maintain a certain resale price or sale period, provided that such reseller meets the credit requirements applied by respondent in the retention of resellers.

5. Notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

6. For a period of five (5) years from the date of service of this order maintain complete business records which fully disclose the manner and form of respondent's compliance with the order, including but not limited to any records referring or relating in whole or in part to:

(a) any communication between respondent and any reseller or prospective reseller relating to the price at which any reseller or prospective reseller is selling, proposes to sell, is advertising or proposes to advertise any product;

(b) the termination or suspension of any reseller for any reason;

(c) the refusal to deal with any prospective reseller for any reason, including the name and address of the prospective reseller; or

(d) any request for reinstatement pursuant to Part II Paragraph 4 of this order.

The records required by this paragraph shall be made available to Commission staff upon reasonable notice.

7. File with the Commission within sixty (60) days after service of this order a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

## IN THE MATTER OF

# UNIVERSAL TRAINING SERVICE, INC., ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9106. Complaint, Jan. 11, 1978 — Decision, July 27, 1979*

**This consent order, among other things, requires eight affiliated vocational schools, headquartered in Miami, Fla., and five corporate officers to cease misrepresenting the prospective earnings, employment opportunities and demand for graduates of their respective courses; the effectiveness of their job placement service; and the extent of job placement assistance they provide to their graduates. They must furnish potential customers with prescribed disclosures concerning educational and other factors considered by employers in hiring; the job success of former graduates; and contracting party's right to cancellation and refund within the provided 14-day "cooling-off" period. Additionally, the schools are required to make restitution to former eligible students in a specified manner.**

## *Appearances*

For the Commission: *Charles Peterson, Arnold C. Celnicker,* and *H. Marshall Korschun.*

For the respondents: *David Yelen, Yelen & Yelen,* Coral Gables, Fla.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Universal Training Service, Inc., Universal Heavy Construction Schools, Inc., Universal Truck Drivers School, Inc., Universal Airlines Personnel Schools, Inc., Universal Motel Schools, Inc., Insurance Adjusters Schools, Inc., Universal Diesel Mechanic Schools, Inc., corporations, and E. McSwiggan & Associates, a partnership, and Edward McSwiggan, Edward W. McSwiggan, Jr., Gerald W. McSwiggan and Agnes McSwiggan, individually and as officers or directors of each of the above-listed corporations and as a partner in E. McSwiggan & Associates, and Marilyn Anne McSwiggan, individually and as an officer of each of the above-listed corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Universal Training Service, Inc., Universal Heavy Construction Schools, Inc., Universal Truck Drivers School, Inc., Universal Airlines Personnel Schools, Inc., Universal Motel Schools, Inc., Insurance Adjusters Schools, Inc., and Universal Diesel Mechanic Schools, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Florida, and all have their principal offices and places of business located at 1901 N.W. Seventh St., Miami, Florida.

Respondent E. McSwiggan & Associates is a partnership not registered under the laws of the State of Florida, with its principal office and place of business at 1901 N.W. Seventh St., Miami, Florida.

Respondent Edward McSwiggan is an individual and is a partner in E. McSwiggan & Associates, and he has been an officer in each of the respondent corporations except Universal Diesel Mechanic Schools, Inc., and is now Chairman of the Board of Directors of each of the respondent corporations.

Respondents Edward W. McSwiggan, Jr., and Gerald W. McSwiggan are individuals, and each is a partner in E. McSwiggan & Associates, and each is an officer and/or director in all of the respondent corporations.

Respondent Agnes McSwiggan has been an officer in each of the respondent corporations.

Respondent Marilyn Anne McSwiggan is, or has been, an officer of all of the respondent corporations.

The said individual respondents cooperate and act together in formulating, directing and controlling the acts and practices of the corporate respondents and the partnership, including the acts and practices hereinafter set forth. Their addresses are the same as that of the corporate respondents.

Par. 2. Respondents are now, and for some time last past have been, engaged in the business of formulating, developing, advertising, offering for sale, selling, distributing, administering and servicing courses of instruction purporting to prepare graduates thereof for employment as heavy equipment operators, tractor-trailer drivers, airline stewardesses, airline hostesses, airline customer service representatives, motel managers, insurance claims adjusters and investigators, diesel mechanics, welders, motorcycle mechanics and other closely related occupations. Said courses include a number of correspondence lessons and a period of resident training at facilities located at Homestead, Florida; Miami Beach, Florida; or Las Vegas, Nevada, which facilities are operated by respondents.

Par. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, advertisements relating to the said courses of instruction to be published in newspapers of general circulation and in magazines and in interstate radio and television broadcasts and by and through the use of such advertisements, respondents have obtained the names and addresses of prospective purchasers of the said courses of instruction and have furnished such names and addresses to salesmen authorized by respondents to sell such courses. Such salesmen have contacted the prospective purchasers identified through the use of respondents' advertisements and have sold such courses to members of the public located in states other than the State of Florida. Said salesmen receive from and transmit to respondents through the U.S. mail "enrollment agreements," contracts, checks and other instruments of a commercial nature relating to the sale of said courses to said purchasers. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said courses of instruction in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their business as aforesaid, and for the purpose of enrolling prospective students and thereby promoting the sale of the aforesaid courses and various other courses of instruction, respondents make numerous statements through advertisements inserted and published in newspapers and periodicals having general circulation throughout the United States; in pamphlets, leaflets, circulars, form letters, cards, printed contracts and other media distributed through the U.S. mail; and through oral representations made by said representatives, on radio and television, and by other means and media, with respect to the nature of such courses of instruction and the advantages and benefits which the enrollees therein will receive from completion of said courses.

PAR. 5. By and through the use of the aforesaid statements, respondents and their salesmen now represent, and have represented, directly or by implication, that:

1. Persons who purchase and complete one of respondents' courses may reasonably expect to secure entry-level employment in the job classification for which they purportedly have been trained without additional training.

2. a. Persons graduating from respondents' courses at the time such representations were made, were earning; or

b. Persons then enrolling in respondents' courses would earn, when they graduated,

"big money" or high pay.

3. There is an urgent need or demand by employers for many

additional persons who have purchased and completed respondents' courses of instruction.

4. Respondents' placement service will secure an entry-level position in the subject fields of the courses offered by respondents for most, if not all, graduates of said courses who request placement assistance.

PAR. 6. In truth and in fact:

1. Persons who purchase and complete one of respondents' courses may not reasonably expect to secure entry-level employment in the job classifications for which they purportedly have been trained without additional training.

2. a. Persons graduating from respondents' courses, at the time such representations were made, were not earning; or

b. Persons then enrolling in respondents' courses would not earn, when they graduated,

"big money" or high pay.

3. There was not, and is not, an urgent need or demand by employers for many additional persons who have purchased and completed respondents' courses of instruction.

4. Respondents' placement service has not secured, and will not now secure, an entry-level position in the subject fields of the courses offered by respondents for most, if not all, graduates of said courses who request placement assistance.

Therefore, the statements and representations referred to in Paragraphs Four and Five hereof were, and are, false, misleading, unfair or deceptive acts or practices.

PAR. 7. Respondents have offered, and are now offering for sale training courses purporting to prepare purchasers thereof for employment as heavy equipment operators, tractor-trailer drivers, airline stewardesses, airline hostesses, airline customer service representatives, motel managers, insurance claims adjusters and investigators, diesel mechanics, welders, motorcycle mechanics and other closely related occupations without disclosing in advertising, promotional brochures or through sales representatives that many employers hire on the basis of other factors, such as, but not limited to, age, union membership, prior actual experience, college education, and participation in employer training programs. In many cases, the foregoing factors have prevented or have substantially impeded purchasers of respondents' courses from obtaining employment in the positions for which they have purportedly been trained.

Knowledge by prospective purchasers of respondents' training courses of factors such as those set out above is pertinent for the purpose of evaluating the possibility of securing future employment upon completion of the training courses and the nature of such employment. Thus, respondents have failed to disclose material facts which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such training courses. Therefore, the aforesaid acts or practices were, and are, false, misleading, unfair or deceptive acts or practices.

PAR. 8. In the further course of their aforesaid business, and at all times mentioned herein, respondents have offered for sale courses intended to train students for employment in certain positions or career fields without disclosing in their advertising, promotional brochures or through sales representatives:

1. The percentage of students recently completing the courses who were able to secure employment in the positions or career fields for which they were trained;
2. The initial salary received by such completing students; and
3. The percentage of recent students for each course offered that have failed to complete their course of instruction.

Knowledge of such facts by prospective students of respondents' courses would indicate that a significant number of students have not completed such courses and not secured employment. Thus, respondents have failed to disclose material facts which, if known to certain prospective students, would be likely to affect their consideration of whether to purchase such courses.

Therefore, the aforesaid acts or practices were and are false, misleading, deceptive or unfair acts or practices.

PAR. 9. In a substantial number of instances, through the use of false, misleading or deceptive acts or practices set forth herein, respondents or their representatives have been able to induce prospective enrollees into executing enrollment contracts upon initial contact without affording the enrollee sufficient time to carefully consider the purchase of the training course and the consequences thereof. Therefore, the aforesaid acts or practices of respondents were and are unfair acts or practices.

PAR. 10. Through the false, misleading, deceptive, or unfair acts or practices herein set forth, respondents have induced students and other persons or entities to pay, or contract to pay, to respondents substantial sums of money to purchase or pay for respondents' courses. In many instances such monies were paid to and received by respondents although such courses were of little value to students.

Respondents have received the aforesaid monies and have failed to offer or refund such sums to, or to rescind the contractual obligations of, many students and other persons or entities participating in the financing of such courses.

By inducing students and other persons or entities to pay, or contract to pay, to respondents substantial sums of money for respondents' courses where such courses are of little value to students and by failing to offer or refund such sums to, or to rescind the contractual obligations of many students and other persons or entities where such courses are of little value, respondents have engaged in unfair acts or practices.

Therefore, the said acts or practices constitute unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 11. By and through the use of the aforesaid acts, practices, or representations, respondents have placed in the hands of others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 12. The use by respondents of the false, misleading, unfair or deceptive statements, representations, acts or practices and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete and to induce a substantial number of such persons to purchase said courses of study and instruction offered by respondents by reason of such erroneous and mistaken belief.

PAR. 13. The aforesaid acts or practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Comission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondents Universal Training Service, Inc., Universal Heavy Construction Schools, Inc., Universal Truck Drivers School, Inc., Universal Airlines Personnel Schools, Inc., Universal Motel Schools, Inc., Insurance Adjusters Schools, Inc., Universal Diesel and Construction Mechanic Schools, Inc., and Universal School of Heavy Equipment Operations, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Florida, and all have their principal office and place of business at 1901 N.W. Seventh St., Miami, Florida.

Respondent E. McSwiggan & Associates is a partnership with its principal office and place of business at 1901 N.W. Seventh St., Miami, Florida.

Respondent Edward McSwiggan is an individual and is a partner in E. McSwiggan & Associates and he has been an officer in each of the respondent corporations except Universal Diesel and Construction Mechanic Schools, Inc., and is now Chairman of the Board of Directors of each of the respondent corporations.

Respondents Edward W. McSwiggan, Jr., and Gerald W. McSwiggan are individuals, and each is a partner in E. McSwiggan & Associates, and each is an officer or director in all of the respondent corporations.

Respondent Agnes McSwiggan is an individual, a partner in E. McSwiggan & Associates, and has been an officer in each of the respondent corporations.

Respondent Marilyn Anne McSwiggan is, or has been, an officer of all of the respondent corporations.

The said individual respondents' addresses are the same as that of the corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

## I

*It is ordered*, That respondents Universal Training Service, Inc., a corporation, Universal Heavy Construction Schools, Inc., a corporation, Universal Truck Drivers School, Inc., a corporation, Universal Airlines Personnel Schools, Inc., a corporation, Universal Motel Schools, Inc., a corporation, Insurance Adjusters Schools, Inc., a corporation, Universal Diesel and Construction Mechanic Schools, Inc., a corporation, and Universal School of Heavy Equipment Operations, Inc., a corporation, their successors and assigns and their officers, E. McSwiggan & Associates, a partnership, Edward McSwiggan, Edward W. McSwiggan, Jr., Gerald W. McSwiggan and Agnes McSwiggan, individually, as officers or directors of said corporations, and as partners trading and doing business as E. McSwiggan & Associates, and Marilyn Anne McSwiggan, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the advertising, promoting, offering for sale, sale or distribution of courses of study, training or instruction in the field of heavy equipment operation, tractor-trailer driving, airline personnel, motel management, insurance claim adjusting, diesel and construction mechanics, welding, motorcycle mechanics, or any other subject, trade or vocation in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, orally, visually, in writing or in any other manner, directly or by implication, except as hereafter provided in Paragraph 10 of Part I of this order that:

a. Graduates of respondents' courses may reasonably expect to secure entry-level employment in the job classification for which they purportedly have been trained.

b. Graduates of respondents' courses have earned or will or may earn any specified amount of money, or otherwise representing by any means, the prospective earnings of respondents' graduates.

c. There is a significant and substantial need or demand for graduates of respondents' courses.

d. Respondents' placement service has secured or will secure an entry-level position in the subject fields of the courses offered by respondents for most, if not all, graduates of said courses who requested or request placement assistance.

2. Representing orally, visually, in writing or in any other manner, directly or by implication, unless respondents disclose the information required in Paragraph 10 of Part I of this order:

a. The general conditions or employment demand in any employment market now or any time in the future.
b. The amount of salary or earnings generally available to persons employed in any occupation.

3. Misrepresenting, orally, visually, in writing or in any other manner, directly or by implication:

a. The employment opportunities available to graduates of any of respondents' courses.
b. The effectiveness or success of respondents' placement service in obtaining employment for graduates of any of respondents' courses.
c. The extent of any placement assistance or service furnished by respondents to help graduates of respondents' courses obtain employment.

4. Failing to disclose in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any tractor-trailer or truck driving course offered by respondents, the following information:

a. The title "IMPORTANT INFORMATION" printed in ten (10) point boldface type above the information specified in subparts b, c and d of this paragraph.
b. Many employers of tractor-trailer or truck drivers prescribe a minimum age of 21 years for drivers.
c. Many employers of tractor-trailer or truck drivers give preferential consideration in hiring to driver applicants who are 25 years of age or more.
d. Many employers of tractor-trailer or truck drivers give preferential consideration in hiring to driver applicants with actual tractor-trailer or truck driving experience.

5. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any heavy equipment operators training course offered by respondents, the following information:

a. The title "IMPORTANT INFORMATION" printed in ten (10) point boldface type above the information specified in subpart b of this paragraph.

b. Many employers of heavy equipment operators hire only operators belonging to unions and heavy equipment operators' unions will not necessarily grant graduates of [name of school] membership based upon the school's training.

6. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any insurance adjusters training course offered by respondents, the following information:

a. The title "IMPORTANT INFORMATION" printed in ten (10) point boldface type above the information specified in subparts b, c and d of this paragraph.

b. Many employers of insurance adjusters prescribe a minimum educational level of two (2) or four (4) years of college.

c. Many employers of insurance adjusters give preferential consideration in hiring to applicants with actual adjusting experience.

d. Many employers of insurance adjusters train their own personnel and training given by [name of school] is not accepted as a replacement for the employers' own training.

7. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any airlines personnel course offered by respondents, the following information:

a. The title "IMPORTANT INFORMATION" printed in ten (10) point boldface type above the information specified in subpart b of this paragraph.

b. Most, if not all, airlines train their own personnel and training given by [name of school] is not accepted as a replacement for the airlines' own training.

8. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any motel management course offered by respondents, the following information:

a. The title "IMPORTANT INFORMATION" printed in ten (10) point boldface type above the information specified in subparts b, c and d of this paragraph.

b. Many employers of motel managers require significant work experience in subordinate positions, either within their own organization, or with other companies within the industry.

c. Many employers of motel managers require that applicants without significant work experience within the industry be college graduates.

d. Many employers of motel managers have their own training programs and training given by [name of school] is not accepted as a replacement for their own programs.

9. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any diesel mechanics course offered by respondents, the following information:

a. The title "IMPORTANT INFORMATION" printed in ten (10) point boldface type above the information specified in subparts b and c of this paragraph.

b. Many employers of diesel mechanics require significant work experience or, for applicants without significant work experience within the industry, completion of a training or apprenticeship program lasting several years.

c. Many employers of diesel mechanics require new diesel mechanics to provide their own tools.

10. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any course of instruction or study offered by respondents, the following information concerning that course in the format depicted in Appendix A for the most recent base period:

For purposes of this paragraph, the "most recent base period" shall mean the most recent six month period, either from January 1 through June 30, or from July 1 through December 31, in which the course was offered, not including any base period that ended within four months of the time disclosures are required to be made pursuant to this paragraph.

a. The number and percentage of enrollees who have failed to complete their course of instruction.

b. The job placement rate, ratio or percentage for enrollees and graduates of the course, and also the numbers upon which such rates, ratios or percentages are based. Job placement shall be determined by the number of enrollees and graduates who (1) left or completed the course within the most recent base period and (2) within four months of leaving or completing the course, obtained employment in jobs for which respondents' course prepared them.

c. The salary range of respondents' graduates, stated in salary increments of $2,000, based upon annual gross salary.

The above disclosures, however, shall not be required for any course newly introduced by respondents, until such time as the new course has been in operation for one base period (either from January 1 through June 30, or from July 1 through December 31) and an additional four months after the base period. However, during such time, the following statement, and no other, shall be made in lieu of the Appendix A Disclosure Form required by this paragraph:

DISCLOSURE NOTICE

**This course has not been in operation long enough to indicate what, if any, actual employment or salary may result upon graduation from this course.**

A course previously offered, but discontinued for at least two (2) years before being offered again shall also be considered as a "course newly introduced" for purposes of this paragraph.

11. Failing to keep adequate records which may be inspected by Commission staff members upon reasonable notice which substantiate the data and information required to be disclosed by Paragraph 10 of Part I of this order.

12. Contracting for the sale of any course of instruction in any subject, trade or vocation in the form of a sales contract or any other agreement which does not contain in immediate proximity to the space reserved in the contract for the signature of the prospective enrollee in boldface type of a minimum size of ten (10) points a statement in the following form:

**You, the prospective enrollee, may cancel this transaction at any time prior to midnight of the fourteenth (14) day after the date of this transaction. Use attached notice of cancellation form to cancel this transaction.**

13. Failing to furnish each prospective enrollee, at the time he signs the sales contract or otherwise agrees to enroll in a course of instruction in any subject, trade or vocation offered by respondents, a complete form in duplicate, which shall be attached to the contract or agreement, and easily detachable, and which shall contain in boldface type of a minimum size of ten (10) points the following:

CANCELLATION FORM

**THE ENROLLMENT CONTRACT THAT YOU SIGNED WITH [NAME OF SCHOOL] ON [DATE] TO ENROLL IN [NAME OF COURSE] MAY BE CANCELLED BY YOU, FOR ANY REASON, IF YOU SIGN THIS STATEMENT AND MAIL IT TO THE ABOVE NAMED SCHOOL WITHIN FOURTEEN (14) DAYS FROM THE TIME THAT YOU RECEIVED THIS STATEMENT. YOU ARE THUS FREE TO CANCEL YOUR ENROLLMENT AND RECEIVE A FULL REFUND OF ANY MONIES YOU HAVE PAID TO THE SCHOOL. IF YOU DO WANT TO CANCEL, YOU SHOULD SIGN YOUR NAME BELOW AND MAIL THIS STATEMENT TO THE SCHOOL**

WITHIN FOURTEEN (14) DAYS. KEEP THE DUPLICATE COPY FOR YOUR OWN RECORDS.

*DATE*

*SIGNATURE*

14. Failing to orally inform each prospective enrollee of his right to cancel at the time he signs a contract or agreement for the sale of any course of instruction.

15. Misrepresenting in any manner the prospective enrollee's right to cancel.

16. Failing or refusing to honor any valid notice of cancellation by a prospective enrollee and within fourteen (14) days after the receipt of such notice, to: (a) refund all payments made under the contract or sale; and (b) cancel and return any negotiable instrument executed by the prospective enrollee in connection with the contract or sale.

17. Making any representations of any kind whatsoever which are not otherwise prescribed by other provisions of this order for which respondents have no reasonable basis prior to the making or disseminating thereof.

18. In the event the Commission promulgates a final Trade Regulation Rule on Advertising, Disclosure, Cooling-Off and Refund Requirements Concerning Proprietary Vocational and Home Study Schools, then, upon the effective date of such Rule, it shall completely supersede the provisions of this order set forth in Paragraphs 1, 2, 10, 12, 13, 14, 15, and 16 of Part I of this order provided that if no provision of the Rule relates in whole or in part to any matter covered by provisions of one of the aforesaid paragraphs of this order, then said provisions of said paragraph shall remain in full force and effect.

## II

*It is further ordered*, That:

1. Within sixty (60) days after the date this order is served on respondents (hereinafter "date of service") Commission staff shall name an independent contractor to be employed by respondents, subject to respondents' approval. Approval shall be granted except for good cause shown.

2. Within sixty (60) days after the date of service, respondents shall compile a list from records in respondents' possession, custody, or control and from information which may be transmitted to respondents by the Commission or by others within said number of days. To the extent said records or information so indicate, that list shall state the following with respect to each person who graduated from respondents' tractor-trailer drivers, heavy equipment operators, diesel

mechanics, welders, motorcycle mechanics, insurance adjusters, motel management or airline personnel courses between January 11, 1975 and January 11, 1978:

a. Name;
b. Last known address;
c. Course and date of completion;
d. Total tuition paid by or for such graduate to respondents;
e. Student number;
f. Social Security Number; and
g. The names and addresses of individuals listed as references or persons likely to know the whereabouts of the graduate.

3. Within sixty (60) days after the date of service, respondents shall give to the independent contractor and to Commission staff a copy of the list described in Part II, Paragraph 2 of this order.

4. Within one hundred (100) days after the date of service, the independent contractor shall deposit in the U.S. mail, first class postage prepaid, an envelope addressed to each graduate at his or her last known address. Each envelope shall bear the independent contractor's return address and shall contain:

a. A copy of the letter in the form set out in Appendix B.

b. A copy of the appropriate Questionnaire in the language, manner, and form shown in Appendices C–H.

c. A first class postage prepaid envelope addressed to the independent contractor.

5. a. If any envelope mailed to a graduate pursuant to Part II, Paragraph 4 of this order is returned to the independent contractor by the United States Postal Service, then the independent contractor shall determine whether the graduate's social security number is included as part of the list described in Paragraph 2 of Part II of this order.

b. For those graduates whose social security number is available, the independent contractor shall compile a list of names and social security numbers. The independent contractor shall maintain said list for thirty (30) days after the date of the mailing done pursuant to Paragraph 4 of Part II of this order.

c. Within one hundred thirty-five (135) days after the date of service, the independent contractor shall deliver to Commission staff the list described in Paragraph 5(b).

d. Within one hundred fifty (150) days after the date of service, Commission staff shall deliver to the independent contractor or his designee a magnetic computer tape containing the names and social security numbers from the list described in Paragraph 5(b) and such other names and social security numbers as Commission staff have obtained regarding potentially eligible class members who have not been located.

6. Within one hundred fifty (150) days after the date of service, the independent contractor shall request the assistance of the Social Security Administration, hereinafter SSA, in locating the potentially eligible class members by:

a. Signing a contract with SSA which, among other things, obligates the independent contractor to pay SSA's charges, *provided, however,* that the independent contractor shall not obligate itself to pay more than six dollars per potentially eligible class member unless the Commission agrees to reimburse it for said overage;

b. Providing SSA with the magnetic computer tape referred to in Paragraph 5(d) of Part II of the order;

c. Providing SSA with a letter for each potentially eligible class member in the form set out in Appendix I and a first class, postage prepaid envelope addressed to the independent contractor; and

d. Requesting SSA to mail such letters and return envelopes to the potentially eligible class members. SSA shall mail such letters within two hundred twenty (220) days after the date of service.

7. If the graduate's social security number is not available from the list, or if SSA is unwilling or unable to provide the services described in Paragraph 6 of Part II of the order, the independent contractor shall, within one hundred thirty-five (135) days after the date of service, mail an envelope to each name and address described in Part II, Paragraph 2(g) of this order. Each envelope shall bear the independent contractor's return address and shall contain:

a. A letter in the language, manner, and form shown in Appendix J; and

b. A first class postage prepaid envelope addressed to the independent contractor.

8. a. If, within two hundred seventy (270) days after the date of service, the independent contractor receives from any source a new address or addresses for graduates whose names appear on the list described in Part II, Paragraph 2 of this order, then, within seven (7) days after receiving such new addresses, the independent contractor shall deposit in the U.S. mail, first class postage prepaid, envelopes which shall be addressed to the graduates at the new address or addresses, bear the independent contractor's return address, and

contain the items described in Part II, Paragraphs 4(a), 4(b) and 4(c) of this order.

b. If, within two hundred seventy (270) days after the date of service, the independent contractor receives requests from anyone for a copy of Appendices B-H, or for information necessary for the implementation of Part II of this order, then, within seven (7) days after receiving such requests, the independent contractor shall deposit in the U.S. mail, first class postage prepaid, envelopes which shall be addressed to the persons making the requests, bear the independent contractor's return address, and contain the items described in Part II, Paragraphs 4(a), 4(b) and 4(c) of this order.

9. Within three hundred fifteen (315) days after the date of service, the independent contractor shall make an initial determination of those students who are eligible class members pursuant to the criteria enumerated in this paragraph, and in accordance with the instructions set forth in Appendix K of this order. An eligible class member is defined as a person who:

a. Graduated from one of respondents' courses between January 11, 1975, and January 11, 1978.

b. Took the course to get a job in a new or different field or to get a better job in the same field.

c. Did not have all of his tuition paid for by an employer or a governmental agency other than the Veterans Administration.

d. After graduation, made a serious effort to find a job in the field of his training.

e. After graduation, contacted four (4) or more companies for the purpose of securing employment.

f. Failed to secure a job in the field of his training.

g. Failed to obtain an offer for a job in the field of his training.

h. Demonstrated his eligibility by responses to the questionnaire and any subsequent inquiry mailed by the contractor pursuant to the provisions of this order before three hundred ten (310) days after the date of service.

Any person who does not satisfy the criteria in a–h listed above is an ineligible class member.

10. Within three hundred fifteen (315) days after the date of service, the independent contractor shall transmit to the respondents and to the Commission staff a list of the tentatively eligible class members as initially determined pursuant to Paragraph 9 of Part II of this order. This list shall be referred to as "tentatively eligible class

members." Said list shall be segregated by year of graduation and shall contain the following information:

a. The graduate's name.

b. The graduate's current address.

c. The graduate's student number as stated in the answer to question 4 of the Eligibility Questionnaire.

d. Total tuition paid as stated in the answer to question 7 of the Eligibility Questionnaire.

e. Whether the course was taken under Universal's special rate for couples and, if so, with whom, as stated in the answer to question 8 of the Eligibility Questionnaire.

f. The amount of the tuition paid by a government agency other than the Veterans Administration as stated in the answer to question 9 of the Eligibility Questionnaire.

g. The amount of the tuition paid by the graduate's employer and which the graduate did not have to repay, as stated in the answer to question 10 of the Eligibility Questionnaire.

h. The amount of the tuition previously refunded to the graduate by Universal as stated in the answer to question 11 of the Eligibility Questionnaire.

11. Within three hundred fifteen (315) days after the date of service, the independent contractor shall transmit to the respondents and to the Commission staff a list of the tentatively ineligible class members as initially determined pursuant to Paragraph 9 of Part II of this order. This list shall be referred to as "tentatively ineligible class members." Said list shall contain the following information:

a. Graduate's name.

b. Graduate's address.

12. Within three hundred fifteen (315) days after the date of service, the independent contractor shall transmit to respondents a copy of all Eligibility Questionnaires and other documents used in compiling the lists of tentatively eligible class members and tentatively ineligible class members.

13. Respondents may challenge the classification of any graduate and the factual accuracy of information appearing on the list of tentatively eligible class members; provided, however, that respondents set forth the factual basis for their challenges and furnish copies of documents relied upon. Respondents shall not rely upon information secured subsequent to September 29, 1978, directly or indirectly from the mailing of job information requests similar in form or substance to

Appendix U; *provided, however,* that respondents may rely upon an employer's verification that a graduate secured employment in a specific occupation. Respondents' challenges shall be contained in a document entitled "Respondents' Challenges."

Within three hundred forty-five (345) days after the date of service, respondents shall transmit to Commission staff "Respondents' Challenges," and the copies of the Eligibility Questionnaires and other documents used in compiling the lists of tentatively eligible class members and tentatively ineligible class members.

14. Within three hundred seventy-five (375) days after the date of service, Commission staff shall advise respondents if they agree with any of respondents' challenges. If Commission staff do not agree with a certain challenge, they shall so state and provide documentary evidence relied upon.

15. Commission staff may challenge the classification of any graduate and the factual accuracy of information appearing on the list of tentatively eligible class members; *provided, however,* that Commission staff set forth the factual basis for their challenges and furnish copies of documents relied upon. Commission challenges shall be contained in a document entitled, "Commission Staff's Challenges."

Within three hundred seventy-five (375) days after the date of service, Commission staff shall transmit to respondents "Commission Staff's Challenges," and the copies of the Eligibility Questionnaires and other documents used in compiling the lists of tentatively eligible class members and tentatively ineligible class members.

16. Within three hundred ninety (390) days after the date of service, respondents shall advise Commission staff if they agree with any of Commission staff's challenges. If respondents do not agree with a certain challenge, they shall so state and provide documentary evidence relied upon.

17. Within three hundred ninety-five (395) days after the date of service, Commission staff shall notify the independent contractor of reclassifications of graduates and any other mutually agreed upon changes in the list of tentatively eligible class members. The independent contractor shall incorporate said changes in the lists of tentatively eligible class members and tentatively ineligible class members.

18. Any remaining disputes concerning the factual information contained in the list of tentatively eligible class members shall be resolved by the independent contractor based upon the information and documents contained in "Respondents' Challenges" and "Commission Staff's Challenges." The independent contractor shall incorporate said changes in the lists of tentatively eligible class members and tentatively ineligible class members. The remaining disputes concern-

ing the classification of a graduate as eligible shall be resolved by arbitration pursuant to Paragraph 19.

19. a. Within three hundred ninety-five (395) days after the date of service, if either party continues to believe a graduate is improperly classified they may demand arbitration by mailing a letter in the form and manner set out in Appendix M and $100.

b. Arbitration shall be governed by the special rules set out in Appendix N and such rules of AAA as are not inconsistent therewith.

c. The arbitrator's decision in each matter shall be limited to finding whether the graduate is an eligible class member and such decision shall be final.

d. The arbitrator's decision in each and every matter shall be transmitted to respondents, Commission staff and the independent contractor within four hundred fifty-five (455) days after the date of service. The independent contractor shall incorporate said changes in the list of tentatively eligible class members and tentatively ineligible class members.

e. If neither party demands arbitration, the time periods following herein shall be advanced by sixty (60) days.

20. Subsequent to the procedures contained in Paragraph 19, the list of tentatively eligible class members shall be referred to as the "list of eligible class members" and the list of tentatively ineligible class members shall be referred to as the "list of ineligible class members."

21. Within four hundred ninety (490) days after the date of service, the independent contractor shall determine the refund due each graduate on the list of eligible class members by the following method:

a. For each graduate who did not take a course under respondents' special rate for couples:

(1) Subtract from the total tuition paid:

a) amount of tuition paid by a government agency other than the Veterans Administration;

b) amount of tuition paid by the graduate's employer and which the graduate did not have to repay;

c) amount of tuition previously refunded to the graduate by respondents.

The remainder shall be defined as "net tuition paid" and shall be recorded on the list of eligible class members.

b. For each graduate who did take a course under respondents' special rate for couples:

1) Subtract from the total tuition paid:

a) amount of tuition paid by a government agency other than the Veterans Administration;

b) amount of tuition paid by the graduate's employer and which the graduate did not have to repay;

c) amount of tuition previously refunded to the graduate by respondents.

2) Add together the results obtained through the procedure in subparagraph 21(b)(1) for each of the two graduates comprising a couple and divide the sum by 2. The quotient shall be defined as "net tuition paid" and shall be recorded on the list of eligible class members.

c. Multiply "net tuition paid," as defined by Paragraph 21(a) or 21(b), by .75. The product shall be defined as "75% of net tuition paid."

d. Add together 75% of net tuition paid for each eligible class member. Determine if this total exceeds $750,000 less administrative costs, hereinafter referred to as "the cap."

e. If the total derived in subparagraph (d) above is less than the cap, enter 75% of net tuition paid for each eligible class member on the list of eligible class members under the heading "refund due." Enter 1/3 of "refund due" on the list under the heading "1/3 refund due."

f. If the total derived in subparagraph (d) above exceeds the cap, reduce the 75% of tuition paid for each eligible class member on a pro rata basis so that the total refunds due equal the cap. Enter the pro rata refund so derived for each eligible class member on the list of eligible class members under the heading "refund due." Enter 1/3 of refund due on the list under the heading "1/3 refund due."

22. Administrative costs shall only include:

a. The independent contractor's fee, including such mailings, and only such mailings, as are provided for in this order.

b. Reimbursement of one half of the arbitration fee paid by the party requesting arbitration.

c. The sum charged by the Social Security Administration for locating potential class members, not to exceed six dollars per potential class member.

Administrative costs shall be borne by respondents.

23. Within five hundred five (505) days after the date of service,

the independent contractor shall deposit in the U.S. mail letters to eligible class members in the form set out in Appendix O and accompanied by a release in the form set out in Appendix P. The envelopes shall be mailed first class, postage prepaid.

24. Within five hundred five (505) days after the date of service, the independent contractor shall deposit in the U.S. mail to each person on the list of ineligible class members a letter in the form set out in Appendix Q. The envelopes shall be mailed first class, postage prepaid.

25. Within five hundred forty-five (545) days after the date of service, the independent contractor shall indicate on the list of eligible class members those graduates who returned releases within five hundred forty (540) days after the date of service and shall provide a copy of said list to respondents and to Commission staff.

26. Any letters, documents or other communications received by the independent contractor subsequent to five hundred forty-five (545) days after the date of service shall be provided to Commission staff.

27. Within five hundred sixty (560) days after the date of service, respondents shall mail the first one-third of the refund due to eligible class members who returned releases as indicated on the list provided by the independent contractor pursuant to Paragraph 25. All refunds made pursuant to this order shall be mailed first class, postage prepaid. The letter accompanying the refund shall be in the form set out in Appendix R.

28. Within nine hundred twenty-five (925) days after the date of service, respondents shall mail the second one-third of the refund due to eligible class members who returned releases as indicated on the list provided by the independent contractor pursuant to Paragraph 25.

The letter accompanying the refund shall be in the form set out in Appendix S and shall be mailed first class, postage prepaid.

29. Within one thousand two hundred ninety (1290) days after the date of service, respondents shall mail the final one-third of the refund due to eligible class members who returned releases as indicated on the list provided by the independent contractor pursuant to Paragraph 25.

The letter accompanying the refund shall be in the form set out in Appendix T and shall be mailed first class, postage prepaid.

30. If a letter mailed pursuant to Paragraphs 27, 28 or 29 is returned unopened, the Commission shall be so notified upon its return and shall have one hundred twenty (120) days after respondents so notify to secure a more recent address for the addressee. If the Commission cannot secure an address to which the letter is deliverable, the sum represented by the undelivered check shall be added to the sum remaining in the cap.

31. Within one thousand four hundred ten (1410) days after the

date of service, the Commission staff shall advise respondents of any graduate who should have received a refund under this part of the order, but did not, due to error in administering the procedures of this part. If funds remain in the cap to make additional disbursements, Commission staff and respondents shall make a good faith effort to determine if refunds should be made to said graduates.

32. For good cause shown, the Regional Director of the Commission's Atlanta Regional Office may grant extensions of time to respondents, the independent contractor, or Commission staff. The Regional Director shall grant extensions requested by the arbitrator or the Social Security Administration. When an extension of time is granted, all other time periods in this order shall be automatically adjusted accordingly.

33. Subsequent to January 8, 1979, and prior to three hundred fifteen (315) days after the date of service, respondents shall not initiate contact with any person graduating from respondents' courses between January 11, 1975, and January 11, 1978, *provided, however*, that respondents may communicate job vacancies evidenced by a current letter from the potential employer.

## III

*It is further ordered*, That respondents distribute a copy of this order to all operating divisions of said corporations and said partnership, and to present or future personnel, agents or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this order and that respondents secure from each such person a signed statement acknowledging receipt of said order.

*It is further ordered*, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered*, That each individual respondent named herein promptly notify the Commission of the discontinuance of his or her present business or employment and of his or her affiliation with a new business or employment. In addition, for a period of ten (10) years from the date of service of this order, the respondents shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the advertising, promoting, offering for sale, sale or distribution of courses of study, training or instruction in any subject, trade or vocation. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. In addition, until such time as the final compliance report is submitted pursuant to Part III of this order, each individual respondent shall promptly notify the Commission of any change in his or her address. The expiration of the notice provisions of this paragraph shall not affect any other obligation arising under this order.

*It is further ordered,* That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with Parts I and III of this order.

*It is further ordered,* That respondents herein shall, within six hundred twenty (620) days, nine hundred eighty-five (985) days, and one thousand four hundred seventy (1470) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with Part II of this order.

## APPENDIX A

### [NAME OF SCHOOL]

### IMPORTANT INFORMATION FOR PROSPECTIVE STUDENTS

**Below is the dropout rate, job placement rate and starting salaries for students in the [name of course] between [date] and [date]. Please read this page carefully before you decide whether or not to enroll in this course.**

| | |
|---|---|
| **1. Total number of students:** | **[number]** |
| **2. Students who failed to complete the course:** | **[number] – [percent]** |
| **3. Students (whether graduating or not) who obtained employment as [occupation]:** | **[number] – [percent]** |
| **4. Graduates who obtained employment as [occupation]:** | **[number] – [percent]** |
| **5. Starting salaries of students who obtained employment as [occupation]:** | |
| **Less than $6,000 per year:** | **[number] – [percent]** |
| **$6,000 — $7,999 per year:** | **[number] – [percent]** |
| **$8,000 — $9,999 per year:** | **[number] – [percent]** |
| **$10,000 — $11,999 per year:** | **[number] – [percent]** |
| **$12,000 — $13,999 per year:** | **[number] – [percent]** |
| **$14,000 — $15,999 per year:** | **[number] – [percent]** |
| **Over $16,000 per year:** | **[number] – [percent]** |

**NOTE: In compiling the foregoing data, information was sought from all students (indicated by item 1 above) and responses were received from ______ students.**

## APPENDIX B

[Name]
[Address]

Dear [Name]:

In accordance with an agreement between the United States Federal Trade Commission and Universal Training Service, Universal has consented to an order whereby Universal shall make adjustments in tuition for certain individuals who graduated from Universal's schools between January 11, 1975 and January 11, 1978.

Enclosed you will find a questionnaire. You may already have received a similar questionnaire from the Federal Trade Commission, the Veterans Administration or Universal Training Service. The enclosed questionnaire, however, seeks different information which is necessary to determine your eligibility for a tuition adjustment. We urge you to answer this questionnaire to the best of your ability no matter how you answered past questionnaires.

You are under no obligation to fill out and return the enclosed questionnaire. However, if you wish to be considered for a tuition adjustment, you must fill out and return the enclosed questionnaire.

DIRECTIONS: Please complete the questionnaire and return it in the enclosed, stamped, addressed envelope. It is suggested that you fill out and mail this questionnaire as soon as possible. If you don't mail it within 21 days, it may not arrive in time for us to consider you for a tuition adjustment. If you misplace the envelope provided, please mail your questionnaire to [name and address of party on return envelope].

You must follow the directions and should answer all questions which apply to you *completely and truthfully*, to the best of your knowledge. Questionnaires which are incomplete or improperly filled out could affect your eligibility.

During 1977, a few students took "combination courses" which consisted of 3 weeks of one subject plus 2 weeks of another subject (for example, heavy equipment plus diesel mechanics, diesel mechanics plus truck driving, heavy equipment plus truck driving, etc.). If you took a combination course, we enclosed a questionnaire which should reflect your major (that is, the course you took for 3 weeks). This is the questionnaire that will be used to determine your eligibility for a tuition adjustment.

Universal sometimes offered a special tuition rate when 2 people signed up for a course together (for example, husband & wife). If you took the course under this plan, we would like you and the person you enrolled with each to fill out a separate questionnaire. If the person you enrolled with did not receive a questionnaire, please make a copy of the enclosed questionnaire for their use or write to us and we will send an additional questionnaire.

After you have answered every applicable question in the questionnaire, do not sign the questionnaire. Take it to a Notary Public. Then sign and swear to the questionnaire in the presence of that person. He or she will then notarize it. Notaries can usually be found at banks, real estate offices, auto dealers, and, in some areas, pharmacies.

You will be notified whether or not you are eligible. Therefore, it is important that we know your current address. Please send notification of any change in your home address to [name and address on the return envelope].

If you have any questions regarding this letter, please contact [name and address of independent contractor].

Your cooperation is appreciated.

Sincerely,

[Independent Contractor]

Enclosure

## APPENDIX C

# QUESTIONNAIRE FOR GRADUATES OF UNIVERSAL DIESEL AND CONSTRUCTION MECHANIC SCHOOL

1. Did you ever take Universal's Diesel Mechanic, Welding or Motorcycle Mechanic Course?

   Yes ☐ No ☐

   If your answer to Question 1 was "Yes", skip to Question 3.

2. If your answer to Question 1 was "No", did you take a different course from Universal?

   Yes ☐ No ☐

   If so, which one? _________________.

   (Skip to Question 18, sign this document and return it in the enclosed postage paid envelope *without having it notarized*).

3. Did you receive a certificate of completion?

   Yes ☐ No ☐

   If so, give the date you received it, if known: _________________.

   (If your answer to Question 3 was "No", skip to Question 18, sign this document and return it in the enclosed postage paid envelope *without having it notarized*).

4. Give your Universal student identification number, if known: __________

5. Did you have a job in the field of your course *when you enrolled in the course?*

   Yes ☐ No ☐

   If so, what kind of job did you have?

   ______________________________________

6. What was the *most important* reason you took the course? (Look over all of the reasons below and then put a check next to the *one* most important reason).

   A. To get a job in a new or different field. ☐

   B. To get a better job in the same field. ☐

   C. To learn something new or useful, but not to get a new or better job. ☐

   D. Other, please explain: ☐

   ______________________________________

   ______________________________________

   ______________________________________

7. What was the total tuition cost for the course?

   $________________

8. Did you take the course with a friend or relative under Universal's special rate for couples?

   Yes ☐ No ☐

   If so, please give the name of the friend or relative:

   ______________________________________

9. Did a governmental agency other than the Veterans Administration (for example, a Job Corps agency or a manpower rehabilitation agency) pay any part of this tuition?

   Yes ☐ No ☐

   If so, how much? $________________

   (Give amount which a government agency other than VA paid. Do not give amount which VA paid).

10. Did your employer pay any part of this tuition?
Yes ☐ No ☐
If so, how much? $________________
If so, did you have to repay your employer?
Yes ☐ No ☐

11. Did you ever get a full or partial tuition refund from Universal?
Yes ☐ No ☐
If so, how much? $________________

12. After finishing the resident training part of the course, did you make a *serious effort* to find a job as a diesel mechanic, welder or motorcycle mechanic?
Yes ☐ No ☐
If the answer is "No", skip to Question 18.

13. ANSWER *ALL* PARTS OF THIS QUESTION AS *PRECISELY AS POSSIBLE.*
(a) After you finished the resident training part of the course, did you personally visit, telephone, or write any companies for the purpose of getting a job in the field of your training course?
Yes ☐ No ☐
(b) If your answer to Question 13(a) is "Yes", what is the total number of companies you personally visited, telephoned, or wrote for the purpose of getting a job?
(If you do not know the exact number, give your best estimate).
________________
(c) Give the names and locations of the companies that you contacted for the purpose of getting a job. Check type of contact. (Do not give more than seven companies, even if you remember more).

| *NAME OF COMPANY* | *LOCATION* | *VISITED* | *TELEPHONED* | *WROTE* |
|---|---|---|---|---|
| (1) ____________ | __________ | ☐ | ☐ | ☐ |
| (2) ____________ | __________ | ☐ | ☐ | ☐ |
| (3) ____________ | __________ | ☐ | ☐ | ☐ |
| (4) ____________ | __________ | ☐ | ☐ | ☐ |
| (5) ____________ | __________ | ☐ | ☐ | ☐ |
| (6) ____________ | __________ | ☐ | ☐ | ☐ |
| (7) ____________ | __________ | ☐ | ☐ | ☐ |

(d) After you contacted companies which you described in 13(c), did you make a *second* contact to any of these companies for the purpose of obtaining employment?
Yes ☐ No ☐

14. After you completed the resident training part of the course, and after you started looking for a job, did you ever contact Universal for more help in finding a job?
Yes ☐ No ☐

15. Since completing your resident training, have you ever worked as a diesel mechanic, welder or motorcycle mechanic?
Yes ☐ No ☐
(If your answer is "Yes", skip to Question 17).

16. Since completing your resident training, have you ever been offered a job as a diesel mechanic, welder or motorcycle mechanic?
Yes ☐ No ☐

17. My present job is: ________________________________

My present business address is:

Employer's Name

Number Street

City State Zip Code

My business telephone number is: (*Area Code*) ______________

18. My present home address is:

Number Street Apartment

City State Zip Code

My home telephone number is: ( _____ ) ______________

Signature
(Please read the accompanying letter before signing).

State of ______________
County of ______________
Subscribed and sworn to before me
this _____ day of _____,
19_____

Notary Public

My commission expires: _____

WARNING: It is a federal crime for anyone to knowingly and willfully make a false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States. 18 U.S.C. Sec. 1001.

## APPENDIX D

## QUESTIONNAIRE FOR GRADUATES OF UNIVERSAL TRUCK DRIVERS SCHOOL

1. Did you ever take Universal's Truck Driving Course?
   Yes ☐ No ☐
   If your answer to Question 1 was "Yes", skip to Question 3.
2. If your answer to Question 1 was "No", did you take a different course fro Universal?
   Yes ☐ No ☐
   If so, which one? ______________

(Skip to Question 18, sign this document and return it in the enclosed postage paid envelope *without having it notarized*).

3. Did you receive a certificate of completion?
Yes ☐ No ☐
If so, give the date you received it, if known: ________________
(If your answer to Question 3 was "No", skip to Question 18, sign this document and return it in the enclosed postage paid envelope *without having it notarized*).
4. Give your Universal student identification number, if known: ________________
5. Did you have a job in the field of your course *when you enrolled in the course?*
Yes ☐ No ☐
If so, what kind of job did you have?
________________________________________
6. What was the *most important* reason you took the course? (Look over all of the reasons below and then put a check next to the *one* most important reason).
A. To get a job in a new or different field. ☐
B. To get a better job in the same field. ☐
C. To learn something new or useful, but not to get a new or better job. ☐
D. Other, please explain: ☐
________________________________________
________________________________________
________________________________________
7. What was the total tuition cost for the course?
$________________
8. Did you take the course with a friend or relative under Universal's special rate for couples?
Yes ☐ No ☐
If so, please give the name of the friend or relative:
________________________________________
9. Did a governmental agency other than the Veterans Administration (for example, a Job Corps agency or a manpower rehabilitation agency) pay any part of this tuition?
Yes ☐ No ☐
If so, how much? $________________
(Give amount which a government agency other than VA paid. Do not give amount which VA paid).
10. Did your employer pay any part of this tuition?
Yes ☐ No ☐
If so, how much? $________________
If so, did you have to repay your employer?
Yes ☐ No ☐
11. Did you ever get a full or partial tuition refund from Universal?
Yes ☐ No ☐
If so, how much? $________________
12. After finishing the resident training part of the course, did you make a *serious effort* to find a job as a tractor-trailer driver or a second driver of a tractor-trailer?
Yes ☐ No ☐
If the answer is "No", skip to Question 18.
13. ANSWER *ALL* PARTS OF THIS QUESTION AS *PRECISELY AS POSSIBLE.*

(a) After you finished the resident training part of the course, did you personally visit, telephone, or write any companies for the purpose of getting a job in the field of your training course?

Yes ☐ No ☐

(b) If your answer to Question 13(a) is "Yes", what is the total number of companies you personally visited, telephoned, or wrote for the purpose of getting a job?

(If you do not know the exact number, give your best estimate).

________________

(c) Give the names and locations of the companies that you contacted for the purpose of getting a job. Check type of contact. (Do not give more than seven companies, even if you remember more).

| *NAME OF COMPANY* | *LOCATION* | *VISITED* | *TELEPHONED* | *WROTE* |
|---|---|---|---|---|
| (1) ________ | ________ | ☐ | ☐ | ☐ |
| (2) ________ | ________ | ☐ | ☐ | ☐ |
| (3) ________ | ________ | ☐ | ☐ | ☐ |
| (4) ________ | ________ | ☐ | ☐ | ☐ |
| (5) ________ | ________ | ☐ | ☐ | ☐ |
| (6) ________ | ________ | ☐ | ☐ | ☐ |
| (7) ________ | ________ | ☐ | ☐ | ☐ |

(d) After you contacted companies which you described in 13(c), did you make a *second* contact to any of these companies for the purpose of obtaining employment?

Yes ☐ No ☐

14. After you completed the resident training part of the course, and after you started looking for a job, did you ever contact Universal for more help in finding a job?

Yes ☐ No ☐

15. Since completing your resident training, have you ever worked as a tractor-trailer driver or second driver on a tractor-trailer?

Yes ☐ No ☐

(If your answer is "Yes", skip to Question 17).

16. Since completing your resident training, have you ever been offered a job as a tractor-trailer driver or second driver on a tractor-trailer?

Yes ☐ No ☐

17. My present job is: ________________________

________________________________

My present business address is:

________________________________

Employer's Name

________________________________

Number Street

________________________________

City State Zip Code

My business telephone number is: (*Area Code*) ____________

18. My present home address is:

________________________________

Number Street Apartment

City State Zip Code

My home telephone number is: (____________) ____________

________________________
Signature
(Please read the accompanying
letter before signing).

State of ____________
County of ____________
Subscribed and sworn to before me
this _____ day of _____,
19_____

________________________
Notary Public

My commission expires: ______

WARNING: It is a federal crime for anyone to knowingly and willfully make a false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States. 18 U.S.C. Sec. 1001.

## APPENDIX E

## QUESTIONNAIRE FOR GRADUATES OF UNIVERSAL AIRLINES PERSONNEL SCHOOL

1. Did you ever take Universal's Airlines Personnel Course?
   Yes ☐ No ☐
   If your answer to Question 1 was "Yes", skip to Question 3.
2. If your answer to Question 1 was "No", did you take a different course from Universal?
   Yes ☐ No ☐
   If so, which one? ____________________
   (Skip to Question 18, sign this document and return it in the enclosed postage paid envelope *without having it notarized*).
3. Did you receive a certificate of completion?
   Yes ☐ No ☐
   If so, give the date you received it, if known: ____________
   (If your answer to Question 3 was "No", skip to Question 18, sign this document and return it in the enclosed postage paid envelope *without having it notarized*).
4. Give your Universal student identification number, if known: ____________
5. Did you have a job in the field of your course *when you enrolled in the course?*
   Yes ☐ No ☐
   If so, what kind of job did you have? ____________
6. What was the *most important* reason you took the course? (Look over all of the reasons below and then put a check next to the *one* most important reason).

A. To get a job in a new or different field. ☐
B. To get a better job in the same field. ☐
C. To learn something new or useful, but not to get a new or better job. ☐
D. Other, please explain: ☐

________________________________________

________________________________________

________________________________________

7. What was the total tuition cost for the course?
$____________
8. Did you take the course with a friend or relative under Universal's special rate for couples?
Yes ☐ No ☐
If so, please give the name of the friend or relative:
________________________________________
9. Did a governmental agency other than the Veterans Administration (for example, a Job Corps agency or a manpower rehabilitation agency) pay any part of this tuition?
Yes ☐ No ☐
If so, how much? $____________
(Give amount which a government agency other than VA paid. Do not give amount which VA paid).
10. Did your employer pay any part of this tuition?
Yes ☐ No ☐
If so, how much? $____________
If so, did you have to repay your employer?
Yes ☐ No ☐
11. Did you ever get a full or partial tuition refund from Universal?
Yes ☐ No ☐
If so, how much? $____________
12. After finishing the resident training part of the course, did you make a *serious effort* to find a job as a flight attendant, ticket agent, reservations agent, cargo agent, travel agent or ship-line agent?
Yes ☐ No ☐
If the answer is "No", skip to Question 18.
13. ANSWER *ALL* PARTS OF THIS QUESTION AS *PRECISELY AS POSSIBLE.*
(a) After you finished the resident training part of the course, did you personally visit, telephone, or write any companies for the purpose of getting a job in the field of your training course?
Yes ☐ No ☐
(b) If your answer to Question 13(a) is "Yes", what is the total number of companies you personally visited, telephoned, or wrote for the purpose of getting a job?
(If you do not know the exact number, give your best estimate).
____________
(c) Give the names and locations of the companies that you contacted for the purpose of getting a job. Check type of contact. (Do not give more than seven companies, even if you remember more).

| *NAME OF COMPANY* | *LOCATION* | *VISITED* | *TELEPHONED* | *WROTE* |
|---|---|---|---|---|
| (1) ________ | ________ | ☐ | ☐ | ☐ |
| (2) ________ | ________ | ☐ | ☐ | ☐ |
| (3) ________ | ________ | ☐ | ☐ | ☐ |
| (4) ________ | ________ | ☐ | ☐ | ☐ |
| (5) ________ | ________ | ☐ | ☐ | ☐ |
| (6) ________ | ________ | ☐ | ☐ | ☐ |
| (7) ________ | ________ | ☐ | ☐ | ☐ |

(d) After you contacted companies which you described in 13(c), did you make a *second* contact to any of these companies for the purpose of obtaining employment?
Yes ☐ No ☐

14. After you completed the resident training part of the course, and after you started looking for a job, did you ever contact Universal for more help in finding a job?
Yes ☐ No ☐

15. Since completing your resident training, have you ever worked as a flight attendant, ticket agent, reservations agent, cargo agent, travel agent, or ship-line agent?
Yes ☐ No ☐
(If your answer is "Yes", skip to Question 17).

16. Since completing your resident training, have you ever been offered a job as a flight attendant, ticket agent, reservations agent, cargo agent, travel agent, or ship-line agent?
Yes ☐ No ☐

17. My present job is: ________________________

________________________________________

My present business address is:

________________________________________

Employer's Name

________________________________________

Number Street

________________________________________

City State Zip Code

My business telephone number is: (*Area Code*) ____________.

18. My present home address is:

________________________________________

Number Street Apartment

________________________________________

City State Zip Code

My home telephone number is: ( ____________ ) ____________.

________________________

Signature
(Please read the accompanying letter before signing).

State of ________________
County of ________________
Subscribed and sworn to before me
this _____ day of _____,
19_____

________________________________

Notary Public

My commission expires: ______

WARNING: It is a federal crime for anyone to knowingly and willfully make a false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States. 18 U.S.C. Sec. 1001.

## APPENDIX F

## QUESTIONNAIRE FOR GRADUATES OF UNIVERSAL MOTEL SCHOOL

1. Did you ever take Universal's Motel Course?
   Yes ☐ No ☐
   If your answer to Question 1 was "Yes", skip to Question 3.
2. If your answer to Question 1 was "No", did you take a different course from Universal?
   Yes ☐ No ☐
   If so, which one? ________________
   (Skip to Question 18, sign this document and return it in the enclosed postage paid envelope *without having it notarized*).
3. Did you receive a certificate of completion?
   Yes ☐ No ☐
   If so, give the date you received it, if known: ________________.
   (If your answer to Question 3 was "No", skip to Question 18, sign this document and return it in the enclosed postage paid envelope *without having it notarized*).
4. Give your Universal student identification number, if known: ________________
5. Did you have a job in the field of your course *when you enrolled in the course?*
   Yes ☐ No ☐
   If so, what kind of job did you have?
   ________________________________________
6. What was the *most important* reason you took the course? (Look over all of the reasons below and then put a check next to the *one* most important reason).
   A. To get a job in a new or different field. ☐
   B. To get a better job in the same field. ☐
   C. To learn something new or useful, but not to get a new or better job. ☐
   D. Other, please explain: ☐
   ________________________________________
   ________________________________________
   ________________________________________
7. What was the total tuition cost for the course?
   $________________
8. Did you take the course with a friend or relative under Universal's special rate for couples?
   Yes ☐ No ☐
   If so, please give the name of the friend or relative:
   ________________________________________
9. Did a governmental agency other than the Veterans Administration (for example,

a Job Corps agency or a manpower rehabilitation agency) pay any part of this tuition?

Yes ☐ No ☐

If so, how much? $________________

(Give amount which a government agency other than VA paid. Do not give amount which VA paid).

10. Did your employer pay any part of this tuition?

Yes ☐ No ☐

If so, how much? $________________

If so, did you have to repay your employer?

Yes ☐ No ☐

11. Did you ever get a full or partial tuition refund from Universal?

Yes ☐ No ☐

If so, how much? $________________

12. After finishing the resident training part of the course, did you make a *serious effort* to find a job as a hotel or motel manager, assistant manager, front desk clerk, executive housekeeper or night auditor?

Yes ☐ No ☐

If the answer is "No", skip to Question 18.

13. ANSWER *ALL* PARTS OF THIS QUESTION AS *PRECISELY AS POSSIBLE*.

(a) After you finished the resident training part of the course, did you personally visit, telephone, or write any companies for the purpose of getting a job in the field of your training course?

Yes ☐ No ☐

(b) If your answer to Question 13(a) is "Yes", what is the total number of companies you personally visited, telephoned, or wrote for the purpose of getting a job?

(If you do not know the exact number, give your best estimate).

________________

(c) Give the names and locations of the companies that you contacted for the purpose of getting a job. Check type of contact. (Do not give more than seven companies, even if you remember more).

| *NAME OF COMPANY* | *LOCATION* | *VISITED* | *TELEPHONED* | *WROTE* |
|---|---|---|---|---|
| (1) ________________ | ________________ | ☐ | ☐ | ☐ |
| (2) ________________ | ________________ | ☐ | ☐ | ☐ |
| (3) ________________ | ________________ | ☐ | ☐ | ☐ |
| (4) ________________ | ________________ | ☐ | ☐ | ☐ |
| (5) ________________ | ________________ | ☐ | ☐ | ☐ |
| (6) ________________ | ________________ | ☐ | ☐ | ☐ |
| (7) ________________ | ________________ | ☐ | ☐ | ☐ |

(d) After you contacted companies which you described in 13(c), did you make a *second* contact to any of these companies for the purpose of obtaining employment?

Yes ☐ No ☐

14. After you completed the resident training part of the course, and after you started looking for a job, did you ever contact Universal for more help in finding a job?

Yes ☐ No ☐

15. Since completing your resident training, have you ever worked as a hotel or

motel manager, assistant manager, front desk clerk, executive housekeeper or night auditor?

Yes ☐ No ☐

(If your answer is "Yes", skip to Question 17).

16. Since completing your resident training, have you ever been offered a job as a hotel or motel manager, assistant manager, front desk clerk, executive housekeeper or night auditor?

Yes ☐ No ☐

17. My present job is: ______________________

______________________

My present business address is:

______________________

Employer's Name

______________________

Number Street

______________________

City State Zip Code

My business telephone number is: (*Area Code*) ______________.

18. My present home address is:

______________________

Number Street Apartment

______________________

City State Zip Code

My home telephone number is: (______________) ______________.

______________________

Signature

(Please read the accompanying letter before signing).

State of ______________

County of ______________

Subscribed and sworn to before me this ______________ day of

______________,

19______.

______________________

Notary Public

My commission expires: ______

WARNING: It is a federal crime for anyone to knowingly and willfully make a false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States. 18 U.S.C. Sec. 1001.

## APPENDIX G

# QUESTIONNAIRE FOR GRADUATES
# OF
# UNIVERSAL HEAVY CONSTRUCTION SCHOOL

1. Did you ever take Universal's Heavy Equipment Operating Course?
   Yes ☐ No ☐
   If your answer to Question 1 was "Yes", skip to Question 3.
2. If your answer to Question 1 was "No", did you take a different course from Universal?
   Yes ☐ No ☐
   If so, which one? ________________.
   (Skip to Question 18, sign this document and return it in the enclosed postage paid envelope *without having it notarized*).
3. Did you receive a certificate of completion?
   Yes ☐ No ☐
   If so, give the date you received it, if known: ________________.
   (If your answer to Question 3 was "No", skip to Question 18, sign this document and return it in the enclosed postage paid envelope *without having it notarized*).
4. Give your Universal student identification number, if known: ________________
5. Did you have a job in the field of your course *when you enrolled in the course?*
   *Yes* ☐ *No* ☐
   If so, what kind of job did you have?
   ________________________________________________
6. What was the *most important* reason you took the course? (Look over all of the reasons below and then put a check next to the *one* most important reason).
   A. To get a job in a new or different field. ☐
   B. To get a better job in the same field. ☐
   C. To learn something new or useful, but not to get a new or better job. ☐
   D. Other, please explain: ☐
   ________________________________________________
   ________________________________________________
   ________________________________________________
   ________________________________________________
7. What was the total tuition cost for the course?
   $________________
8. Did you take the course with a friend or relative under Universal's special rate for couples?
   Yes ☐ No ☐
   If so, please give the name of the friend or relative:
   ________________________________________________
9. Did a governmental agency other than the Veterans Administration (for example, a Job Corps agency or a manpower rehabilitation agency) pay any part of this tuition?
   Yes ☐ No ☐
   If so, how much? $________________
   (Give amount which a government agency other than VA paid. Do not give amount which VA paid).
10. Did your employer pay any part of this tuition?
    Yes ☐ No ☐
    If so, how much? $________________
    If so, did you have to repay your employer?
    Yes ☐ No ☐

**11. Did you ever get a full or partial tuition refund from Universal?**
**Yes ☐ No ☐**
**If so, how much? $________________**

**12. After finishing the resident training part of the course, did you make a *serious effort* to find a job as a heavy equipment operator?**
**Yes ☐ No ☐**
**If the answer is "No", skip to Question 18.**

**13. ANSWER *ALL* PARTS OF THIS QUESTION AS *PRECISELY AS POSSIBLE.***

**(a) After you finished the resident training part of the course, did you personally visit, telephone, or write any companies for the purpose of getting a job in the field of your training course?**
**Yes ☐ No ☐**

**(b) If your answer to Question 13(a) is "Yes", what is the total number of companies you personally visited, telephoned, or wrote for the purpose of getting a job?**
**(If you do not know the exact number, give your best estimate).**
________________

**(c) Give the names and locations of the companies that you contacted for the purpose of getting a job. Check type of contact. (Do not give more than seven companies, even if you remember more).**

| ***NAME OF COMPANY*** | ***LOCATION*** | ***VISITED*** | ***TELEPHONED*** | ***WROTE*** |
|---|---|---|---|---|
| **(1)** ____________ | __________ | ☐ | ☐ | ☐ |
| **(2)** ____________ | __________ | ☐ | ☐ | ☐ |
| **(3)** ____________ | __________ | ☐ | ☐ | ☐ |
| **(4)** ____________ | __________ | ☐ | ☐ | ☐ |
| **(5)** ____________ | __________ | ☐ | ☐ | ☐ |
| **(6)** ____________ | __________ | ☐ | ☐ | ☐ |
| **(7)** ____________ | __________ | ☐ | ☐ | ☐ |

**(d) After you contacted companies which you described in 13(c), did you make a *second* contact to any of these companies for the purpose of obtaining employment?**
**Yes ☐ No ☐**

**14. After you completed the resident training part of the course, and after you started looking for a job, did you ever contact Universal for more help in finding a job?**
**Yes ☐ No ☐**

**15. Since completing your resident training, have you ever worked as a heavy equipment operator?**
**Yes ☐ No ☐**
**(If your answer is "Yes", skip to Question 17).**

**16. Since completing your resident training, have you ever been offered a job as a heavy equipment operator?**
**Yes ☐ No ☐**

**17. My present job is: ____________________________**

________________________________________

**My present business address is:**

________________________________________

**Employer's Name**

________________________________________
Number Street

________________________________________
City State Zip Code

My business telephone number is: (*Area Code*) ______________

18. My present home address is:

________________________________________
Number Street Apartment

________________________________________
City State Zip Code

My home telephone number is: ( ______________ ) ______________.

________________________________________
Signature
(Please read the accompanying letter before signing).

State of ______________
County of ______________
Subscribed and sworn to before me this ______________ day of
______________,
19____

________________________________________
Notary Public

My commission expires: ______

WARNING: It is a federal crime for anyone to knowingly and willfully make a false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States. 18 U.S.C. Sec. 1001.

## APPENDIX H

# QUESTIONNAIRE FOR GRADUATES
# OF
# UNIVERSAL INSURANCE ADJUSTERS SCHOOL

1. Did you ever take Universal's Insurance Adjusting Course?
   Yes ☐ No ☐
   If your answer to Question 1 was "Yes", skip to Question 3.
2. If your answer to Question 1 was "No", did you take a different course from Universal?
   Yes ☐ No ☐
   If so, which one? ________________________________
   (Skip to Question 18, sign this document and return it in the enclosed postage paid envelope *without having it notarized*).
3. Did you receive a certificate of completion?
   Yes ☐ No ☐

If so, give the date you received it, if known: ________________

(If your answer to Question 3 was "No", skip to Question 18, sign this document and return it in the enclosed postage paid envelope *without having it notarized*).

4. Give your Universal student identification number, if known: ________________

5. Did you have a job in the field of your course *when you enrolled in the course?*

   Yes ☐ No ☐

   If so, what kind of job did you have? ________________

   ________________________________________________

6. What was the *most important* reason you took the course? (Look over all of the reasons below and then put a check next to the *one* most important reason).

   A. To get a job in a new or different field. ☐

   B. To get a better job in the same field. ☐

   C. To learn something new or useful, but not to get a new or better job. ☐

   D. Other, please explain: ☐

   ________________________________________________

   ________________________________________________

   ________________________________________________

7. What was the total tuition cost for the course?

   $________________

8. Did you take the course with a friend or relative under Universal's special rate for couples?

   Yes ☐ No ☐

   If so, please give the name of the friend or relative:

   ________________________________________________

9. Did a governmental agency other than the Veterans Administration (for example, a Job Corps agency or a manpower rehabilitation agency) pay any part of this tuition?

   Yes ☐ No ☐

   If so, how much? $________________

   (Give amount which a government agency other than VA paid. Do not give amount which VA paid).

10. Did your employer pay any part of this tuition?

    Yes ☐ No ☐

    If so, how much? $________________

    If so, did you have to repay your employer?

    Yes ☐ No ☐

11. Did you ever get a full or partial tuition refund from Universal?

    Yes ☐ No ☐

    If so, how much? $________________.

12. After finishing the resident training part of the course, did you make a *serious effort* to find a job as an insurance adjuster or investigator?

    Yes ☐ No ☐

    If the answer is "No", skip to Question 18.

13. ANSWER *ALL* PARTS OF THIS QUESTION AS *PRECISELY AS POSSIBLE.*

    (a) After you finished the resident training part of the course, did you personally visit, telephone, or write any companies for the purpose of getting a job in the field of your training course?

    Yes ☐ No ☐

    (b) If your answer to Question 13(a) is "Yes", what is the total number of

companies you personally visited, telephoned, or wrote for the purpose of getting a job?
(If you do not know the exact number, give your best estimate).
______________

(c) Give the names and locations of the companies that you contacted for the purpose of getting a job. Check type of contact. (Do not give more than seven companies, even if you remember more).

| *NAME OF COMPANY* | *LOCATION* | *VISITED* | *TELEPHONED* | *WROTE* |
|---|---|---|---|---|
| (1) ______________ | ______________ | ☐ | ☐ | ☐ |
| (2) ______________ | ______________ | ☐ | ☐ | ☐ |
| (3) ______________ | ______________ | ☐ | ☐ | ☐ |
| (4) ______________ | ______________ | ☐ | ☐ | ☐ |
| (5) ______________ | ______________ | ☐ | ☐ | ☐ |
| (6) ______________ | ______________ | ☐ | ☐ | ☐ |
| (7) ______________ | ______________ | ☐ | ☐ | ☐ |

(d) After you contacted companies which you described in 13(c), did you make a *second* contact to any of these companies for the purpose of obtaining employment?
Yes ☐ No ☐

14. After you completed the resident training part of the course, and after you started looking for a job, did you ever contact Universal for more help in finding a job?
Yes ☐ No ☐

15. Since completing your resident training, have you ever worked as an insurance adjuster or investigator?
Yes ☐ No ☐
(If your answer is "Yes", skip to Question 17).

16. Since completing your resident training, have you ever been offered a job as an insurance adjuster or investigator?
Yes ☐ No ☐

17. My present job is: ______________________________
______________________________________________
My present business address is:
______________________________________________
Employer's Name
______________________________________________
Number Street
______________________________________________
City State Zip Code
My business telephone number is: (*Area Code*) ______________

18. My present home address is:
______________________________________________
Number Street Apartment
______________________________________________
City State Zip Code
My home telephone number is: ( ______________ ) ______________

______________________________

Signature
(Please read the accompanying
letter before signing).

State of _______________
County of _______________
Subscribed and sworn to before me
this _______________ day of
_______________,
19_____.

______________________________
Notary Public

My commission expires: _____.

WARNING: It is a federal crime for anyone to knowingly and willfully make a false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States. 18 U.S.C. Sec. 1001.

## APPENDIX I

[NAME]
[ADDRESS]

DEAR [NAME]:

In accordance with an agreement between the United States Federal Trade Commission and Universal Training Service, Universal has consented to an order whereby Universal shall make adjustments in tuition for certain individuals who graduated from Universal's schools between January 11, 1975, and January 11, 1978.

On [ Date ], we sent out questionnaires to certain graduates. Your name was on this mailing list. However, because of the age of Universal's files, we are afraid that the questionnaire may not have reached you. We, therefore, request that you send us your current address. It is important that you furnish your name, address and telephone number to us in the enclosed prepaid envelope within 14 days after you receive this letter. Otherwise we may not be able to get an Eligibility Questionnaire delivered to you. Should you lose the envelope, send your name, address and telephone number to [name and address of independent contractor].

This letter was forwarded to you by the Social Security Administration which agreed to assist in contacting you because of the circumstances of this matter. However, the Social Security Administration has not revealed your home or business address to the Federal Trade Commission or any other party. You are free, therefore, to reply or not as you choose.

[Independent Contractor]

---

(cut here)

Name: ______________________________
Current Address: ______________________________
Telephone Number: (Area Code) ____________________

## APPENDIX J

[NAME]
[ADDRESS]

DEAR [NAME]:

In accordance with an agreement between the United States Federal Trade Commission and Universal Training Service, you are requested to provide us with the last known address of [insert name of student].

It is believed that this person graduated from one of Universal's courses between January 11, 1975, and January 11, 1978. The Federal Trade Commission has determined that it is necessary to collect information from certain graduates of Universal Training Service's courses to implement the terms of an order which, among other things, requires the company to make tuition adjustments for certain graduates, possibly including the person named above.

If you know the current address of the person named above, please write it in the place provided at the bottom of this page and return it to us in the enclosed postage prepaid envelope as soon as possible, but *not later than* 14 days after you receive this letter. If you lose the envelope, send the information requested to [name and address of independent contractor].

Your cooperation will be appreciated.

Sincerely,

[Independent Contractor]

______________________________
(current address of person listed above)

______________________________

## APPENDIX K

### Instructions to Independent Contractor

The tasks to be performed by the independent contractor and the time period in which to perform said tasks are set out in Part II of this order.

The contractor shall receive the responses to Appendices C–H (Eligibility Questionnaires). From these responses the contractor will determine all eligible class members and, supplemented by information furnished pursuant to this order, the amount of refund to which each member is entitled. All references to question numbers refer to the questions on the Eligibility Questionnaires.

a. If the answer to question 1 is "no," go to question 2; if the answer is "yes," go to question 3.

b. If the answer to question 2 is "yes," send the graduate the appropriate Eligibility Questionnaire; if it is "no," place the individual on the list of "ineligibles."

c. If the answer to question 3 is "no," place the graduate on the list of ineligibles.

d. Disregard questions 4 and 5 for purposes of determining eligibility.

e. If the answer to question 6 is A or B, continue. If the answer is C, place the graduate on the ineligible list.

Answer D allows the graduate to state his own reason for taking the course. Analyze this answer and determine whether it resembles A, B or C. Treat the answer in the same manner as the one that it most closely resembles.

f. Disregard questions 7 and 8 for purposes of determining eligibility.

g. If the answer to question 9 is "yes" and the dollar amount is the same as listed in question 7, place the graduate on the list of ineligibles.

h. If the answer to the first part of question 10 is "yes" and the dollar amount is the same as listed in question 7 and the answer to the last part of question 10 is "no," place the graduate on the list of ineligibles.

i. If the answer to question 11 is "yes" and the dollar amount is the same as that listed in question 7, place the graduate on the list of ineligibles.

j. If the answer to question 12 is "no," place the graduate on the list of ineligibles.

k. If the answer to question 13(a) is "no," place the graduate on the list of ineligibles.

l. If the answer to question 13(b) is less than 4, place the graduate on the list of ineligibles.

m. If the answer to question 13(c) includes the names of one or more companies, or if the answer indicates that the graduate does not remember any names, continue to question 13(d).

n. If the graduate leaves 13(c) blank, send him a letter in the form set out in Appendix L and a copy of question 13(c).

o. If in response to Appendix L the graduate does not list the name and address of at least one company or state he does not remember, place his name on the list of ineligibles.

p. Disregard questions 13(d) and 14 for purposes of determining eligibility.

q. If the answer to question 15 is "yes," place the graduate on the list of ineligibles.

r. If the answer to question 16 is "yes," place the graduate on the list of ineligibles.

s. Place all graduates who have not been placed on the list of ineligibles on the list of eligible class members and determine the refund due.

It is your duty to determine whether a graduate is an eligible class member. If a returned questionnaire is not signed and notarized and the answers to the questions do not place the graduate on the list of ineligibles, return the questionnaire to the graduate requesting that he sign it in the presence of a notary public. If the answer to a question is absent or unclear and the answers to the remaining questions do not place the graduate on the list of ineligibles, you must write to him and request a clarification. If you receive no response, place the graduate on the list of ineligibles. If you receive a response, use it, in conjunction with the other information you have, to determine if the graduate is eligible or ineligible.

## APPENDIX L

[NAME]
[ADDRESS]

DEAR [NAME]:

When you filled out a recent questionnaire regarding the course you took with Universal Training Service, you failed to answer question 13(c). It will be necessary for us to have an answer to this question before we can determine your eligibility for a tuition adjustment.

Please answer the enclosed copy of question 13(c) and return it in the enclosed postage prepaid envelope. If you do not remember the companies you contacted, so state.

If you lose the envelope, send the answer to [name and address of independent contractor].

[Independent Contractor]

## APPENDIX M

## DEMAND FOR ARBITRATION THROUGH THE AMERICAN ARBITRATION ASSOCIATION

DATE ________________

To: American Arbitration Association
140 West 51st Street
New York, New York 10020
*Attn:* Mr. Michael Hoellering
From: [Name and Address of Requester]
Re: [Name and Address of Potentially Eligible Graduate]

Pursuant to the terms of the consent order between the Federal Trade Commission and Universal Training Service, an independent contractor has classified the above-named individual as [an eligible or ineligible] member of the restitution class. The undersigned challenges that classification. It is requested that a determination be made as to the correct classification of the named individual.

Copies of the graduate's questionnaire, evidence relied upon by respondents and Commission staff and the requisite fee are enclosed herewith.

The undersigned alleges that the named individual is [an eligible or ineligible] class member because:

Signed,

## APPENDIX N

## SPECIAL ARBITRATION RULES FOR NEGOTIATED CONSENT ORDER (DOCKET NO. 9106) BETWEEN THE FEDERAL TRADE COMMISSION AND UNIVERSAL TRAINING SERVICE, INC. FOR ARBITRATION THROUGH THE AMERICAN ARBITRATION ASSOCIATION

### I. *Initiation of Arbitration*

With respect to each potentially eligible graduate, for purposes of a tuition adjustment, Federal Trade Commission staff or respondents Universal Training Service, *et al.*, hereinafter "the party(ies)," shall initiate an arbitration proceeding within the time specified in Part II, Paragraph 19 of the order, by sending to the American Arbitration Association, hereafter "AAA," the following information and documents in duplicate:

1. A "Demand for Arbitration" in the language, manner, and form shown herein as Appendix M.
2. A copy of the Eligibility Questionnaire and a copy of all other documents relied upon by the independent contractor, Commission staff or respondents in connection with any of the provisions of Part II of the order. Respondents shall

not rely upon information secured subsequent to September 29, 1978, directly or indirectly from the mailing of job information requests similar in form or substance to Appendix U; *provided, however*, that respondents may rely upon an employer's verification that a graduate secured employment in a specific occupation.

3. A copy of Part II of the order and the instructions to the independent contractor.

II. *Appointment of Arbitrator*

With respect to each matter for which a Demand for Arbitration is submitted, AAA shall appoint an arbitrator to arbitrate said dispute, and shall appoint another arbitrator whenever an appointed arbitrator is unable to serve promptly. All such arbitrators appointed by AAA, including any such arbitrators employed by AAA, shall be persons qualified by AAA as arbitrators.

III. *Determination by Arbitrator as to Whether the Party Has a Reasonable Basis for Demanding Arbitration*

Upon receipt of the Demand for Arbitration from the party, the arbitrator shall examine the accompanying documents described in Part I of these Rules and shall determine whether there is any factual basis for putting through arbitration the party's claim that the potentially eligible graduate was misclassified. In making the determination the arbitrator shall be limited to and bound by the standards and definitions of Part II of the order, and the instructions to the independent contractor. If the arbitrator decides that the demand for arbitration by the requesting party is inconsistent with Part II of the order, the arbitrator shall so inform the requesting party by letter and shall close the case if the party, within ten (10) days after receipt of said letter, fails to provide the arbitrator with material facts which demonstrate that arbitration would not be inconsistent with Part II of the order.

IV. *Evidence by Filing of Documents*

All evidence submitted by parties to the arbitrated dispute shall consist of written information or documents. No oral testimony shall be accepted.

V. *Relevancy and Materiality of Evidence*

The arbitrator shall be the sole judge of the relevancy and materiality of the evidence offered.

VI. *Transmittal of Evidence to Opposing Party*

Upon determining that respondents' request for arbitration is not inconsistent with Part II of the order, the arbitrator shall mail to the non-requesting party copies of the requesting party's Demand for Arbitration and all documents submitted to the arbitrator by the requesting party.

VII. *Additional Evidence*

The arbitrator may request such additional evidence as he or she deems necessary from either party, the potentially eligible graduate or anyone else, before closing the arbitration and shall allow said individual fifteen (15) days after the date of said request to provide such evidence.

VIII. *Arbitrator's Decision*

With respect to each arbitration proceeding, and on the basis of evidence received pursuant to these Rules, the arbitrator shall render his or her decision within ten (10) days after said arbitration proceeding is closed. The arbitrator's decision shall be limited to whether the potentially eligible graduate was misclassified. The decision shall not be made solely on the failure of a party to submit rebuttal evidence or evidence requested. The decision shall be final and binding on all parties.

The AAA shall mail a notice of the arbitrator's decision to both parties and to the independent contractor without including in said notice any detailed findings of fact or opinion.

IX. *Burden of Proof*

In all cases referred to arbitration, the requesting party shall carry the burden of proof to establish that a potentially eligible graduate was misclassified.

X. *General Provisions*

A. To the extent not inconsistent with these special Rules, the Commercial Arbitration Rules of AAA shall apply to proceedings under these Rules.

B. Either party may have evidence submitted under these Rules by an attorney representing said party. However, use of an attorney is not required.

XI. *Costs*

The administrative fee payable to the AAA for each matter submitted to arbitration shall be $100.00. When the requesting party demands arbitration, it shall tender said fee with its Demand for Arbitration.

XII. *Nothing in These Rules Shall Invalidate or Restrict Any Right or Remedy of Any Consumer Under Any State or Federal Law.*

## APPENDIX O

[NAME]
[ADDRESS]

DEAR [NAME]:

In accordance with an agreement between the United States Federal Trade Commission and Universal Training Service, Universal has consented to an order whereby Universal shall make adjustments in tuition for certain individuals who graduated from Universal's schools between January 11, 1975 and January 11, 1978.

The order of the Commission contains the provisions identifying the class of persons eligible for adjustments, and the procedures for making adjustments. (You may obtain a copy of the order without charge by writing to the Federal Trade Commission, Public Reference Branch, Room 130, Washington, D.C. 20580. Refer to Universal Training Service, Inc., Docket No. 9106).

In accordance with the provisions of the order, it has been determined that you are entitled to a tuition adjustment of $ ________________.

Pursuant to the Commission's order, *to get a refund you must sign and return the enclosed release* which waives any legal claims against Universal for additional refunds. It is important that you return the release in the enclosed postage paid envelope within 14 days after you receive this letter.

Under terms of the order you will receive 1/3 of the sum above after a signed release is returned, 1/3 at the end of one year and the remaining 1/3 at the end of two years. We will need your most current address in order to send your refunds. Therefore, make sure you let us know if you move.

If you lose the envelope, send the release to [name and address of independent contractor].

[Independent Contractor]

## APPENDIX P

### RELEASE

In consideration of the partial refund payment to be made to me pursuant to the Federal Trade Commission's order issued in Docket 9106, I hereby release Universal Training Service, Inc., [name of school attended by the graduate], and all of its affiliates from any and all further claims, known or unknown, with respect to or relating to my tuition for a Universal course.

(Signature)

(Date)

Print name and address:

## APPENDIX Q

### IMPORTANT NOTICE

Pursuant to an order of the Federal Trade Commission, Universal Training Service agreed to make a partial tuition adjustment to certain former students in its courses. The order of the Commission contains provisions identifying the class of persons eligible for adjustments and the procedures for making adjustments.

In accordance with Part II of the order, it has been determined, based upon your response to the "Eligibility Questionnaire," that you are not eligible for an adjustment. A copy of this order may be obtained from the Federal Trade Commission, Public Reference Branch, Room 130, Washington, D.C. 20580, without charge. Refer to Universal Training Service, Inc., Docket No. 9106.

[Independent Contractor]

## APPENDIX R

[NAME]
[ADDRESS]

DEAR [NAME]:

Enclosed is a check for the first one-third of your tuition refund pursuant to the Federal Trade Commission order against Universal Training Service about which you were informed. To make sure that you receive the remaining parts of your refund, please notify [name and address of independent contractor] of a change in your name or address.

UNIVERSAL TRAINING SERVICE,
INC.

## APPENDIX S

[NAME]
[ADDRESS]

DEAR [NAME]:

Enclosed is a check for the second one-third of your tuition refund pursuant to the

Federal Trade Commission order against Universal Training Service about which you were informed. To make sure that you receive the remaining part of your refund, please notify [name and address of independent contractor] of a change in your name or address.

UNIVERSAL TRAINING SERVICE,
INC.

## APPENDIX T

[NAME]
[ADDRESS]

DEAR [NAME]:

Enclosed is a check for the final one-third of your tuition refund pursuant to the Federal Trade Commission order against Universal Training Service about which you were informed. It will no longer be necessary for you to notify [name of independent contractor] of a change in your name or address.

UNIVERSAL TRAINING SERVICE,
INC.

## APPENDIX U

Dear Graduate,

We sincerely hope you have found success in the vocational field you trained for.

Are you working? If so, please tell us about it. The information requested below will keep your file current.

You may be interested to know that *Universal Schools awards a $10.00 cash bonus* for each graduate who notifies us of his employment, past or present.

To qualify, you must have *either worked or are currently* working in a job that is related to your training program at the school.

If you are having difficulty finding a job, let us know, additional placement assistance will be forthcoming.

Sincerely,

UNIVERSAL TRAINING SERVICE, INC.

Barbara Desi
Placement Director

---

1. Name and address of employer. ____________________

________________________________________

2. What are your duties and job title where employed. __________

________________________________________

3. Since graduation have you ever worked in a occupation related to your training? ☐ YES ☐ NO

4. If yes, where did you work? ____________________
   - A. What were your duties? ____________________
   - B. How long did you work there? ____________________

SIGNED ____________________

Student Number ____________________

Your mailing address ____________________

________________________________________

# IN THE MATTER OF

# AIRCO, INC.

## CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 3 OF THE CLAYTON ACT

*Docket 9098. Complaint, May 18, 1977 — Decision, July 31, 1979*

This consent order, among other things, requires a Montvale, N.J. manufacturer and seller of industrial gases and welding products to cease, for a period of twenty years, from entering into, or enforcing agreements that require distributors of industrial gases to purchase from Airco any part of their industrial gas requirements, unless the initial term or renewal of such contracts and the minimum period for termination falls within specified time frame. The firm is also prohibited from requiring a distributor to purchase industrial gases at particular locations, or as a condition of purchasing welding or other industrial gas products at the same or any other location; and from refusing to sell its products to a distributor because that distributor refuses to purchase from Airco a designated part of its industrial gas requirements at a particular location. Additionally, the order prescribes arbitration for any dispute arising from company's refusal to sell; and sets forth the manner and form of such arbitration.

## *Appearances*

For the Commission: *Gordon Youngwood, Peter L. Feldman,* and *Stephen C. Garavito.*

For the respondent: *W. Foster Wollen, Sherman & Sterling,* New York City, *R. Bruce MacWhorter, Danforth C. Newcomb and David Graus,* New York City.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Airco, Inc. ("Airco"), respondent herein, has violated the provisions of Section 3 of the Clayton Act, as amended, (15 U.S.C. 14), and the provisions of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

## DEFINITIONS

1. For the purpose of construing this complaint, the following definition shall apply:

(a) "Distributors" shall mean a business firm whose primary function in the industrial gas and welding products business is the purchase of industrial gases and welding products for the purpose of resale.

(b) "Welding products" are the equipment, supplies and consummable items used to fuse or cut metals.

(c) "Industrial gases" shall mean the following gases: oxygen, nitrogen, argon, acetylene, hydrogen, and helium.

## RESPONDENT

2. Respondent Airco is a publicly-owned New York corporation with its principal place of business at 85 Chestnut Ridge Road, Montvale, New Jersey.

3. Airco is engaged in the manufacture and sale of industrial gases, ferroalloys and carbide, medical gases and equipment, cryogenic equipment, welding and cutting equipment, carbon, graphite, electronics and metals.

4. For 1975 Airco had net sales of $765.7 million and a net income of $42.7 million.

5. Airco, one of the nation's three leading producers of industrial gases, sells industrial gases to distributors through its Airco Welding Products Division. During 1972, Airco had the second largest volume of domestic sales of acetylene, argon, helium, nitrogen and oxygen to distributors and the largest volume of domestic sales of hydrogen to distributors.

6. At all times relevant herein, Airco sold and shipped its products in interstate commerce and was engaged in commerce within the meaning of the Clayton Act, as amended, and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

## TRADE AND COMMERCE

7. The relevant lines of commerce affected by the actions of Airco are the sales to distributors of each of the following relevant industrial gases: acetylene, argon, helium, hydrogen, nitrogen, and oxygen.

8. During 1972, there were substantial sales by Airco of acetylene, argon, helium, hydrogen, nitrogen, and oxygen to distributors. Airco is one of the major sellers of these six gases to distributors.

9. The United States and certain sections thereof constitute geographic markets or sections of the country for each relevant line of commerce.

10. Barriers to entry are high for a new distributor of relevant industrial gases.

11. Barriers to entry are high for a new supplier of relevant industrial gases.

## ACTS AND PRACTICES

12. In the course of interstate commerce, Airco, a leading company in each relevant line of commerce alleged herein, has used and is using its economic power and has engaged and is engaging in acts and practices to foreclose competition in the sale of relevant industrial gases to distributors. Among the acts and practices in which Airco has engaged and is continuing to engage in the course of interstate commerce, are the following:

(a) Requiring distributors, pursuant to a contract, agreement, or understanding, to purchase from Airco their total requirements of each of the relevant industrial gases.

(b) Requiring distributors to purchase their total requirements of the relevant industrial gases from Airco as a condition to their purchasing any relevant industrial gas from Airco.

(c) Requiring distributors to purchase their total requirements of the relevant industrial gases from Airco as a condition to their purchasing of welding products from Airco.

(d) Making available to customers of industrial gas distributors who have ceased purchasing one or more Airco industrial gases, products at rates set for the purpose of destroying a competitor or eliminating competition.

(e) Preventing, hindering and frustrating distributors from engaging in the production and sale of acetylene.

## EFFECTS

13. The acts and practices identified in Paragraph 10 have or may have the following effects among others:

(a) Substantially lessening competition for the sale of relevant industrial gases to distributors.

(b) Substantially lessening competition for the sale of relevant industrial gases to consumers.

(c) Increasing entry barriers into each line of commerce alleged herein.

(d) Depriving distributors of the opportunity of competing for sales of relevant industrial gases to certain classes of customers.

(e) Depriving distributors of the freedom of choice to purchase industrial gases from competitors of Airco.

## VIOLATIONS

14. The acts and practices alleged herein constitute tying arrangements, exclusive dealing arrangements or total requirements contracts in violation of Section 3 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

15. The acts and practices alleged herein constitute unfair methods of competition or unfair acts and practices by Airco in violation of Section 5 of the Federal Trade Commission Act, as amended.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 3 of the Clayton Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Airco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 85 Chestnut Ridge Road, in the City of Montvale, State of New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

For the purpose of this order, the following definitions shall apply:

1. "Industrial gases" shall mean the following gases: oxygen, nitrogen, argon, acetylene, hydrogen and helium.
2. "Welding products" shall mean equipment, supplies and consumable items used to fuse or thermally to cut metals.
3. "Distributor" shall mean a business firm whose primary function in the industrial gas and welding products business is the purchase of industrial gases and welding products for the purpose of resale within the United States, but shall not include any business firm whose primary function in the resale of industrial gases and welding products is the distribution of industrial gases and welding products to entities engaged in the plumbing, heating or air conditioning trade.
4. "Location" shall mean a bona fide sales and distribution facility operated by a distributor as a receiving or distribution point for industrial gases, which facility ordinarily carries an inventory of industrial gases and welding products and is staffed with a bona fide sales force and operating and/or distribution personnel. Two or more facilities that are staffed by common sales and operating and/or distribution personnel shall be deemed to comprise a single location.
5. "Requirements" of any distributor for an industrial gas at any location shall mean such distributor's total requirements for such industrial gas either delivered to such location or delivered direct by the distributor to using customers which are generally served by sales or distribution personnel assigned to such location.

## I

*It is ordered and directed*, That for a period of twenty (20) years from the date of service of this order, respondent Airco, Inc. (hereinafter Airco), its subsidiaries, divisions, affiliates, successors, and assigns, in connection with the distribution, offering for sale, or sale of industrial gases or welding products to distributors in which it owns less than a majority interest, shall:

A. Not offer, renew, extend or enter into any contracts or agreements, or enforce directly or indirectly those provisions of any contract or agreement, which require any distributor:

1. to purchase from Airco all or any part of its requirements of any industrial gas under a contract or agreement (a) having an initial term,

or a term on renewal, of more than 1 year or (b) if the agreement shall renew itself on an anniversary date unless terminated, or be terminable on notice, requiring prior notice of more than 90 days to effect such termination; or

2. to purchase from Airco all or any part of its requirements of any industrial gas at one or more locations as a condition to being permitted to purchase from Airco such industrial gas at another location; or

3. to purchase from Airco all or any part of its requirements of any industrial gas at any location as a condition to be permitted to purchase from Airco any other industrial gas at the same or any other location; or

4. to purchase from Airco all or any part of its requirements of any industrial gas at any location as a condition to being permitted to purchase from Airco any welding products.

B. Not refuse to sell, subject to Paragraph A 1 above, industrial gases or welding products to an Airco distributor because that distributor refuses (1) to purchase all or a designated part of its requirements of industrial gases from Airco; or (2) to purchase from Airco all or any part of its requirements of industrial gases at more than one of its locations.

## II

*It is further ordered,* That for a period of twenty (20) years from the date of service of this order:

A. If Airco has at its instance refused to sell to an Airco Distributor one or more industrial gases or welding products, following an election by that distributor to purchase one or more industrial gases from a supplier other than Airco, and a dispute exists between the distributor and Airco as to whether such refusal by Airco, subject to Paragraph I A 1 above, is because that distributor refuses (1) to purchase from Airco all or a designated part of its requirements of industrial gases; or (2) to purchase from Airco all or any part of its requirements of industrial gases at more than one of its locations, then the distributor or Airco may elect to have the dispute determined by arbitration under this Part II. If the arbitrators shall determine that such refusal by Airco was by reason of an aforementioned refusal to purchase by the distributor, Airco may nevertheless refuse to sell industrial gases or other welding products to such distributor if it is determined by the arbitrators that (a) such refusal was not in reprisal for the distributor's election to purchase industrial gases elsewhere than from Airco and (b) there was no commercially advantageous and less restrictive alternative available to Airco enabling Airco to market in the distributor's market area such industrial gas or gases purchased by the distributor from other sources.

In making such determinations, the arbitrators (i) shall consider, among other facts they deem relevant and to the extent they deem relevant, the current and prior relationship and course of business between Airco and the distributor and between Airco and other distributors; other practical business alternatives open to Airco; the present and future effect of the refusal to sell by Airco on other Airco distributors; and Airco's goals as to market participation and profitability; (ii) shall be guided by applicable law as to issues raised and (iii) shall not regard as itself dispositive but shall consider their conclusion (if they do so conclude) that Airco's said refusal to sell would not have occurred but for the earlier refusal to purchase by the distributor.

B. Unless otherwise agreed to by the parties, arbitration shall be held by three arbitrators and at a location in the United States designated by the distributor and in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The award of the arbitrators shall be final and binding on both parties. The arbitrators shall, upon a proper showing, issue protective orders and/or receive evidence *in camera* in the same manner as an administrative law judge of the Federal Trade Commission. In the event of a default by either party in appearing before the arbitrators, the arbitrators are authorized to render a decision, pursuant to advance written notice, upon the testimony of the party appearing.

C. Airco will not refuse to sell to any distributor eligible to invoke arbitration under this Part II without providing 60 days written notice to the distributor (a "discontinuance notice"). Any demand by a distributor for arbitration shall be delivered by notice in writing to Airco within 60 days of receipt of a discontinuance notice. Any demand by Airco for arbitration shall be effective upon notice to the distributor. Where arbitration has been demanded by either party, Airco may not refuse to sell the product referred to in the discontinuance notice to such distributor pending the decision of the arbitrators. The arbitrators shall render their decision within 120 days from the date of demand for arbitration and shall have the mandate to impose a time schedule for briefing, argument, presentation of evidence and the like to permit such time limit to be observed. The costs other than attorneys' fees shall be shared equally by the distributor and by Airco if Airco is the successful party in the arbitration and solely by Airco if the distributor prevails, unless in the course of arbitration it is determined by the arbitrators that either of the parties did not act in good faith, in which event that person not acting in good faith shall bear all such costs.

D. The distributor's right to arbitration shall be clearly set forth in any distributor agreements that Airco shall enter into with its distributors.

E. As soon as feasible and in any event within 10 days after receipt by Airco of a distributor's demand for arbitration under this Part II, or simultaneously with transmittal by Airco of an arbitration demand to a distributor, Airco shall notify the Commission of such demand and the nature of the dispute. Airco shall also notify the Commission of the names of the arbitrators and the dates of the arbitration hearings within 10 days of the time known. The Commission may at its election intervene as friend of the arbitrators, and present evidence, engage in argument and submit briefs.

If Airco shall initiate arbitration hereunder, then the Commission may, in its sole discretion, at any time before any evidence has been taken suspend the provisions of this Part II respecting such arbitration. Airco will, if arbitration was initiated by it, on demand, provide the Commission with reasonable information for it to determine whether to suspend arbitration proceedings. If the Commission elects to suspend the provisions of Part II, Airco will not effect its refusal to sell to the distributor for at least 120 days from the date of receipt of the Commission of Airco's arbitration demand. In order for the Commission to have time to assess its possible courses of action pursuant to this order, the arbitrators shall not commence the taking of evidence prior to 60 days from the date of receipt at the office of the Commission of notification of such arbitration demand or such earlier time as to which the Commission may agree.

F. If the distributor shall prevail in the arbitration, then Airco shall enter into an appropriate contractual relationship in conformity with this order.

G. The Commission will not assert any claim that Airco has violated this order based merely upon the subject matter of any dispute arbitrated hereunder unless Airco has failed to comply with the award of the arbitrators in such dispute.

H. If in any arbitration under Part II the distributor prevails but elects not to be reinstated or continued as an Airco distributor as to products covered by the arbitration, then the following shall apply if the distributor so elects in writing delivered within 30 days of the date of the arbitration award.

If the distributor shall have had furnished to him by Airco more than 50% in dollar value (determined at the time of the distributor's said election based upon the then replacement cost) of cylinders of all kinds used in its industrial gases business, whether the furnishing thereof by Airco has been by lease, rental, demurrage, loan or any other arrangement in which ultimate ownership has been retained by Airco, then Airco agrees it will, at the distributor's election, sell all or any part of such cylinders belonging to it and used by the distributor to the distributor at a price which is the greater of the average of the book value on the books of Airco of such cylinders of like kind or 85% of the replacement value thereof. Airco further agrees that it will finance the sale to the distributor of such cylinders in a transaction calling for payment of principal and interest over a 10-year period, at an interest rate equivalent to that currently prevailing in financial circles for similar risks.

## III

*It is further ordered:*

That for a period of twenty (20) years from the date of service of this order, Airco shall not, either directly or indirectly through subsidiaries in which Airco owns a majority interest, (i) lease or otherwise make available to customers of any distributor who has ceased purchasing one or more Airco industrial gases within the preceding two years, industrial gas cylinders at rental or demurrage rates set for the purpose of destroying a competitor or eliminating competition, or (ii) lease or otherwise make available to competitors of any distributor who has ceased purchasing one or more Airco industrial gases within the preceding two years, industrial gas cylinders at rental or demurrage rates lower than the standard rental or demurrage rate for such cylinders then in effect for Airco industrial gas distributors for the purpose of destroying a competitor or eliminating competition; *provided, however,* that if either a standard cylinder rental rate schedule to Airco industrial gas distributors or a standard cylinder demurrage rate schedule to such distributors, but not both, is in effect, then, for the purpose of this Part III, one shall be deemed to be equivalent to the other on the basis of the revenue that would be generated by a single cylinder during a two-month period of continuous usage, rounded to the nearest cent; and *provided, further,* that for the purpose of this Part III, a standard cylinder rental or demurrage rate shall be a rate which is available to all Airco industrial gas distributors; and *provided, further,* that the purpose of destroying a competitor or eliminating competition must be established by proof of intent on the part of Airco to destroy the industrial gas business of, or eliminate as a competitor, a distributor who has ceased to distribute one or more Airco industrial gases; and evidence that Airco has engaged in price competition with such distributor or that Airco intends to seek or obtain the trade of particular customers then being served by such distributor shall not, by itself, be sufficient to establish such intent; and *provided, further*, that Airco may set rental or demurrage rates for customers or competitors of such distributor lower than those in effect for Airco industrial gas distributors in good faith response to competitive conditions in the area served by such distributor; and *provided, still further*, that Airco shall have all defenses which would be available in law, including, but not limited to, the defenses of meeting competition and cost justification.

## IV

*It is further ordered:*

That if provisions of the consent order entered against Union Carbide Corporation on September 28, 1977 in settlement of a proceeding in FTC Docket No. C-2902 similar to provisions of this order, are hereafter modified or revoked, then Airco may apply to the Commission for modification of, or relief from, any such provisions in this order, and upon such application the Commission shall grant such modification or relief in the provisions of this order covered by such application as is necessary to conform such provisions in this order with the modified provisions of such Union Carbide consent order.

## V

*It is further ordered:*

That Airco shall within twenty-one (21) days after service upon it of this order forward a copy of this order and the complaint issued herein, along with a copy of the attached letter (Attachment A) on respondent's official company stationery and signed by a responsible official of Airco to distributors of Airco industrial gases and/or welding products.

## VI

*It is further ordered:*

That Airco notify the Commission at least thirty (30) days prior to any proposed changes in corporate structure of Airco such as dissolution, assignment or sale resulting in the emergence of a successor corporation, which may affect compliance obligations arising out of the order.

## VII

*It is further ordered:*

That Airco shall within sixty (60) days after service upon it of this order file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order, and shall file such other reports as may from time to time be required to assure compliance with the terms and conditions of this order.

## ATTACHMENT A

## (LETTERHEAD OF AIRCO, INC.)

Date:

Dear — — — — — —:

Airco has entered into a consent order with the Federal Trade Commission which obligates the company not to impose certain restrictions upon its distributors* of industrial gases* and welding products* or to engage in certain other practices. A copy of the consent order is attached. In brief, Airco has agreed not to require the purchase by any Airco distributor of any industrial gas at any location* as a condition of his being permitted to buy any other gas, or to buy the same gas at another location, or to buy any welding product, and will not refuse to sell a particular gas or welding product to an Airco distributor because he discontinues buying another product from Airco.

Airco has also agreed not to enforce any provisions of any existing contracts for the purchase of industrial gases or welding products which are inconsistent with the consent order. As a consequence, your present single contract with us covering your requirements* for all the industrial gases you now buy from us may now be treated by you as a group of identical but separate contracts, each covering your requirements for one industrial gas. These contracts may be terminated by you for all the products you buy, or separately for particular products or for any specific location, upon prior written notice to us of not less than 90 days (even though your contract may provide for a longer notice) effective at the next anniversary date under your existing contract, or if the anniversary date falls within 90 days of the date hereof, then 90 days after such notice.

Within six months of the date of this letter, Airco will submit to you a new form of supply contract consistent with the consent order discussed above. If you terminate any existing contract, you will be offered this new contract in its place. In any event, the new contract will replace all current contracts as soon as our commitments with our respective distributors permit us to effect the substitution, and we will issue appropriate notices of termination to our distributors at the time we circulate the new form of contract.

Finally, your attention is called to the provisions of Part II of the order giving you the right to arbitrate certain disputes which you might have with Airco as to Airco's right to discontinue dealing with you because you have elected to purchase industrial gases from another supplier.

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* The terms "industrial gases," "welding products," "distributor," "requirements" and "location" are defined in the enclosed order.

If in the future, you believe that any of the terms of the enclosed consent order have been violated, you may report the details in writing to:

Federal Trade Commission
Bureau of Competition
Washington, D.C. 20580

Very truly yours,

(Name and Title of
Responsible Official)
Airco, Inc.

## IN THE MATTER OF

# PENDLETON WOOLEN MILLS, INC.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2985. Complaint, July 31, 1979 — Decision, July 31, 1979*

**This consent order, among other things, requires a Portland, Ore. manufacturer of wool products to cease fixing, maintaining, or enforcing resale prices for its products; soliciting the identity of dealers who fail to conform to such prices; and taking adverse action against recalcitrants. Respondent is also prohibited from restricting the use of product trademarks or other identification in the sale or advertising of such products; and barred from suggesting retail prices for any product until April 20, 1982.**

## *Appearances*

For the Commission: *Jeffrey Klurfeld.*

For the respondent: *James H. Clarke* and *William Lubersky, Spears, Lubersky, Campbell & Bledsoe,* Portland, Oregon.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Pendleton Woolen Mills, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For purposes of this complaint, the following definitions shall apply:

"Product" is defined as any item which is manufactured, offered for sale or sold by respondent. Product shall not include any item which Jacques deLoux, Inc. manufactures or purchases from any third party, and which it sells to any person, partnership, corporation or firm other than to respondent.

"Dealer" is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

PARAGRAPH 1. Respondent Pendleton Woolen Mills, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 218 S. W. Jefferson St., Portland, Oregon.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of wearing apparel for men, women and children, blankets and wool fabric. Sales by respondent for fiscal year 1978 exceeded $40 million.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent sells and distributes its products directly to more than 5,000 retail dealers located throughout the United States who in turn resell respondent's products to the general public.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale and distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold and distributed by respondent.

PAR. 6. In the course and conduct of its business as above described, respondent has for some time last past effectuated and pursued a policy throughout the United States, the purpose or effect of which is and has been to fix, control, establish, manipulate and maintain the resale prices at which its dealers advertise, offer for sale and sell its products.

PAR. 7. By various means and methods, respondent has effectuated and enforced the aforesaid practice and policy by which it can and does fix, control, establish, manipulate and maintain the resale prices at which its products are advertised, offered for sale and sold by its dealers. To carry out said practice or policy, respondent adopted and employed, and still employs, the following means and methods among others:

(a) It requires prospective dealers as a condition of becoming dealers, and requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that they will sell products at prices suggested by respondent.

(b) It requires prospective dealers as a condition of becoming dealers, and requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that, in the event they sell any product at less than respondent's suggested retail price, they will not identify such product in any advertisement as having been manufactured by respondent.

PAR. 8. By means of the aforesaid acts and practices and more, respondent, in combination, agreement, understanding and conspiracy with certain of its dealers and with the acquiescence of other of its dealers, has established, maintained and pursued a planned course of action to fix and maintain certain specified uniform prices at which products will be resold.

PAR. 9. The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of respondent's products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Pendleton Woolen Mills, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 218 S.W. Jefferson St., in the City of Portland, State of Oregon.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

For the purposes of this order, the following definitions shall apply:

"Product" is defined as any item which is manufactured, offered for sale or sold by respondent. Product shall not include any item which Jacques deLoux, Inc. manufactures or purchases from any third party, and which it sells to any person, partnership, corporation or firm other than to respondent.

"Dealer" is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

*It is ordered*, That respondent Pendleton Woolen Mills, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

## I

1. Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

2. Establishing, exacting any assurance to comply with, continuing, enforcing, or announcing the terms of any contract, agreement, understanding, or arrangement with any dealer which fixes, establishes, maintains or enforces, directly or indirectly, the resale price at which any product is to be sold or advertised.

3. Securing or attempting to secure any promise or assurance from

any dealer regarding the resale price at which such dealer will or may advertise or sell any product, or requiring or requesting any dealer to obtain approval from respondent for any resale price at which such dealer may or will advertise or sell any product.

4. Requiring, requesting, or soliciting any dealer to report the identity of any other dealer, because of the price at which such dealer is advertising, offering to sell or selling any product; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating any dealer.

5. Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at a resale price other than that which respondent has established or suggested, where such surveillance program is conducted to fix, maintain, control or enforce the retail price at which any product is sold or advertised.

6. Terminating or taking any other action to restrict, prevent, or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

7. Restricting any dealer who has purchased any product which bears any of respondent's trademarks or identifications affixed thereto from using any trademark or other identification so affixed in the sale or advertising of such product.

## II

Publishing, disseminating, circulating, providing or communicating, orally or in writing or by any other means, any suggested retail price from the date of service of this order until April 20, 1982; *provided, however*, that if, after April 20, 1982, respondent suggests any retail price, respondent shall:

a. Clearly and conspicuously state on any material on which such suggested price is stated that such price is suggested only.

b. Mail to all dealers a letter stating that no dealer is obligated to adhere to any suggested retail price and that such suggested retail price is advisory only.

## III

*It is further ordered*, That respondent shall:

1. Within thirty (30) days after service of this order, mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to each of its present accounts. An affidavit shall be sworn to by an official of respondent verifying that the attached Exhibit A was so mailed.

2. Mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to any person, partnership, corporation or firm that becomes a new account within three (3) years after service of this order.

## IV

*It is further ordered,* That the respondent shall forthwith distribute a copy of this order to all operating divisions of said corporation, and to present or future personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this order, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

## V

*It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

## VI

*It is further ordered,* That respondent shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

### EXHIBIT A

Dear Retailer:

Pendleton Woolen Mills, without admitting any violation of the law, has agreed to the entry of an order by the Federal Trade Commission regulating certain distribution practices. In connection therewith, the company has agreed to send you this letter describing the order.

The order provides, among other things, as follows:

1. You can advertise and sell Pendleton products at any price you choose.
2. Pendleton will not take any action against you, including termination, because of the price at which you advertise or sell its products.
3. Pendleton will not suggest retail prices for any product until April 20, 1982.
4. The price at which you sell or advertise our products will not affect your right to use Pendleton trademarks or other identification in your sale or advertising of products bearing Pendleton trademarks or identification.

If you have any questions regarding the order or this letter, please call Mr. Pedley at Pendleton.

________________________________

for Pendleton Woolen Mills, Inc.

IN THE MATTER OF

# MACK TRUCKS, INC.

## CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2978. Complaint, Aug. 1, 1979 — Decision, Aug. 1, 1979*

**This consent order, among other things, requires an Allentown, Pa. manufacturer of heavy-duty trucks and other vehicles to cease "updating" any document, or otherwise misrepresenting the model year of trucks, truck-tractors, vans, chassis, and incomplete vehicles. The company is effectively required to assign model years to vehicles shipped to all states except Hawaii, following written standards set for each model before the start of the model year. A label indicating the model year or date of manufacture must be permanently affixed to each vehicle and specified information concerning the label disclosed in Owners' Manuals. Additionally, the company is required to maintain, for four years, records regarding model year designation standards for each vehicle it manufactures.**

### *Appearances*

For the Commission: *Paul Sailer.*

For the respondent: *Daniel K. Mayers, Wilmer, Cutler & Pickering,* Wash., D.C.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Mack Trucks, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1.

### DEFINITIONS

(a) "The Beginning of a Model Year"

For purposes of this complaint, the beginning of a model year (for example, "the beginning of the 1973 model year") for a particular model vehicle is defined as the moment in time when a vehicle of that model class is identified, or may according to company policy, be identified as being of that model year:

1. by numeral or code in a vehicle identification number, and/or
2. on an original Certificate of Origin, and/or
3. on some other document identifying a particular vehicle.

(b) "The — Model Year"

For purposes of this complaint, a particular model year (for example, "the 1973 model year") when referring to a period of time, is defined as that period of time which starts at the beginning of that model year and continues to (but does not include) the beginning of the subsequent model year.

PAR. 2. Respondent Mack Trucks, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its principal office and place of business located at 2100 Mack Boulevard, Allentown, Pennsylvania.

PAR. 3. Respondent Mack Trucks, Inc. is now and has been engaged in the manufacture, advertising, offering for sale, sale and distribution of certain motor vehicles, including but not limited to trucks which exceed 26,000 pounds in gross vehicle weight.

PAR. 4. In the course and conduct of its aforesaid business, respondent Mack Trucks, Inc. causes the said motor vehicles, after manufacture, to be transported from its place of business located in various States of the United States to purchasers, and to wholesalers and dealers, and branches for sale to prospective purchasers, which purchasers, wholesalers, branches, retailers and prospective purchasers are located in various States of the United States other than the states in which such vehicles were manufactured. Respondent, Mack Trucks, Inc., maintains, and at all times mentioned herein, has maintained a substantial course of trade in said products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of respondent's business has been and is substantial.

PAR. 5. In the course and conduct of its business respondent designates and at all times mentioned herein, had designated on Certificates of Origin and other documents which relate to and identify particular heavy duty trucks and other vehicles manufactured by respondent that such vehicles are of a particular model year.

After manufacture such vehicles are sent and have been sent to franchised dealers and to respondent-owned sales branches, which offer such vehicles for sale to the public as vehicles of the particular model year designated on the Certificates of Origin and other documents.

PAR. 6. At the end of a model year, respondent's franchised dealers returned and have returned to it Certificates of Origin and other documents for unsold vehicles. Respondent then "redesignates" and has "redesignated" such unsold vehicles by issuing new Certificates of Origin on which the said vehicles are identified as being of the forthcoming model year. These Certificates are and have been returned to the aforesaid dealers for use in the offering for sale and sale of such vehicles.

PAR. 7. Through the use of such newly issued Certificates of Origin, respondent directly and by implication represents and has represented, and provides and has provided the means and opportunity for respondent's franchised dealers directly and by implication to represent, offer for sale, and sell such vehicles as having been manufactured during the latest model year. In truth and in fact, such vehicles were not manufactured during the latest model year.

PAR. 8. By redesignating the model years of unsold vehicles on Certificates of Origin and other similar documents identifying such vehicles and by furnishing such redesignated Certificates of Origin and documents to its dealers for use in misrepresenting the model years of respondent's vehicles as aforesaid, respondent is engaged and has been engaged in unfair, false, misleading and deceptive acts or practices.

PAR. 9. Respondent has sold heavy duty trucks to retail purchasers through respondent-owned sales branches, and in connection with such sales, respondent has designated the model year of such vehicles on Certificates of Origin and other documents identifying such vehicles as the current model year.

In so doing respondent has represented directly or by implication, that said vehicles were manufactured during the model year represented on the Certificates of Origin. In truth and in fact, in many instances such vehicles were manufactured during a previous model year.

PAR. 10. Such representations constitute and have constituted unfair, false, misleading and deceptive acts or practices.

PAR. 11. The issuance by respondent of Certificates of Origin and other documents containing said false, misleading and deceptive representations concerning the model years of vehicles as described in Paragraphs One through Ten, has had, and now has, the capacity and tendency to mislead first and subsequent retail purchasers of such vehicles into the erroneous and mistaken belief that said representations made concerning the model years of particular vehicles were and are true, and into the purchase of substantial quantities of said vehicles manufactured by respondent, by reason of said erroneous and mistaken belief.

PAR. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals in the sale of motor vehicles of the same general kind and nature of those sold by the respondent.

PAR. 13. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mack Trucks, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 2100 Mack Boulevard, Allentown, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

*It is ordered,* That respondent, Mack Trucks, Inc., a corporation, its successors, and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of trucks, truck-tractors, vans, chassis and incomplete vehicles, intended for on-highway use, (hereinafter in this order referred to as "vehicles"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using any Certificate of Origin or other document to redesignate the model year of any such vehicle; and shall forthwith represent accurately on any Certificate of Origin or other document the model year, if any, of such vehicle; and shall not use a manufacturer's Certificate of Origin or other document to misrepresent the model year of any such vehicle.

*It is further ordered,* That respondent shall not represent orally or in any document identifying any vehicle, or in any advertisement or promotional material, or in any number or code incorporated into a vehicle identification number, that any vehicle is of a particular model year, or designate or cause to be designated any vehicle as being of a particular model year, unless for each such vehicle:

1. Such designation of representation is made in accordance with written designation standards which clearly identify the vehicles to which they apply and the starting dates when such standards takes effect, and

2. The aforementioned designation standards are uniformly applied throughout a model year to all vehicles of the same model assigned a model year designation, whether such vehicles are distributed for sale to the first retail purchaser through factory-owned branches or through dealers; and

3. The aforementioned designation standards are such that the model year assigned particular vehicles is determined by:

a. The characteristics of the vehicle designated, or

b. The date of manufacture (regardless of the extent, if any, of changes in physical characteristics from vehicles of a preceding model year), *provided, however,* that:

(1) Vehicles whose assembly began before the model year changeover date but were completed after such date, may be designated as being of the earlier model year, and

(2) Where a particular model is manufactured in two or more plants,

all vehicles of that model manufactured after a particular date in one plant and after a later date (or dates) in another plant (or plants) may be designated as being of the same model year provided that the date of manufacture of the last vehicle designated as of a particular model year in any plant, occur no later than thirty (30) days after the date of manufacture of the first vehicle designated as of the succeeding model year in any other plant;

4. All vehicles designated as being of a particular model year shall be so designated on or before the date of manufacture; and

5. All vehicles once designated as being of a particular model year shall remain so designated except that the model year designation may be corrected when a vehicle at the time of manufacture is assigned an incorrect designation which is inconsistent with the previously established standards;

*provided, however,* that nothing in this order shall require that the first and last days of a model year coincide with the first and last days of the corresponding calendar year.

For purposes of this order, the date of manufacture shall be the date upon which the last act of manufacturing or assemblage to be performed by respondent is completed by respondent. Further steps of manufacture by a later stage manufacturer (for example, the installation of a truck body) however initiated or contracted shall not affect the date of manufacture of vehicles manufactured by respondent, for purposes of this order.

*It is further ordered:*

1. that respondent indicate a numerical model year on Certificates or Statements of Origin for new vehicles shipped to its dealers, branches or customers, in any state which, by statute or regulation, titles or registers such vehicles and which by statute, regulation, or action of a state official acting pursuant to authority provided by statute or regulation:

a. prescribes forms evidencing title or registration, or application forms for title or registration, which contain a space for model year designation, or

b. requires a model year designation on:

(i) Certificates or Statements of Origin for such vehicles, or

(ii) Certificates of Title, Certificates of Ownership, bills of sale, or other documents evidencing title or registration of such vehicles, or

(iii) Applications for title or registration of such vehicles.

2. that if respondent, for vehicles sent to any other state, does not

designate a model year on Certificates of Origin for vehicles of a particular model, respondent:

a. shall provide a space on such certificates preceded by the word "model year" or "year," and

b. shall denote in such space either "N.A." or "Not Applicable" or "None" and shall not leave such space blank.

3. Nothing in this order shall require respondent to designate a model year on Certificates or Statements of Origin for chassis or incomplete vehicles which:

a. are not titled or registered, and

b. are incorporated in motor homes or recreational vehicles which are titled and registered, and for which separate Certificates or Statements of Origin are prepared by independent motor home or recreational vehicle manufacturers.

*Provided, however,* that if respondent in accordance with this subsection does not designate a model year on Certificates or Statements of Origin for chassis or incomplete vehicles for motor homes or recreational vehicles, respondent:

a. shall provide a space on such certificates preceded by the word "model year" or "year," and

b. shall denote in such space either "N.A." or "Not Applicable" or "None" and shall not leave such space blank.

*It is further ordered,* That respondent will:

1. Clearly and conspicuously disclose the month and year of manufacture on a label permanently affixed to each vehicle at manufacture, or

2. Comply with the certification requirements of National Highway Traffic Safety Administration regulation 49 C.F.R. 567 (1974);

*provided, however,* that if the certification requirements of National Highway Traffic Safety Administration regulation 49 C.F.R. 567 (1974) are repealed, or otherwise become ineffective by action of law, respondent will subsequently disclose clearly and conspicuously the month and year of manufacture on a label permanently affixed to each vehicle it manufactures.

*It is further ordered,* That for all vehicles manufactured by respondent after the effective date of this order:

1. Respondent shall maintain and make available for inspection and copying by Commission staff, records that indicate the dates of manufacture, model years, and corresponding vehicle identification numbers for a period of four (4) years after manufacture of such vehicles, and

2. That respondent shall maintain and make available for inspection and copying by Commission staff, model year designation standards for a period of four (4) years after such standards are issued.

*It is further ordered*, That until January 1, 1980, respondent shall file with the Commission each model year, a copy of each new model year designation standard for all vehicles manufactured by respondent, within seven (7) calendar days after each such standard becomes final;

*provided, however*, that failure to provide such information shall not be a violation of this order unless respondent fails to file such information within ten (10) days after receiving a written request to do so from the Commission staff.

*It is further ordered*, That until January 1, 1980, at the beginning of each model year, respondent shall file with the Commission such records as will indicate the serial numbers of all vehicles manufactured by respondent which have been identified on Certificates of Origin in any number or code in vehicle identification numbers or in any other documents as being of the preceding model year.

*It is further ordered*, That respondent clearly and conspicuously disclose the following information in the Owner's Manual for all vehicles it manufactures (or if an Owner's Manual is not provided, in other documents provided to purchasers which describe how to maintain or care for vehicles):

1. The fact that NHTSA regulations require that a certification label be affixed, and prescribe where such label may be located, and
2. The location (or possible locations) of the certification label, and
3. The fact that this label indicates (or is required by NHTSA regulations to indicate) the date of manufacture of the vehicle, and
4. The location of a vehicle identification number, and
5. If a model year is coded in the vehicle identification number, the manner in which the model year is coded in the vehicle identification number.

*It is further ordered*, That respondent:

1. Clearly and conspicuously disclose in the Owner's Manual for all chassis and incomplete vehicles sold to intermediate or final stage

manufacturers of motor homes or recreational vehicles (or if an Owner's Manual is not provided, in other documents provided to purchasers which describe how to maintain or care for vehicles) that:

a. Complete vehicles are manufactured in two (or more) stages by two (or more) separate manufacturers, and

b. The manufacture of the complete vehicle is completed at a later date than the manufacture of the chassis or incomplete vehicle, and

c. (If applicable) that consequently the model year of the complete vehicle may be later than the model year of the incomplete vehicle or chassis;

2. Send to each manufacturer of motor homes and recreational vehicles who purchases chassis or incomplete vehicles from respondent, a written request that the manufacturer and his dealers disclose to prospective purchasers of complete vehicles, prior to purchase, the information contained in Sections 1(a), (b), and (c) of this paragraph.

*It is further ordered*, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions, offices, agents, representatives, or employees involved in preparation of Certificates of Origin or assignment of model year to any vehicle or vehicles subject to this order, and to dealers, and branches who sell such vehicles.

*It is further ordered*, That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent which may affect compliance obligations arising out of the order.

*It is further ordered*, That the respondent herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

# IN THE MATTER OF

# CHRYSLER CORPORATION

## CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2979. Complaint, Aug. 1, 1979 — Decision, Aug, 1, 1979*

**This consent order, among other things, requires a Highland Park, Mich. manufacturer of heavy-duty trucks and other vehicles to cease "updating" any document, or otherwise misrepresenting the model year of trucks, truck-tractors, vans, chassis, and incomplete vehicles. The company is effectively required to assign model years to vehicles shipped to all states except Hawaii, following written standards set for each model before the start of the model year. A label indicating the model year or date of manufacture must be permanently affixed to each vehicle and specified information concerning the label disclosed in Owners' Manuals. Additionally, the company is required to maintain, for four years, records regarding model year designation standards for each vehicle it manufactures.**

### *Appearances*

For the Commission: *Paul Sailer.*

For the respondent: *Matten B. Maher*, Highland Park, Mich.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Chrysler Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1.

### DEFINITIONS

(a) "The Beginning of a Model Year"

For purposes of this complaint, the beginning of a model year (for example, "the beginning of the 1973 model year") for a particular model vehicle is defined as the moment in time when a vehicle of that model class is identified, or may according to company policy, be identified as being of that model year:

1. by numeral or code in a vehicle identification number, and/or
2. on an original Certificate of Origin, and/or
3. on some other document identifying a particular vehicle.

(b) "The — Model Year"

For purposes of this complaint, a particular model year (for example, "the 1973 model year") when referring to a period of time, is defined as that period of time which starts at the beginning of that model year and continues to (but does not include) the beginning of the subsequent model year.

PAR. 2. Respondent Chrysler Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 12000 Oakland Ave., Highland Park, Michigan.

PAR. 3. Respondent Chrysler Corporation is now and has been engaged in the manufacture, advertising, offering for sale, sale and distribution of certain motor vehicles, including but not limited to trucks which exceed 26,000 pounds in gross vehicle weight.

PAR. 4. In the course and conduct of its aforesaid business, respondent Chrysler Corporation causes the said motor vehicles, after manufacture, to be transported from its place of business located in various States of the United States to purchasers, and to wholesalers and dealers, and branches for sale to prospective purchasers, which purchasers, wholesalers, branches, retailers and prospective purchasers are located in various States of the United States other than the states in which such vehicles were manufactured. Respondent Chrysler Corporation maintains, and at all times mentioned herein, has maintained a substantial course of trade in said products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of respondent's business has been and is substantial.

PAR. 5. In the course and conduct of its business, respondent designates and at all times mentioned herein, had designated on Certificates of Origin and other documents which relate to and identify particular heavy duty trucks and other vehicles manufactured by respondent that such vehicles are of a particular model year.

After manufacture such vehicles are sent and have been sent to franchised dealers and to respondent-owned sales branches, which offer such vehicles for sale to the public as vehicles of the particular model year designated on the Certificates of Origin and other documents.

PAR. 6. At the end of a model year, respondent's franchised dealers returned and have returned to it Certificates of Origin and other documents for unsold vehicles. Respondent then "redesignates" and

has "redesignated" such unsold vehicles by issuing new Certificates of Origin on which the said vehicles are identified as being of the forthcoming model year. These Certificates are and have been returned to the aforesaid dealers for use in the offering for sale and sale of such vehicles.

PAR. 7. Through the use of such newly issued Certificates of Origin, respondent directly and by implication represents and has represented, and provides and has provided the means and opportunity for respondent's franchised dealers directly and by implication to represent, offer for sale, and sell such vehicles as having been manufactured during the latest model year. In truth and in fact, such vehicles were not manufactured during the latest model year.

PAR. 8. By redesignating the model years of unsold vehicles on Certificates of Origin and other similar documents identifying such vehicles and by furnishing such redesignated Certificates of Origin and documents to its dealers for use in misrepresenting the model years of respondent's vehicles as aforesaid, respondent is engaged and has been engaged in unfair, false, misleading and deceptive acts or practices.

PAR. 9. Respondent has sold heavy duty trucks to retail purchasers through respondent-owned sales branches, and in connection with such sales, respondent has designated the model year of such vehicles on Certificates of Origin and other documents identifying such vehicles as the current model year.

In so doing respondent has represented directly or by implication, that said vehicles were manufactured during the model year represented on the Certificates of Origin. In truth and in fact, in many instances such vehicles were manufactured during a previous model year.

PAR. 10. Such representations constitute and have constituted unfair, false, misleading and deceptive acts or practices.

PAR. 11. The issuance by respondent of Certificates of Origin and other documents containing said false, misleading and deceptive representations concerning the model years of vehicles as described in Paragraphs One through Ten, has had, and now has, the capacity and tendency to mislead first and subsequent retail purchasers of such vehicles into the erroneous and mistaken belief that said representations made concerning the model years of particular vehicles were and are true, and into the purchase of substantial quantities of said vehicles manufactured by respondent, by reason of said erroneous and mistaken belief.

PAR. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and

individuals in the sale of motor vehicles of the same general kind and nature of those sold by the respondent.

PAR. 13. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of the draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Chrysler Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 12000 Oakland Ave., Highland Park, Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

*It is ordered,* That respondent Chrysler Corporation, a corporation, its successors, and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of trucks, truck-tractors, vans, chassis and incomplete vehicles, intended for on-highway use, (hereinafter in this order referred to as "vehicles"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using any Certificate of Origin or other document to redesignate the model year of any such vehicle; and shall forthwith represent accurately on any Certificate of Origin or other document the model year, if any, of any such vehicle; and shall not use a manufacturer's Certificate of Origin or other document to misrepresent the model year of any such vehicle.

*It is further ordered,* That respondent shall not represent orally or in any document identifying any vehicle, or in any advertisement or promotional material, or in any number or code incorporated into a vehicle identification number, that any vehicle is of a particular model year; or designate or cause to be designated any vehicle as being of a particular model year, unless for each such vehicle:

1. Such designation or representation is made in accordance with written designation standards which clearly identify the vehicles to which they apply and the starting dates when such standards take effect; and
2. The aforementioned designation standards are uniformly applied throughout a model year to all vehicles of the same model assigned a model year designation, whether such vehicles are distributed for sale to the first retail purchaser through factory-owned branches or through dealers; and
3. The aforementioned designation standards are such that the model year assigned particular vehicles is determined by:

a. The characteristics of the vehicle designated, or

b. The date of manufacture (regardless of the extent, if any, of changes in physical characteristics from vehicles of a preceding model year), *provided, however,* that:

(1) Vehicles whose assembly began before the model year changeover date but were completed after such date, may be designated as being of the earlier model year, and

(2) Where a particular model is manufactured in two or more plants,

all vehicles of that model manufactured after a particular date in one plant and after a later date (or dates) in another plant (or plants) may be designated as being of the same model year provided that the date of manufacture of the last vehicle designated as of a particular model year in any plant, occur no later than thirty (30) days after the date of manufacture of the first vehicle designated as of the succeeding model year in any other plant;

4. All vehicles designated as being of a particular model year shall be so designated on or before the date of manufacture; and

5. All vehicles once designated as being of a particular model year shall remain so designated except that the model year designation may be corrected when a vehicle at the time of manufacture is assigned an incorrect designation which is inconsistent with the previously established standards;

*Provided, however,* that nothing in this order shall require that the first and last days of a model year coincide with the first and last days of the corresponding calendar year.

For purposes of this order, the date of manufacture shall be the date upon which the last act of manufacturing or assemblage to be performed by respondent is completed by respondent. Further steps of manufacture by a later stage manufacturer (for example, the installation of a truck body) however initiated or contracted shall not affect the date of manufacture of vehicles manufactured by respondent, for purposes of this order.

*It is further ordered:*

1. that respondent indicate a numerical model year on Certificates or Statements of Origin for new vehicles shipped to its dealers, branches, or customers, in any state which, by statute or regulation, titles or registers such vehicles and which by statute, regulation, or action of a state official acting pursuant to authority provided by statute or regulation:

a. prescribes forms evidencing title or registration, or application forms for title registration, which contain a space for model year designation, or

b. requires a model year designation on:

(i) Certificates or Statements of Origin for such vehicles, or

(ii) Certificates of Title, Certificates of Ownership, bills of sale, or other documents evidencing title or registration of such vehicles, or

(iii) Applications for title or registration of such vehicles.

2. that if respondent, for vehicles sent to any other state, does not designate a model year on Certificates of Origin for vehicles of a particular model, respondent:

a. shall provide a space on such certificates preceded by the word "model year" or "year," and

b. shall denote in such space either "N.A." or "Not Applicable" or "None" and shall not leave such space blank.

3. Nothing in this order shall require respondent to designate a model year on Certificates or Statements of Origin for chassis or incomplete vehicles which:

a. are not titled or registered, and

b. are incorporated in motor homes or recreational vehicles which are titled and registered, and for which separate Certificates or Statements of Origin are prepared by independent motor home or recreational vehicle manufacturers.

*Provided, however*, that if respondent in accordance with this subsection does not designate a model year on Certificates or Statements of Origin for chassis or incomplete vehicles for motor homes or recreational vehicles, respondent:

a. shall provide a space on such certificates preceded by the word "model year" or "year," and

b. shall denote in such space either "N.A." or "Not Applicable" or "none" and shall not leave such space blank.

*It is further ordered*, That respondent will:

1. Clearly and conspicuously disclose the month and year of manufacture on a label permanently affixed to each vehicle at manufacture, or

2. Comply with the certification requirements of National Highway Traffic Safety Administration regulation 49 C.F.R. 567 (1974);

*Provided, however*, that if the certification requirements of National Highway Traffic Safety Administration regulation 49 C.F.R. 567 (1974) are repealed, or otherwise become ineffective by action of law, respondent will subsequently disclose clearly and conspicuously the month and year of manufacture on a label permanently affixed to each vehicle it manufactures.

*It is further ordered*, That for all vehicles manufactured by respondent after the effective date of this order:

1. Respondent shall maintain and make available for inspection and copying by Commission staff, records that indicate the dates of manufacture, model years, and corresponding vehicle identification numbers for a period of four (4) years after manufacture of such vehicles, and

2. That respondent shall maintain and make available for inspection and copying by Commission staff, model year designation standards for a period of four (4) years after such standards are issued.

*It is further ordered*, That until January 1, 1980, respondent shall file with the Commission each model year, a copy of each new model year designation standard for all vehicles manufactured by respondent, within seven (7) calendar days after such standard becomes final; *provided, however*, that failure to provide such information shall not be a violation of this order unless respondent fails to file such information within ten (10) days after receiving a written request to do so from the Commission staff.

*It is further ordered*, That until January 1, 1980, at the beginning of each model year, respondent shall file with the Commission such records as will indicate the serial numbers of all vehicles manufactured by respondent which have been identified on Certificates of Origin in any number or code in vehicle identification numbers or in any other documents as being of the preceding model year.

*It is further ordered*, That respondent clearly and conspicuously disclose the following information in the Owner's Manual for all vehicles it manufactures (or if an Owner's Manual is not provided, in other documents provided to purchasers which describe how to maintain or care for vehicles):

1. The fact that NHTSA regulations require that a certification label be affixed, and prescribe where such label may be located, and
2. The location (or possible locations) of the certification label, and
3. The fact that this label indicates (or is required by NHTSA regulations to indicate) the date of manufacture of the vehicle, and
4. The location of a vehicle identification number, and
5. If a model year is coded in the vehicle identification number, the manner in which the model year is coded in the vehicle identification number.

*It is further ordered*, That respondent:

1. Clearly and conspicuously disclose in the Owner's Manual for all chassis and incomplete vehicles sold to intermediate or final stage manufacturers of motor homes or recreational vehicles (or if an

Owner's Manual is not provided, in other documents provided to purchasers which describe how to maintain or care for vehicles) that:

a. Complete vehicles are manufactured in two (or more) stages by two (or more) separate manufacturers, and

b. The manufacture of the complete vehicle is completed at a later date than the manufacture of the chassis or incomplete vehicle, and

c. (If applicable) that consequently the model year of the complete vehicle may be later than the model year of the incomplete vehicle or chassis;

2. Send to each manufacturer of motor homes and recreational vehicles who purchases chassis or incomplete vehicles from respondent, a written request that the manufacturer and his dealers disclose to prospective purchasers of complete vehicles, prior to purchase, the information contained in Sections 1(a), (b), and (c) of this paragraph.

*It is further ordered*, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions, offices, agents, representatives, or employees involved in preparation of Certificates of Origin or assignment of model year to any vehicle or vehicles subject to this order, and to dealers, and branches who sell such vehicles.

*It is further ordered*, That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent which may affect compliance obligations arising out of the order.

*It is further ordered*, That the respondent herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## IN THE MATTER OF

# FORD MOTOR COMPANY

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2980. Complaint, Aug. 1, 1979 — Decision, Aug. 1, 1979*

**This consent order, among other things, requires a Dearborn, Mich. manufacturer of heavy-duty trucks and other vehicles to cease "updating" any document, or otherwise misrepresenting the model year of trucks, truck-tractors, vans, chassis, and incomplete vehicles. The company is effectively required to assign model years to vehicles shipped to all states except Hawaii, following written standards set for each model before the start of the model year. A label indicating the model year or date of manufacture must be permanently affixed to each vehicle and specified information concerning the label disclosed in Owners' Manuals. Additionally, the company is required to maintain, for four years, records regarding model year designation standards for each vehicle it manufactures.**

### *Appearances*

For the Commission: *Paul Sailer.*

For the respondent: *Stewart M. Weiner,* Dearborn, Mich.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ford Motor Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1.

### DEFINITIONS

(a) "The Beginning of a Model Year"

For purposes of this complaint, the beginning of a model year (for example, "the beginning of the 1973 model year") for a particular model vehicle is defined as the moment in time when a vehicle of that model class is identified, or may according to company policy, be identified as being of that model year:

1. by numeral or code in a vehicle identification number, and/or
2. on an original Certificate of Origin, and/or
3. on some other document identifying a particular vehicle.

(b) "The — Model Year"

For purposes of this complaint, a particular model year (for example, "the 1973 model year") when referring to a period of time, is defined as that period of time which starts at the beginning of that model year and continues to (but does not include) the beginning of the subsequent model year.

PAR. 2. Respondent Ford Motor Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at The American Road, Dearborn, Michigan.

PAR. 3. Respondent Ford Motor Company is now and has been engaged in the manufacture, advertising, offering for sale, sale and distribution of certain motor vehicles, including but not limited to trucks which exceed 26,000 pounds in gross vehicle weight.

PAR. 4. In the course and conduct of its aforesaid business, respondent Ford Motor Company causes the said motor vehicles, after manufacture, to be transported from its places of business located in various States of the United States to purchasers, and to wholesalers and dealers, and branches for sale to prospective purchasers, which purchasers, wholesalers, branches, retailers and prospective purchasers are located in various States of the United States other than the states in which such vehicles were manufactured. Respondent Ford Motor Company maintains, and at all times mentioned herein, has maintained, a substantial course of trade in said products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of respondent's business has been and is substantial.

PAR. 5. In the course and conduct of its business respondent designates and at all times mentioned herein, has designated on Certificates of Origin and other documents which relate to and identify particular heavy duty trucks and other vehicles manufactured by respondent that such vehicles are of a particular model year.

After manufacture such vehicles are sent and have been sent to franchised dealers and to respondent-owned sales branches which offer such vehicles for sale to the public as vehicles of the particular model year designated on the Certificates of Origin and other documents.

PAR. 6. At the end of a model year, respondent's franchised dealers returned and have returned to it Certificates of Origin and other documents for unsold vehicles. Respondent then "redesignates" and

has "redesignated" such unsold vehicles by issuing new Certificates of Origin on which the said vehicles are identified as being of the forthcoming model year. These Certificates are and have been returned to the aforesaid dealers for use in the offering for sale and sale of such vehicles.

PAR. 7. Through the use of such newly issued Certificates of Origin, respondent directly and by implication represents and has represented, and provides and has provided the means and opportunity for respondent's franchised dealers directly and by implication to represent, offer for sale, and sell such vehicles as having been manufactured during the latest model year. In truth and in fact, such vehicles were not manufactured during the latest model year.

PAR. 8. By redesignating the model years of unsold vehicles on Certificates of Origin and other similar documents identifying such vehicles and by furnishing such redesignated Certificates of Origin and documents to its dealers for use in misrepresenting the model years of respondent's vehicles as aforesaid, respondent is engaged and has been engaged in unfair, false, misleading and deceptive acts or practices.

PAR. 9. Respondent has sold heavy duty trucks to retail purchasers through respondent-owned sales branches, and in connection with such sales, respondent has designated the model year of such vehicles on Certificates of Origin and other documents identifying such vehicles as the current model year.

In so doing respondent has represented directly or by implication, that said vehicles were manufactured during the model year represented on the Certificates of Origin. In truth and in fact, in many instances such vehicles were manufactured during a previous model year.

PAR. 10. Such representations constitute and have constituted unfair, false, misleading and deceptive acts or practices.

PAR. 11. The issuance by respondent of Certificates of Origin and other documents containing said false, misleading and deceptive representations concerning the model years of vehicles as described in Paragraphs One through Ten, has had, and now has, the capacity and tendency to mislead first and subsequent retail purchasers of such vehicles into the erroneous and mistaken belief that said representations made concerning the model years of particular vehicles were and are true, and into the purchase of substantial quantities of said vehicles manufactured by respondent, by reason of said erroneous and mistaken belief.

PAR. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and

individuals in the sale of motor vehicles of the same general kind and nature of those sold by the respondent.

PAR. 13. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ford Motor Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at The American Road, Dearborn, Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

*It is ordered,* That respondent Ford Motor Company, a corporation, its successors, and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of trucks, truck-tractors, vans, chassis and incomplete vehicles, intended for on-highway use, (hereinafter in this order referred to as "vehicles"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using any Certificate of Origin or other document to redesignate the model year of any such vehicle; and shall forthwith represent accurately on any Certificate of Origin or other document the model year, if any, of such vehicle; and shall not use a manufacturer's Certificate of Origin or other document to misrepresent the model year of any such vehicle.

*It is further ordered,* That respondent shall not represent orally or in any document identifying any vehicle, or in any advertisement or promotional material, or in any number or code incorporated into a vehicle identification number, that any vehicle is of a particular model year, or designate or cause to be designated any vehicle as being of a particular model year, unless for each such vehicle:

1. Such designation of representation is made in accordance with written designation standards which clearly identify the vehicles to which they apply and the starting dates when such standards take effect; and

2. The aforementioned designation standards are uniformly applied throughout a model year to all vehicles of the same model assigned a model year designation, whether such vehicles are distributed for sale to the first retail purchaser through factory-owned branches or through dealers; and

3. The aforementioned designation standards are such that the model year assigned particular vehicles is determined by:

a. The characteristics of the vehicle designated, or

b. The date of manufacture (regardless of the extent, if any, of changes in physical characteristics from vehicles of a preceding model year), *provided, however,* that:

(1) Vehicles whose assembly began before the model year changeover date but were completed after such date, may be designated as being of the earlier model year, and

(2) Where a particular model is manufactured in two or more plants,

all vehicles of that model manufactured after a particular date in one plant and after a later date (or dates) in another plant (or plants) may be designated as being of the same model year provided that the date of manufacture of the last vehicle designated as of a particular model year in any plant, occur no later than thirty (30) days after the date of manufacture of the first vehicle designated as of the succeeding model year in any other plant;

4. All vehicles designated as being of a particular model year shall be so designated on or before the date of manufacture; and

5. All vehicles once designated as being of a particular model year shall remain so designated except that the model year designation may be corrected when a vehicle at the time of manufacture is assigned an incorrect designation which is inconsistent with the previously established standards;

*provided, however,* that nothing in this order shall require that the first and last days of a model year coincide with the first and last days of the corresponding calendar year.

For purposes of this order, the date of manufacture shall be the date upon which the last act of manufacturing or assemblage to be performed by respondent is completed by respondent. Further steps of manufacture by a later stage manufacturer (for example, the installation of a truck body) however initiated or contracted shall not affect the date of manufacture of vehicles manufactured by respondent, for purposes of this order.

*It is further ordered:*

1. that respondent indicate a numerical model year on Certificates or Statements of Origin for new vehicles shipped to its dealers, branches, or customers, in any state which, by statute or regulation, titles or registers such vehicles and which by statute, regulation, or action of a state official acting pursuant to authority provided by statute or regulation:

a. prescribes forms evidencing title or registration, or application forms for title or registration, which contain a space for model year designation, or

b. requires a model year designation on:

(i) Certificates or Statements of Origin for such vehicles, or

(ii) Certificates of Title, Certificates of Ownership, bills of sale, or other documents evidencing the title or registration by such vehicles, or

(iii) Applications for title or registration of such vehicles.

2. that if respondent, for vehicles sent to any other state, does not designate a model year on Certificates of Origin for vehicles of a particular model, respondent:

a. shall provide a space on such certificates preceded by the word "model year" or "year," and
b. shall denote in such space either "N.A." or "Not Applicable" or "None" and shall not leave such space blank.

3. Nothing in this order shall require respondent to designate a model year on Certificates or Statements of Origin for chassis or incomplete vehicles which:

a. are not titled or registered, and
b. are incorporated in motor homes or recreational vehicles which are titled and registered, and for which separate Certificates or Statements of Origin are prepared by independent motor home or recreational vehicle manufacturers.

*Provided, however,* that if respondent in accordance with this subsection does not designate a model year on Certificates or Statements of Origin for chassis or incomplete vehicles for motor homes or recreational vehicles, respondent:

a. shall provide a space on such certificates preceded by the word "model year" or "year," and
b. shall denote in such space either "N.A." or "Not Applicable" or "None" and shall not leave such space blank.

*It is further ordered,* That respondent will:

1. Clearly and conspicuously disclose the month and year of manufacture on a label permanently affixed to each vehicle at manufacture, or
2. Comply with the certification requirements of National Highway Traffic Safety Administration regulation 49 C.F.R. 567 (1974);

*provided, however,* that if the certification requirements of National Highway Traffic Safety Administration regulation 49 C.F.R. 567 (1974) are repealed, or otherwise become ineffective by action of law, respondent will subsequently disclose clearly and conspicuously the month and year of manufacture on a label permanently affixed to each vehicle it manufactures.

*It is further ordered*, That for all vehicles manufactured by respondent after the effective date of this order:

1. Respondent shall maintain and make available for inspection and copying by Commission staff, records that indicate the dates of manufacture, model years, and corresponding vehicle identification numbers for a period of four (4) years after manufacture of such vehicles, and
2. That respondent shall maintain and make available for inspection and copying by Commission staff, model year designation standards for a period of four (4) years after such standards are issued.

*It is further ordered*, That until January 1, 1980, respondent shall file with the Commission each model year, a copy of each new model year designation standard for all vehicles manufactured by respondent, within seven (7) calendar days after each such standard becomes final;

*Provided, however*, that failure to provide such information shall not be a violation of this order unless respondent fails to file such information within ten (10) days after receiving a written request to do so from the Commission staff.

*It is further ordered*, That until January 1, 1980, at the beginning of each model year, respondent shall file with the Commission such records as will indicate the serial numbers of all vehicles manufactured by respondent which have been identified on Certificates of Origin in any number or code in vehicle identification numbers or in any other documents as being of the preceding model year.

*It is further ordered*, That respondent clearly and conspicuously disclose the following information in the Owner's Manual for all vehicles it manufactures (or if an Owner's Manual is not provided, in other documents provided to purchasers which describe how to maintain or care for vehicles):

1. The fact that NHTSA regulations require that a certification label be affixed, and prescribe where such label may be located, and
2. The location (or possible locations) of the certification label, and
3. The fact that this label indicates (or is required by NHTSA regulations to indicate) the date of manufacture of the vehicle, and
4. The location of a vehicle identification number, and
5. If a model year is coded in the vehicle identification number, the manner in which the model year is coded in the vehicle identification number.

*It is further ordered*, That respondent:

1. Clearly and conspicuously disclose in the Owner's Manual for all chassis and incomplete vehicles sold to intermediate or final stage manufacturers of motor homes or recreational vehicles (or if an Owner's Manual is not provided, in other documents provided to purchasers which describe how to maintain or care for vehicles) that:

a. Complete vehicles are manufactured in two (or more) stages by two (or more) separate manufacturers, and

b. The manufacture of the complete vehicle is completed at a later date than the manufacture of the chassis or incomplete vehicle, and

c. (If applicable) that consequently the model year of the complete vehicle may be later than the model year of the incomplete vehicle or chassis;

2. Send to each manufacturer of motor homes and recreational vehicles who purchases chassis or incomplete vehicles from respondent, a written request that the manufacturer and his dealers disclose to prospective purchasers of complete vehicles, prior to purchase, the information contained in Sections 1(a), (b), and (c) of this paragraph.

*It is further ordered*, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions, offices, agents, representatives, or employees involved in preparation of Certificates of Origin or assignment of model year to any vehicle or vehicles subject to this order, and to dealers, and branches who sell such vehicles.

*It is further ordered*, That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent which may affect compliance obligations arising out of the order.

*It is further ordered*, That the respondent herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## IN THE MATTER OF

# PACCAR, INC.

## CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2981. Complaint, Aug. 1, 1979 — Decision, Aug. 1, 1979*

**This consent order, among other things, requires a Bellevue, Wash. manufacturer of heavy-duty trucks and other vehicles to cease "updating" any document, or otherwise misrepresenting the model year of trucks, truck-tractors, vans, chassis, and incomplete vehicles. The company is effectively required to assign model years to vehicles shipped to all states except Hawaii, following written standards set for each model before the start of the model year. A label indicating the model year or date of manufacture must be permanently affixed to each vehicle and specified information concerning the label disclosed in Owners' Manuals. Additionally, the company is required to maintain, for four years, records regarding model year designation standards for each vehicle it manufactures.**

### *Appearances*

For the Commission: *Paul Sailer.*

For the respondent: *John S. Voorhees, Howrey & Simon,* Washington, D.C.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Paccar, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1.

### DEFINITIONS

(a) "The Beginning of a Model Year"

For purposes of this complaint, the beginning of a model year (for example, "the beginning of the 1973 model year") for a particular model vehicle is defined as the moment in time when a vehicle of that model class is identified, or may according to company policy, be identified as being of that model year:

1. by numeral or code in a vehicle identification number, and/or
2. on an original Certificate of Origin, and/or
3. on some other document identifying a particular vehicle.

(b) "The — Model Year"

For purposes of this complaint, a particular model year (for example, "the 1973 model year") when referring to a period of time, is defined as that period of time which starts at the beginning of that model year and continues to (but does not include) the beginning of the subsequent model year.

PAR. 2. Respondent Paccar, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Business Center Building, 777 106th Ave., N.E., Bellevue, Washington.

PAR. 3. Respondent Paccar, Inc. is now and has been engaged in the manufacture, advertising, offering for sale, sale and distribution of certain motor vehicles, including but not limited to trucks which exceed 26,000 pounds in gross vehicle weight.

PAR. 4. In the course and conduct of its aforesaid business, respondent Paccar, Inc. causes the said motor vehicles, after manufacture, to be transported from its places of business located in various States of the United States to purchasers, and to wholesalers and dealers, and branches for sale to prospective purchasers, which purchasers, wholesalers, branches, retailers and prospective purchasers are located in various States of the United States other than the states in which such vehicles were manufactured. Respondent Paccar, Inc. maintains, and at all times mentioned herein, has maintained a substantial course of trade in said products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of respondent's business has been and is substantial.

PAR. 5. In the course and conduct of its business, respondent designates and at all times mentioned herein, has designated on Certificates of Origin and other documents which relate to and identify particular heavy duty trucks and other vehicles manufactured by respondent that such vehicles are of a particular model year.

After manufacture such vehicles are sent and have been sent to franchised dealers and to respondent-owned sales branches, which offer such vehicles for sale to the public as vehicles of the particular model year designated on the Certificates of Origin and other documents.

Par. 6. At the end of a model year, respondent's franchised dealers returned and have returned to it Certificates of Origin and other documents for unsold vehicles. Respondent then "redesignates" and has "redesignated" such unsold vehicles by issuing new Certificates of Origin on which the said vehicles are identified as being of the forthcoming model year. These Certificates are and have been returned to the aforesaid dealers for use in the offering for sale and sales of such vehicles.

Par. 7. Through the use of such newly issued Certificates of Origin, respondent directly and by implication represents and has represented, and provides and has provided the means and opportunity for respondent's franchised dealers directly and by implication to represent, offer for sale, and sell such vehicles as having been manufactured during the latest model year. In truth and in fact, such vehicles were not manufactured during the latest model year.

Par. 8. By redesignating the model years of unsold vehicles on Certificates of Origin and other similar documents identifying such vehicles and by furnishing such redesignated Certificates of Origin and documents to its dealers for use in misrepresenting the model years of respondent's vehicles as aforesaid, respondent is engaged and has been engaged in unfair, false, misleading and deceptive acts or practices.

Par. 9. Respondent has sold heavy duty trucks to retail purchasers through respondent-owned sales branches, and in connection with such sales, respondent has designated the model year of such vehicles on Certificates of Origin and other documents identifying such vehicles as the current model year.

In so doing respondent has represented directly or by implication, that said vehicles were manufactured during the model year represented on the Certificates of Origin. In truth and in fact, in many instances such vehicles were manufactured during a previous model year.

Par. 10. Such representation constitute and have constituted unfair, false, misleading and deceptive acts or practices.

Par. 11. The issuance by respondent of Certificates of Origin and other documents, containing said false, misleading and deceptive representations concerning the model years of vehicles as described in Paragraphs One through Ten, has had, and now has, the capacity and tendency to mislead first and subsequent retail purchasers of such vehicles into the erroneous and mistaken belief that said representations made concerning the model years of particular vehicles were and are true, and into the purchase of substantial quantities of said vehicles manufactured by respondent, by reason of said erroneous and mistaken belief.

Par. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals in the sale of motor vehicles of the same general kind and nature of those sold by the respondent.

PAR. 13. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Paccar, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Business Center Building, 777 106th Ave., N.E., Bellevue, Washington.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

*It is ordered*, That respondent Paccar, Inc., a corporation, its successors, and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of trucks, truck-tractors, vans, chassis and incomplete vehicles, intended for on-highway use, (hereinafter in this order referred to as "vehicles"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using any Certificate of Origin or other document to redesignate the model year of any such vehicle; and shall forthwith represent accurately on any Certificate of Origin or other document the model year, if any, of such vehicle; and shall not use a manufacturer's Certificate of Origin or other document to misrepresent the model year of any such vehicle.

*It is further ordered*, That respondent shall not represent orally or in any document identifying any vehicle, or in any advertisement or promotional material, or in any number or code incorporated into a vehicle identification number, that any vehicle is of a particular model year, or designate or cause to be designated any vehicle as being of a particular model year, unless for each such vehicle:

1. Such designation of representation is made in accordance with written designation standards which clearly identify the vehicles to which they apply and the starting dates when such standards take effect; and

2. The aforementioned designation standards are uniformly applied throughout a model year to all vehicles of the same model assigned a model year designation, whether such vehicles are distributed for sale to the first retail purchaser through factory-owned branches or through dealers; and

3. The aforementioned designation standards are such that the model year assigned particular vehicles is determined by:

a. The characteristics of the vehicle designated, or

b. The date of manufacture (regardless of the extent, if any, of changes in physical characteristics from vehicles of a preceding model year), *provided, however*, that:

(1) Vehicles whose assembly began before the model year changeover date but were completed after such date, may be designated as being of the earlier model year, and

(2) Where a particular model is manufactured in two or more plants, all vehicles of that model manufactured after a particular date in one plant and after a later date (or dates) in another plant (or plants) may

be designated as being of the same model year provided that the date of manufacture of the last vehicle designated as of a particular model year in any plant, occur no later than thirty (30) days after the date of manufacture of the first vehicle designated as of the succeeding model year in any other plant;

4. All vehicles designated as being of a particular model year shall be so designated on or before the date of manufacture; and

5. All vehicles once designated as being of a particular model year shall remain so designated except that the model year designation may be corrected when a vehicle at the time of manufacture is assigned an incorrect designation which is inconsistent with the previously established standards;

*provided, however,* That nothing in this order shall require that the first and last days of a model year coincide with the first and last days of the corresponding calendar year.

For purposes of this order, the date of manufacture shall be the date upon which the last act of manufacturing or assemblage to be performed by respondent is completed by respondent. Further steps of manufacture by a later stage manufacturer (for example, the installation of a truck body) however initiated or contracted shall not affect the date of manufacture of vehicles manufactured by respondent, for purposes of this order.

*It is further ordered:*

1. that respondent indicate a numerical model year on Certificates or Statements of Origin for new vehicles shipped to its dealers, branches, or customers, in any state which, by statute or regulation, titles, or registers such vehicles and which by statute, regulation, or action of a state official acting pursuant to authority provided by statute or regulation:

a. prescribes forms evidencing title or registration, or application forms for title or registration, which contain a space for model year designation, or

b. requires a model year designation on:

(i) Certificates or Statements of Origin for such vehicles, or

(ii) Certificates of Title, Certificates of Ownership, bills of sale, or other documents evidencing the title or registration of such vehicles, or

(iii) Applications for title or registration of such vehicles.

2. that if respondent, for vehicles sent to any other state, does not

designate a model year on Certificates of Origin for vehicles of a particular model, respondent:

a. shall provide a space on such certificates preceded by the word "model year" or "year," and
b. shall denote in such space either "N.A." or "Not Applicable" or "None" and shall not leave such space blank.

3. Nothing in this order shall require respondent to designate a model year on Certificates or Statements of Origin for chassis or incomplete vehicles which:

a. are not titled or registered, and
b. are incorporated in motor homes or recreational vehicles which are titled and registered, and for which separate Certificates or Statements of Origin are prepared by independent motor home or recreational vehicle manufacturers.

*Provided, however,* that if respondent in accordance with this subsection does not designate a model year on Certificates or Statements of Origin for chassis or incomplete vehicles for motor homes or recreational vehicles, respondent:

a. shall provide a space on such certificates preceded by the word "model year" or "year," and
b. shall denote in such space either "N.A." or "Not Applicable" or "None" and shall not leave such space blank.

*It is further ordered,* That respondent will:

1. Clearly and conspicuously disclose the month and year of manufacture on a label permanently affixed to each vehicle at manufacture, or
2. Comply with the certification requirements of National Highway Traffic Safety Administration regulation 49 C.F.R. 567 (1974);

*provided, however,* that if the certification requirements of National Highway Traffic Safety Administration regulation 49 C.F.R. 567 (1974) are repealed, or otherwise become ineffective by action of law, respondent will subsequently disclose clearly and conspicuously the month and year of manufacture on a label permanently affixed to each vehicle it manufactures.

*It is further ordered,* That for all vehicles manufactured by respondent after the effective date of this order:

1. Respondent shall maintain and make available for inspection and

copying by Commission staff, records that indicate the dates of manufacture, model years, and corresponding vehicle identification numbers for a period of four (4) years after manufacture of such vehicles, and

2. That respondent shall maintain and make available for inspection and copying by Commission staff, model year designation standards for a period of four (4) years after such standards are issued.

*It is further ordered*, That until January 1, 1980, respondent shall file with the Commission each model year, a copy of each new model year designation standard for all vehicles manufactured by respondent, within seven (7) calendar days after each such standard becomes final;

*provided, however*, that failure to provide such information shall not be a violation of this order unless respondent fails to file such information within ten (10) days after receiving a written request to do so from the Commission staff.

*It is further ordered*, That respondent clearly and conspicuously disclose the following information in the Owner's Manual for all vehicles it manufactures (or if an Owner's Manual is not provided, in other documents provided to purchasers which describe how to maintain or care for vehicles):

1. The fact that NHTSA regulations require that a certification label be affixed, and prescribe where such label may be located, and
2. The location (or possible locations) of the certification label, and
3. The fact that this label indicates (or is required by NHTSA regulations to indicate) the date of manufacture of the vehicle, and
4. The location of a vehicle identification number, and
5. If a model year is coded in the vehicle identification number, the manner in which the model year is coded in the vehicle identification number.

*It is further ordered*, That respondent:

1. Clearly and conspicuously disclose in the Owner's Manual for all chassis and incomplete vehicles sold to intermediate or final stage manufacturers of motor homes or recreational vehicles (or if an Owner's Manual is not provided, in other documents provided to purchasers which describe how to maintain or care for vehicles) that:

a. Complete vehicles are manufactured in two (or more) stages by two (or more) separate manufacturers, and

b. The manufacture of the complete vehicle is completed at a later date than the manufacture of the chassis or incomplete vehicle, and

c. (If applicable) that consequently the model year of the complete vehicle may be later than the model year of the incomplete vehicle or chassis;

2. Send to each manufacturer of motor homes and recreational vehicles who purchases chassis or incomplete vehicles from respondent, a written request that the manufacturer and his dealers disclose to prospective purchasers of complete vehicles, prior to purchase, the information contained in Sections 1(a), (b), and (c) of this paragraph.

*It is further ordered,* That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions, offices, agents, representatives, or employees involved in preparation of Certificates of Origin or assignment of model year to any vehicle or vehicles subject to this order, and to dealers, and branches who sell such vehicles.

*It is further ordered,* That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent which may affect compliance obligations arising out of the order.

*It is further ordered,* That the respondent herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

### IN THE MATTER OF

# WHITE MOTOR CORPORATION

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2982. Complaint, Aug. 1, 1979 — Decision, Aug. 1, 1979*

This consent order, among other things, requires an Eastlake, Ohio manufacturer of heavy-duty trucks and other vehicles to cease "updating" any document, or otherwise misrepresenting the model year of trucks, truck-tractors, vans, chassis, and incomplete vehicles. The company is effectively required to assign model years to vehicles shipped to all states except Hawaii, following written standards set for each model before the start of the model year. A label indicating the model year or date of manufacture must be permanently affixed to each vehicle and specified information concerning the label disclosed in Owners' Manuals. Additionally, the company is required to maintain, for four years, records regarding model year designation standards for each vehicle it manufactures.

## *Appearances*

For the Commission: *Paul Sailer.*

For the respondent: *Edward Green*, Eastlake, Ohio.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that White Motor Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1.

### DEFINITIONS

(a) "The Beginning of a Model Year"

For purposes of this complaint, the beginning of a model year (for example, "the beginning of the 1973 model year") for a particular model vehicle is defined as the moment in time when a vehicle of that model class is identified, or may according to company policy, be identified as being of that model year:

1. by numeral or code in a vehicle identification number, and/or
2. on an original Certificate of Origin, and/or
3. on some other document identifying a particular vehicle.

(b) "The — Model Year"

For purposes of this complaint, a particular model year (for example, "the 1973 model year") when referring to a period of time, is defined as that period of time which starts at the beginning of that model year and continues to (but does not include) the beginning of the subsequent model year.

PAR. 2. Respondent White Motor Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 35129 Curtis Boulevard, Eastlake, Ohio.

PAR. 3. Respondent White Motor Corporation is now and has been engaged in the manufacture, advertising, offering for sale, sale and distribution of certain motor vehicles, including but not limited to trucks which exceed 26,000 pounds in gross vehicle weight.

PAR. 4. In the course and conduct of its aforesaid business, respondent White Motor Corporation causes the said motor vehicles, after manufacture, to be transported from its places of business located in various States of the United States to purchasers, and to wholesalers and dealers, and branches for sale to prospectives purchasers, which purchasers, wholesalers, branches, retailers and prospective purchasers are located in various States of the United States other than the states in which such vehicles were manufactured. Respondent, White Motor Corporation, maintains, and at all times mentioned herein, has maintained a substantial course of trade in said products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of respondent's business has been and is substantial.

PAR. 5. In the course and conduct of its business, respondent designates and at all times mentioned herein, has designated on Certificates of Origin and other documents which relate to and identify particular heavy duty trucks and other vehicles manufactured by respondent that such vehicles are of a particular model year.

After manufacture such vehicles are sent and have been sent to franchised dealers and to respondent-owned sales branches, which offer such vehicles for sale to the public as vehicles of the particular model year designated on the Certificates of Origin and other documents.

PAR. 6. At the end of a model year, respondent's franchised dealers returned and have returned to it Certificates of Origin and other documents for unsold vehicles. Respondent then "redesignates" and has "redesignated" such unsold vehicles by issuing new Certificates of Origin on which the said vehicles are identified as being of the forthcoming model year. These Certificates are and have been returned to the aforesaid dealers for use in the offering for sale and sale of such vehicles.

PAR. 7. Through the use of such newly issued Certificates of Origin, respondent directly and by implication represents and has represented, and provides and has provided the means and opportunity for respondent's franchised dealers directly and by implication to represent, offer for sale, and sell such vehicles as having been manufactured during the latest model year. In truth and in fact, such vehicles were not manufactured during the latest model year.

PAR. 8. By redesignating the model years of unsold vehicles on Certificates of Origin and other similar documents identifying such vehicles and by furnishing such redesignated Certificates of Origin and documents to its dealers for use in misrepresenting the model years of respondent's vehicles as aforesaid, respondent is engaged and has been engaged in unfair, false, misleading and deceptive acts or practices.

PAR. 9. Respondent has sold heavy duty trucks to retail purchasers through respondent-owned sales branches, and in connection with such sales, respondent has designated the model year of such vehicles on Certificates of Origin and other documents identifying such vehicles as the current model year.

In so doing respondent has represented directly or by implication, that said vehicles were manufactured during the model year represented on the Certificates of Origin. In truth and in fact, in many instances such vehicles were manufactured during a previous model year.

PAR. 10. Such representations constitute and have constituted unfair, false, misleading and deceptive acts or practices.

PAR. 11. The issuances by respondent of Certificates of Origin and other documents containing said false, misleading and deceptive representations concerning the model years of vehicles as described in Paragraphs One through Ten, has had, and now has, the capacity and tendency to mislead first and subsequent retail purchasers of such vehicles into the erroneous and mistaken belief that said representations made concerning the model years of particular vehicles were and are true, and into the purchase of substantial quantities of said vehicles manufactured by respondent, by reasons of said erroneous and mistaken belief.

PAR. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and

individuals in the sale of motor vehicles of the same general kind and nature of those sold by the respondent.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, and were and all are to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent White Motor Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 35129 Curtis Boulevard, Eastlake, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

*It is ordered,* That respondent, White Motor Corporation, a corporation, its successors, and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of trucks, truck-tractors, vans, chassis and incomplete vehicles, intended for on-highway use, (hereinafter in this order referred to as "vehicles"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using any Certificate of Origin or other document to redesignate the model year of any such vehicle; and shall forthwith represent accurately on any Certificate of Origin or other document the model year, if any, of such vehicle; and shall not use a manufacturer's Certificate of Origin or other document to misrepresent the model year of any such vehicle.

*It is further ordered,* That respondent shall not represent orally or in any document identifying any vehicle, or in any advertisement or promotional material, or in any number or code incorporated into a vehicle identification number, that any vehicle is of a particular model year, or designate or cause to be designated any vehicle as being of a particular model year, unless for each such vehicle:

1. Such designation of representation is made in accordance with written designation standards which clearly identify the vehicles to which they apply and the starting dates when such standards take effect; and

2. The aforementioned designation standards are uniformly applied throughout a model year to all vehicles of the same model assigned a model year designation, whether such vehicles are distributed for sale to the first retail purchaser through factory-owned branches or through dealers; and

3. The aforementioned designation standards are such that the model year assigned particular vehicles is determined by:

a. The characteristics of the vehicle designated, or

b. The date of manufacture (regardless of the extent, if any, of changes in physical characteristics from vehicles of a preceding model year), *provided, however,* that:

(1) Vehicles whose assembly began before the model year changeover date but were completed after such date, may be designated as being of the earlier model year, and

(2) Where a particular model is manufactured in two or more plants,

all vehicles of that model manufactured after a particular date in one plant and after a later date (or dates) in another plant (or plants) may be designated as being of the same model year provided that the date of manufacture of the last vehicle designated as of a particular model year in any plant, occur no later than thirty (30) days after the date of manufacture of the first vehicle designated as of the succeeding model year in any other plant;

4. All vehicles designated as being of a particular model year shall be so designated on or before the date of manufacture; and

5. All vehicles once designated as being of a particular model year shall remain so designated except that the model year designation may be corrected when a vehicle at the time of manufacture is assigned an incorrect designation which is inconsistent with the previously established standards;

*provided, however*, that nothing in this order shall require that the first and last days of a model year coincide with the first and last days of the corresponding calendar year.

For purposes of this order, the date of manufacture shall be the date upon which the last act of manufacturing or assemblage to be performed by respondent is completed by respondent. Further steps of manufacture by a later stage manufacturer (for example, the installation of a truck body) however initiated or contracted shall not affect the date of manufacture of vehicles manufactured by respondent, for purposes of this order.

*It is further ordered:*

1. that respondent indicate a numerical model year on Certificates or Statements of Origin for new vehicles shipped to its dealers, branches, or customers, in any state which, by statute or regulation, titles, or registers such vehicles and which by statute, regulation, or action of a state official acting pursuant to authority provided by statute or regulation:

a. prescribes forms evidencing title or registration, or application forms for title or registration, which contain a space for model year designation, or

b. requires a model year designation on:

(i) Certificates or Statements of Origin for such vehicles, or

(ii) Certificates of Title, Certificates of Ownership, bills of sale, or other documents evidencing the title or registration of such vehicles, or

(iii) Applications for title or registration of such vehicles.

2. that if respondent, for vehicles sent to any other state, does not designate a model year on Certificates of Origin for vehicles of a particular model, respondent:

a. shall provide a space on such certificates preceded by the word "model year" or "year," and
b. shall denote in such space either "N.A." or "Not Applicable" or "None" and shall not leave such space blank.

3. Nothing in this order shall require respondent to designate a model year on Certificates or Statements of Origin for chassis or incomplete vehicles which:

a. are not titled or registered, and
b. are incorporated in motor homes or recreational vehicles which are titled and registered, and for which separate Certificates or Statements of Origin are prepared by independent motor home or recreational vehicle manufacturers.

*Provided, however,* that if respondent in accordance with this subsection does not designate a model year on Certificates or Statements of Origin for chassis or incomplete vehicles for motor homes or recreational vehicles, respondent:

a. shall provide a space on such certificates preceded by the word "model year" or "year," and
b. shall denote in such space either "N.A." or "Not Applicable" or "None" and shall not leave such space blank.

*It is further ordered,* That respondent will:

1. Clearly and conspicuously disclose the month and year of manufacture on a label permanently affixed to each vehicle at manufacture, or
2. Comply with the certification requirements of National Highway Traffic Safety Administration regulation 49 C.F.R. 567 (1974);

*provided, however,* that if the certification requirements of National Highway Traffic Safety Administration regulation 49 C.F.R. 567 (1974) are repealed, or otherwise become ineffective by action of law, respondent will subsequently disclose clearly and conspicuously the month and year of manufacture on a label permanently affixed to each vehicle it manufactures.

*It is further ordered,* That for all vehicles manufactured by respondent after the effective date of this order:

1. Respondent shall maintain and make available for inspection and copying by Commission staff, records that indicate the dates of manufacture, model years, and corresponding vehicle identification numbers for a period of four (4) years after manufacture of such vehicles, and

2. That respondent shall maintain and make available for inspection and copying by Commission staff, model year designation standards for a period of four (4) years after such standards are issued.

*It is further ordered,* That until January 1, 1980, respondent shall file with the Commission each model year, a copy of each new model year designation standard for all vehicles manufactured by respondent, within seven (7) calendar days after each such standard becomes final;

*provided, however,* that failure to provide such information shall not be a violation of this order unless respondent fails to file such information within ten (10) days after receiving a written request to do so from the Commission staff.

*It is further ordered,* That respondent clearly and conspicuously disclose the following information in the Owner's Manual for all vehicles it manufactures (or if an Owner's Manual is not provided, in other documents provided to purchasers which describe how to maintain or care for vehicles):

1. The fact that NHTSA regulations require that a certification label be affixed, and prescribe where such label may be located, and
2. The location (or possible locations) of the certification label, and
3. The fact that this label indicates (or is required by NHTSA regulations to indicate) the date of manufacture of the vehicle, and
4. The location of a vehicle identification number, and
5. If a model year is coded in the vehicle identification number, the manner in which the model year is coded in the vehicle identification number.

*It is further ordered,* That respondent:

1. Clearly and conspicuously disclose in the Owner's Manual for all chassis and incomplete vehicles sold to intermediate or final stage manufacturers of motor homes or recreational vehicles (or if an Owner's Manual is not provided, in other documents provided to purchasers which describe how to maintain or care for vehicles) that:

a. Complete vehicles are manufactured in two (or more) stages by two (or more) separate manufacturers, and

b. The manufacture of the complete vehicle is completed at a later date than the manufacture of the chassis or incomplete vehicle, and

c. (If applicable) that consequently the model year of the complete vehicle may be later than the model year of the incomplete vehicle or chassis;

2. Send to each manufacturer of motor homes and recreational vehicles who purchases chassis or incomplete vehicles from respondent, a written request that the manufacturer and his dealers disclose to prospective purchasers of complete vehicles, prior to purchase, the information contained in Sections 1(a), (b), and (c) of this paragraph.

*It is further ordered,* That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions, offices, agents, representatives, or employees involved in preparation of Certificates of Origin or assignment of model year to any vehicle or vehicles subject to this order, and to dealers, and branches who sell such vehicles.

*It is further ordered,* That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent which may affect compliance obligations arising out of the order.

*It is further ordered,* That the respondent herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## IN THE MATTER OF

# INTERNATIONAL HARVESTER COMPANY

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2983. Complaint, Aug. 1, 1979 — Decision, Aug. 1, 1979*

This consent order, among other things, requires a Chicago, Ill. manufacturer of heavy-duty trucks and other vehicles to cease "updating" any document, or otherwise misrepresenting the model year of trucks, truck-tractors, vans, chassis, and incomplete vehicles. The company is effectively required to assign model years to vehicles shipped to all states except Hawaii, following written standards set for each model before the start of the model year. A label indicating the model year or date of manufacture must be permanently affixed to each vehicle and specified information concerning the label disclosed in Owners' Manuals. Additionally, the company is required to maintain, for four years, records regarding model year designation standards for each vehicle it manufactures.

## *Appearances*

For the Commission: *Paul Sailer.*

For the respondent: *J.R. Fruchterman*, Chicago, Ill.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that International Harvester, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1.

### DEFINITIONS

(a) "The Beginning of a Model Year"

For purposes of this complaint, the beginning of a model year (for example, "the beginning of the 1973 model year") for a particular model vehicle is defined as the moment in time when a vehicle of that model class is identified, or may according to company policy, be identified as being of that model year:

1. by numeral or code in a vehicle identification number, and/or
2. on an original Certificate of Origin, and/or
3. on some other document identifying a particular vehicle.

(b) "The — Model Year"

For purposes of this complaint, a particular model year (for example, "the 1973 model year") when referring to a period of time, is defined as that period of time which starts at the beginning of that model year and continues to (but does not include) the beginning of the subsequent model year.

PAR. 2. Respondent International Harvester is a corporation organized, existing, and doing business under and by virture of the laws of the State of Delaware, with its principal office and place of business located at 401 North Michigan Ave., Chicago, Illinois.

PAR. 3. Respondent International Harvester is now and has been engaged in the manufacture, advertising, offering for sale, sale and distribution of certain motor vehicles, including but not limited to trucks which exceed 26,000 pounds in gross vehicle weight.

PAR. 4. In the course and conduct of its aforesaid business, respondent, International Harvester, causes the said motor vehicles, after manufacture, to be transported from its place of business located in various States of the United States to purchasers, and to wholesalers and dealers, and branches for sale to prospectives purchasers, which purchasers, wholesalers, branches, retailers and prospective purchasers are located in various States of the United States other than the states in which such vehicles were manufactured. Respondent, International Harvester, maintains, and at all times mentioned herein, has maintained a substantial course of trade in said products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of respondent's business has been and is substantial.

PAR. 5. In the course and conduct of its business respondent designates and at all times mentioned herein, has designated on Certificates of Origin and other documents which relate to and identify particular heavy duty trucks and other vehicles manufactured by respondent that such vehicles are of a particular model year.

After manufacture such vehicles are sent and have been sent to franchised dealers and to respondent-owned sales branches, which offer such vehicles for sale to the public as vehicles of the particular model year designated on the Certificates of Origin and other documents.

PAR. 6. At the end of a model year, respondent's franchised dealers returned and have returned to it Certificates of Origin and other documents for unsold vehicles. Respondent then "redesignates" and

has "redesignated" such unsold vehicles by issuing new Certificates of Origin on which the said vehicles are identified as being of the forthcoming model year. These Certificates are and have been returned to the aforesaid dealers for use in the offering for sale and sale of such vehicles.

PAR. 7. Through the use of such newly issued Certificates of Origin, respondent directly and by implication represents and has represented, and provides and has provided the means and opportunity for respondent's franchised dealers directly and by implication to represent, offer for sale, and sell such vehicles as having been manufactured during the latest model year. In truth and in fact, such vehicles were not manufactured during the latest model year.

PAR. 8. By redesignating the model years of unsold vehicles on Certificates of Origin and other similar documents identifying such vehicles and by furnishing such redesignated Certificates of Origin and documents to its dealers for use in misrepresenting the model years of respondent's vehicles as aforesaid, respondent is engaged and has been engaged in unfair, false, misleading and deceptive acts or practices.

PAR. 9. Respondent has sold heavy duty trucks to retail purchasers through respondent-owned sales branches, and in connection with such sales, respondent has designated the model year of such vehicles on Certificates of Origin and other documents identifying such vehicles as the current model year.

In so doing respondent has represented directly or by implication, that said vehicles were manufactured during the model year represented on the Certificates of Origin. In truth and in fact, in many instances such vehicles were manufactured during a previous model year.

PAR. 10. Such representations constitute and have constituted unfair, false, misleading and deceptive acts or practices.

PAR. 11. The issuances by respondent of Certificates of Origin and other documents containing said false, misleading and deceptive representations concerning the model years of vehicles as described in Paragraphs One through Ten, has had, and now has, the capacity and tendency to mislead first and subsequent retail purchasers of such vehicles into the erroneous and mistaken belief that said representations were concerning the model years of particular vehicles were and are true, and into the purchase of substantial quantities of said vehicles manufactured by respondent, by reasons of said erroneous and mistaken belief.

PAR. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and

individuals in the sale of motor vehicles of the same general kind and nature of those sold by the respondent.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, and were and all are to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent International Harvester Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 401 North Michigan Ave., Chicago, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

*It is ordered,* That respondent International Harvester Company, a corporation, its successors, and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of trucks, truck-tractors, vans, chassis and incomplete vehicles, intended for on-highway use, (hereinafter in this order referred to as "vehicles"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using any Certificate of Origin or other document to redesignate the model year of any such vehicle; and shall forthwith represent accurately on any Certificate of Origin or other document the model year, if any, of such vehicle; and shall not use a manufacturer's Certificate of Origin or other document to misrepresent the model year of any such vehicle.

*It is further ordered,* That respondent shall not represent orally or in any document identifying any vehicle, or in any advertisement or promotional material, or in any number or code incorporated into a vehicle identification number, that any vehicle is of a particular model year, or designate or cause to be designated any vehicle as being of a particular model year, unless for each such vehicle:

1. Such designation of representation is made in accordance with written designation standards which clearly identify the vehicles to which they apply and the starting dates when such standards take effect; and

2. The aforementioned designation standards are uniformly applied throughout a model year to all vehicles of the same model assigned a model year designation, whether such vehicles are distributed for sale to the first retail purchaser through factory-owned branches or through dealers; and

3. The aforementioned designation standards are such that the model year assigned particular vehicles is determined by:

a. The characteristics of the vehicle designated, or

b. The date of manufacture (regardless of the extent, if any, of changes in physical characteristics from vehicles of a preceding model year), *provided, however,* that:

(1) Vehicles whose assembly began before the model year change-over date but were completed after such date, may be designated as being of the earlier model year, and

(2) Where a particular model is manufactured in two or more plants,

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all vehicles of that model manufactured after a particular date in one plant and after a later date (or dates) in another plant (or plants) may be designated as being of the same model year provided that the date of manufacture of the last vehicle designated as of a particular model year in any plant, occur no later than thirty (30) days after the date of manufacture of the first vehicle designated as of the succeeding model year in any other plant;

4. All vehicles designated as being of a particular model year shall be so designated on or before the date of manufacture; and

5. All vehicles once designated as being of a particular model year shall remain so designated except that the model year designation may be corrected when a vehicle at the time of manufacture is assigned an incorrect designation which is inconsistent with the previously established standards;

*provided, however,* that nothing in this order shall require that the first and last days of a model year coincide with the first and last days of the corresponding calendar year.

For purposes of this order, the date of manufacture shall be the date upon which the last act of manufacturing or assemblage to be performed by respondent is completed by respondent. Further steps of manufacture by a later stage manufacturer (for example, the installation of a truck body) however initiated or contracted shall not affect the date of manufacture of vehicles manufactured by respondent, for purposes of this order.

*It is further ordered:*

1. that respondent indicate a numerical model year on Certificates or Statements of Origin for new vehicles shipped to its dealers, branches, or customers, in any state which, by statute or regulation, titles or registers such vehicles and which by statute, regulation, or action of a state official acting pursuant to authority provided by statute or regulation:

a. prescribes forms evidencing title or registration, or application forms for title or registration, which contain a space for model year designation, or

b. requires a model year designation on:

(i) Certificates or Statements of Origin for such vehicles, or

(ii) Certificates of Title, Certificates of Ownership, bills of sale, or other documents evidencing the title or registration of such vehicles, or

(iii) Applications for title or registration of such vehicles.

2. that if respondent, for vehicles sent to any other state, does not designate a model year on Certificates of Origin for vehicles of a particular model, respondent:

a. shall provide a space on such certificates preceded by the word "model year" or "year," and
b. shall denote in such space either "N.A." or "Not Applicable" or "None" and shall not leave such space blank.

3. Nothing in this order shall require respondent to designate a model year on Certificates or Statements of Origin for chassis or incomplete vehicles which:

a. are not titled or registered, and
b. are incorporated in motor homes or recreational vehicles which are titled and registered, and for which separate Certificates or Statements of Origin are prepared by independent motor home or recreational vehicle manufacturers.

*Provided, however,* that if respondent in accordance with this subsection does not designate a model year on Certificates or Statements of Origin for chassis or incomplete vehicles for motor homes or recreational vehicles, respondent:

a. shall provide a space on such certificates preceded by the word "model year" or "year," and
b. shall denote in such space either "N.A." or "Not Applicable" or "None" and shall not leave such space blank.

*It is further ordered,* That respondent will:

1. Clearly and conspicuously disclose the month and year of manufacture on a label permanently affixed to each vehicle at manufacture, or
2. Comply with the certification requirements of National Highway Traffic Safety Administration regulation 49 C.F.R. 567 (1974);

*provided, however,* that if the certification requirements of National Highway Traffic Safety Administration regulation 49 C.F.R. 567 (1974) are repealed, or otherwise become ineffective by action of law, respondent will subsequently disclose clearly and conspicuously the month and year of manufacture on a label permanently affixed to each vehicle it manufactures.

*It is further ordered,* That for all vehicles manufactured by respondent after the effective date of this order:

1. Respondent shall maintain and make available for inspection and copying by Commission staff, records that indicate the dates of manufacture, model years, and corresponding vehicle identification numbers for a period of four (4) years after manufacture of such vehicles, and
2. That respondent shall maintain and make available for inspection and copying by Commission staff, model year designation standards for a period of four (4) years after such standards are issued.

*It is further ordered*, That until January 1, 1980, respondent shall file with the Commission each model year, a copy of each new model year designation standard for all vehicles manufactured by respondent, within seven (7) calendar days after each such standard becomes final;

*provided, however*, that failure to provide such information shall not be a violation of this order unless respondent fails to file such information within ten (10) days after receiving a written request to do so from the Commission staff.

*It is further ordered*, That until January 1, 1980, at the beginning of each model year, respondent shall file with the Commission such records as will indicate the serial numbers of all vehicles manufactured by respondent which have been identified on Certificates of Origin in any number or code in vehicle identification numbers or in any other documents as being of the preceding model year.

*It is further ordered*, That respondent clearly and conspicuously disclose the following information in the Owner's Manual for all vehicles it manufactures (or if an Owner's Manual is not provided, in other documents provided to purchasers which describe how to maintain or care for vehicles):

1. The fact that NHTSA regulations require that a certification label be affixed, and prescribe where such label may be located, and
2. The location (or possible locations) of the certification label, and
3. The fact that this label indicates (or is required by NHTSA regulations to indicate) the date of manufacture of the vehicle, and
4. The location of a vehicle identification number, and
5. If a model year is coded in the vehicle identification number, the manner in which the model year is coded in the vehicle identification number.

*It is further ordered*, That respondent:

1. Clearly and conspicuously disclose in the Owner's Manual for all chassis and incomplete vehicles sold to intermediate or final stage manufacturers of motor homes or recreational vehicles (or if an

Owner's Manual is not provided, in other documents provided to purchasers which describe how to maintain or care for vehicles) that:

a. Complete vehicles are manufactured in two (or more) stages by two (or more) separate manufacturers, and

b. The manufacture of the complete vehicle is completed at a later date than the manufacture of the chassis or incomplete vehicle, and

c. (If applicable) that consequently the model year of the complete vehicle may be later than the model year of the incomplete vehicle or chassis;

2. Send to each manufacturer of motor homes and recreational vehicles who purchases chassis or incomplete vehicles from respondent, a written request that the manufacturer and his dealers disclose to prospective purchasers of complete vehicles, prior to purchase, the information contained in Sections 1(a), (b), and (c) of this paragraph.

*It is further ordered*, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions, offices, agents, representatives, or employees involved in preparation of Certificates of Origin or assignment of model year to any vehicle or vehicles subject to this order, and to dealers, and branches who sell such vehicles.

*It is further ordered*, That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent which may affect compliance obligations arising out of the order.

*It is further ordered*, That the respondent herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## IN THE MATTER OF

# WOODLAND MOBILE HOMES, INC., ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND MAGNUSON-MOSS WARRANTY ACTS

*Docket C-2984. Complaint, Aug. 3, 1979 — Decision, Aug. 3, 1979*

**This consent order, among other things, requires a Santa Rosa, Calif. seller of mobile homes and other consumer products and its affiliate, Woodland Mobile Homes, Inc. of Nevada, to cease failing to make available to prospective buyers, prior to purchase, the text of written warranties offered for their products as required by federal regulations.**

## *Appearances*

For the Commission: *Harold G. Sodergren.*

For the respondent: *Pro se.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Warranty Act") and the implementing Rule Concerning the Pre-Sale Availability of Written Warranty Terms (16 CFR 702 (1977)) (effective January 1, 1977) ("Pre-Sale Rule") duly promulgated on December 31, 1975 [40 F.R: 60189] pursuant to Title I, Section 109 of the Warranty Act (15 U.S.C. 2309) (a copy of the Pre-Sale Rule is marked and attached as Appendix A* and is incorporated herein by reference as if fully set forth verbatim), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Woodland Mobile Homes, Inc., and Woodland Mobile Homes, Inc. of Nevada, corporations, and Allan Borgia, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and Pre-Sale Rule, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Woodland Mobile Homes, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Its principal office and place of business is located at 333 South E St., Santa Rosa, California.

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* Not reproduced herein for reasons of economy.

Respondent Woodland Mobile Homes, Inc. of Nevada, an affiliate of Woodland Mobile Homes, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada. Its principal office and place of business is located at 440 Gentry Way, Reno, Nevada.

Respondent Allan Borgia is an officer of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations and his address is the same as that of said Woodland Mobile Homes, Inc.

PAR. 2. Respondents have been, and are now, engaged in the advertising, offering for sale, and sale of mobile homes to the public.

PAR. 3. In the course and conduct of their business, respondents offer for sale and sell to consumers, consumer products distributed in commerce as "consumer product", "consumer", and "commerce" are defined by Sections 101(1), 101(3), 101(13) and 101(14), respectively, of the Warranty Act.

PAR. 4. Subsequent to January 1, 1977, respondents, in the course and conduct of their business, have offered for sale and sold mobile homes and other consumer products costing the consumer in excess of $15.00, many of which are warranted by the manufacturer. Respondents are, therefore, sellers as "seller" is defined in Section 702.1(e) of the Pre-Sale Rule.

PAR. 5. In connection with the offering for sale and sale of mobile homes and other consumer products, respondents have failed, as required by Section 702.3(a) of the Pre-Sale Rule, to make the text of the written warranties available for prospective buyers' review prior to sale through one or more of the following methods:

(a) Clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product;

(b) Maintaining a warranty binder system which is readily available to the prospective buyers, along with conspicuous signs indicating the availability and identifying the location of binders when the binders are not prominently displayed;

(c) Displaying the package of the consumer product on which the text of the written warranty is disclosed in such a way that the warranty is clearly visible to prospective buyers at the point of sale; and

(d) Placing a sign which contains the text of the written warranty in close proximity to the product to which it applies.

PAR. 6. Respondents' failure to comply with the Pre-Sale Rule as described in Paragraph Five of this complaint is a violation of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, and the Rule Concerning the Pre-Sale Availability of Written Warranty Terms promulgated under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Woodland Mobile Homes, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 333 South E St., Santa Rosa, California.

Respondent Woodland Mobile Homes, Inc. of Nevada is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 440 Gentry Way, Reno, Nevada.

Respondent Allan Borgia is an officer of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations and his address is the same as that of said Woodland Mobile Homes, Inc.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

## I

## DEFINITIONS

For the purposes of this order the definitions of the terms "consumer product," "warrantor," and "written warranty" as defined in Section 101 of the Warranty Act shall apply. The definition of the term "binder" as defined in Section 702.1(g) of the Pre-Sale Rule shall apply.

## II

*It is ordered*, That respondents Woodland Mobile Homes, Inc., and Woodland Mobile Homes, Inc. of Nevada, corporations, their successors and assigns, and their officers, and Allan Borgia, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, and sale of mobile homes or other consumer products, do forthwith cease and desist from:

1. Failing to make available in respondents' display area for prospective buyers' review prior to sale, the text of any written warranties offered or granted by the manufacturers of mobile homes and consumer products sold by respondents.

With respect to mobile homes, "display area" means a prominent location inside each mobile home.

2. Maintaining a binder or series of binders to satisfy the requirements of Paragraph 1, above, unless such binder or binders are located in each mobile home being displayed for sale by respondents, and such binder or binders include at least one copy of each written warranty applicable to the mobile home and the consumer products contained in the mobile home.

In utilizing any such binder or binders respondents shall:

(a) provide prospective buyers with ready access thereto; and

(b) (1) display such binder(s) in a manner reasonably calculated to elicit the prospective buyers' attention; or

(2) (i) make such binder(s) available to prospective buyers on request; and

(ii) place signs reasonably calculated to elicit the prospective buyers' attention in prominent locations within each mobile home, advising such prospective buyers of the availability of the binder(s), including instructions for obtaining access; and

(c) index such binder(s) according to product or warrantor; and

(d) clearly entitle such binder(s) as "Warranties" or other similar title.

## III

*It is further ordered,* That respondents post, in a prominent location in each mobile home being displayed for sale, a sign, two feet (length) by two feet (width), reasonably calculated to elicit prospective buyers' attention, which contains a verbatim reproduction of the following language:

**IMPORTANT!**

**NOT ALL WARRANTIES ARE THE SAME**

**We provide warranties for you to compare before you buy**
**Please ask to see them**
**Check: Full or limited?**
**What costs are covered?**
**What do you have to do?**
**Are all parts covered?**
**How long does the warranty last?**

Such sign shall be posted for a period of not less than three years from the effective date of this order. The language in such sign shall be unencumbered by other written or visual matter, shall be indented and punctuated as indicated in this paragraph, above, and shall be printed in black against a solid white background, as follows:

a. The word "Important" shall serve as the title of the notice and shall be printed in capital letters in 42 point boldface type followed by an exclamation mark.

b. The next phrase shall be printed on a separate line in capital letters and in 42 point boldface type.

c. The next two phrases shall be printed on separate lines and in 36 point medium face type.

d. Each succeeding phrase shall be printed on a separate line and in 24 point medium face type.

## IV

1. *It is further ordered,* That respondents deliver a copy of this order to cease and desist to all present and future employees, salespersons, agents, independent contractors, and other representatives of respondents engaged in the sale of mobile homes or consumer products on behalf of respondents, and secure a signed statement acknowledging receipt of the order from each such person.

2. *It is further ordered,* That respondents instruct all present and future employees, salespersons, agents, independent contractors, and other representatives of respondents, engaged in the sale of mobile homes or other consumer products on behalf of respondents, as to their specific obligations and duties under the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act (Pub. Law 93-637, 15 U.S.C. 2301, *et seq.*), all present and future implementing Rules promulgated under the Act, and this order.

3. *It is further ordered,* That respondents institute a program of continuing surveillance to reveal whether respondents' employees, salespersons, agents, independent contractors, or other representatives are engaged in practices which violate this order.

4. *It is further ordered,* That respondents maintain complete records for a period of not less than three (3) years from the date of the incident, of any written or oral information received which indicates the possibility of a violation of this order by any of respondents' employees, salespersons, agents, independent contractors, or other representatives. Any oral information received indicating the possibility of a violation of this order shall be reduced to writing, and shall include the name, address and telephone number of the informant, the name and address of the individual involved, the date of the communication and a brief summary of the information received. Such records shall be available upon request to representatives of the Federal Trade Commission during normal business hours upon reasonable advance notice.

5. *It is further ordered,* That respondents maintain, for a period of not less than three (3) years from the effective date of this order, complete business records to be furnished upon request to the staff of the Federal Trade Commission, relating to the manner and form of their continuing compliance with all the terms and provisions of this order.

6. *It is further ordered,* That the corporate respondents notify the Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any

other change in the corporate respondents which may affect compliance obligations arising out of this order.

7. *It is further ordered,* That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of 10 years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

8. *It is further ordered,* That respondents shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

### IN THE MATTER OF

# THE DINERS CLUB, INC., ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

*Docket C-2884. Complaint,*[*] *April 22, 1977 — Decision, Aug. 10, 1979*

**This amended order modifies an April 22, 1977 consent order issued against National Account Systems, Inc. (NAS), its owner, The Diners Club, Inc. (Diners), and three NAS subsidiaries, by including Payco American Corporation (Payco) as a respondent. Payco, who has purchased NAS and its subsidiaries from Diners, has agreed, upon transfer of interest, to assume Diners' obligations under the amended order, although Diners would still be bound by the provision prohibiting the use of independent agents or other entities to circumvent any term of the amended order.**

## *Appearances*

For the Commission: *Kenneth H. Donney.*

For the respondents: *Frank C. Christl, Gendel, Raskoff, Shapiro & Quittner*, Los Angeles, Calif.

## DECISION AND ORDER

The Diners Club, Inc. and Payco American Corporation, by a petition filed April 3, 1979, withdrawing a petition filed by The Diners Club, Inc. on July 19, 1978, request, pursuant to Rule 3.72(b)(2) of the Commission's Rules of Practice, that the Commission reopen these proceedings and modify the order to cease and desist against Diners Club, Inc., *inter alia*, which has become final.

The staff of the Los Angeles Regional Office has filed an answer to the petition to reopen and modify. In the answer, it is stated that the staff joins with The Diners Club, Inc. and Payco American Corporation in urging that the order to cease and desist be modified by the Commission. The Director of the Bureau of Consumer Protection concurs with this recommendation.

In the complaint in this case issued by the Commission on April 22, 1977, Diners Club, Inc. was named as a respondent in that it was the parent corporation of National Account Systems, Inc. The complaint did not allege that Diners Club, Inc. engaged in any unlawful practices. The order required Diners Club, Inc. to be financially responsible for any civil penalties assessed and prohibited Diners Club, Inc. from knowingly using independent agents or other entities to circumvent the provisions of the order. Diners Club, Inc. was specifically not bound by the substantive provisions of the order set forth in Parts I, II and III.

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[*] Complaint previously published at 89 F.T.C. 282.

The Diners Club, Inc. has entered into a letter agreement dated June 22, 1978, to sell National Account Systems, Inc. and its subsidiaries, to Payco American Corporation. The petition requests that Payco American Corporation be substituted for Diners Club, Inc. insofar as financial liability might accrue for civil penalties assessed against any respondent in this case other than Diners Club, Inc. The acquisition was consummated on March 30, 1979, subject to certain conditions subsequent, including the approval of this petition by the Commission.

Moreover, in order to assure the Commission that its order will be fully and faithfully followed, Payco American Corporation has also agreed to be a respondent in this case insofar as Part IV of the order, including, but not limited to, the prohibition against knowingly using independent agents of other entities to circumvent the provisions of the order. It is also requested that Part IV of the order be modified to describe The Diners Club, Inc. as the former owner of National Account Systems, Inc.

In view of the willingness of Payco American Corporation, as the new parent of National Account Systems, Inc. to undertake the same responsibilities under the order as The Diners Club, Inc., and in view of the fact that The Diners Club, Inc. will remain as a respondent for the purpose of effectuating Part IV of the order, it is determined by the Commission that it is in the public interest to modify the order as requested. Accordingly,

*It is ordered*, That the proceedings be, and they hereby are, reopened, and the order to cease and desist heretofore issued in this case be, and they thereby are, modified to read as follows:

1. Respondent National Account Systems, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of Payco American Corporation.

Respondent NAS Creditors Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent National Account Systems of Milwaukee, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent A. B. Hartman, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent The Diners Club, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 10 Columbus Circle, New York, New York. The Diners Club, Inc., is joined as a respondent in that it was the sole owner of National Account Systems, Inc., and will be liable for civil penalty as provided in Section IV, herein.

Respondent Payco American Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 2401 North Mayfair Road, Milwaukee, Wisconsin 53226. Payco American Corporation is joined as a respondent in that it is the sole owner of National Account Systems, Inc., having purchased all of the stock of that corporation from The Diners Club, Inc., and will be liable for civil penalty as provided in Part IV herein in the event that any named respondent except The Diners Club, Inc. violates any of the provisions of Part IV of the order after it becomes final or in the event that National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., or A. B. Hartman, Inc., violate any of the other provisions of the order after it becomes final.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

National Account Systems, Inc., NAS Creditors Service, Inc., National Account Systems of Milwaukee, Inc., and A. B. Hartman, Inc., for the purposes of Parts I, II, and III of this amended order are the only parties to whom reference is made when the term "respondents" is used.

Liability of The Diners Club, Inc. for civil penalty resulting from violations of this amended order shall be limited to that arising from violations by it, National Account Systems, Inc., NAS Creditors Service, Inc., National Account Systems of Milwaukee, Inc. or A.B. Hartman, Inc. of any of the provisions of Part IV of this amended order after it becomes final and before the transfer of interests set forth and described in the Amended Agreement Containing Amended Consent Order to Cease and Desist in accordance with the terms of which this amended order has been issued, or violations by National Account Systems, Inc., NAS Creditors Service, Inc., National Account Systems of Milwaukee, Inc. or A.B. Hartman, Inc. of any of the other provisions of this amended order after it becomes final and before such transfer of interests; or violations by it of any of the provisions of the first paragraph of Part IV of the amended order after it becomes final and after such transfer of interests. Liability of Payco American Corporation for civil penalty resulting from violation of this amended order shall be limited to that arising from violations by it, National Account Systems, Inc., NAS Creditors Service, Inc., National Account Systems of Milwaukee, Inc. or A.B. Hartman, Inc. of any of the provisions of Part IV of this amended order after it becomes final and after such transfer of interests, or violations by National Account Systems, Inc., NAS Creditors Service, Inc., National Account Systems of Milwaukee, Inc. or A.B. Hartman, Inc. of any of the other provisions of this amended order after it becomes final and after such transfer of interests. If the aforesaid transfer of interests shall fail to be consummated on or before June 30, 1979, then this amended order shall thereupon be deemed to be null and void, and the order originally issued in this proceeding shall be deemed to have theretofore and thereafter been in full and continuous force and effect.

## I

*It is ordered*, That National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., and A. B. Hartman, Inc., their successors and assigns, their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or branch, or other device in connection with the collection of or attempting to collect consumer debts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Obtaining information on consumers from a consumer reporting agency or any other source under false pretenses.
2. Failing to keep accurate records of the sources of all information obtained on all consumers.
3. Retaining on respondents' premises any books, pamphlets, or any other writings or materials containing subscriber codes or any information which would enable respondents to use subscriber codes unless respondents or their employees or agents are:

(a) Members of a consumer reporting agency; and

(b) Authorized to possess and use such codes; such authorization must expressly include collecting or attempting to collect debts for respondents and such authorization must be maintained in respondents' files.

Any such codes or information currently in respondents' possession or which subsequently come into respondents' possession and are not permitted as required in (a) and (b) must be destroyed or returned to the authorized user and a record kept of such action for three years, making such record available to the Federal Trade Commission for inspection and copying upon request.

4. Representing in any manner, directly or by implication, orally or in writing, that respondents have the authority or right to cause debtors to go to jail or to be defendants in criminal prosecutions for not paying their debts; or misrepresenting in any manner respondents' authority to affect debtors' legal rights or liabilities.

5. Representing in any manner, directly or by implication, orally or in writing, that respondents are serving legal or judicial documents upon debtors unless such is the case; or misrepresenting in any manner the status, significance or official nature of any papers sent to debtors.

6. Representing in any manner, directly or by implication, orally or in writing, that respondents or their agents are something or someone other than a debt collection agency or debt collector; or misrepresenting in any manner the official, professional or vocational status of respondents or their agents, or misrepresenting, in any manner, the position or function of any of respondents' agents, employees, and representatives.

7. Representing in any manner, directly or by implication, orally or in writing, that respondents will destroy or attempt to harm debtors' credit standings, or that respondents possess the authority or intend to disclose information regarding debtors to a consumer reporting agency; or misrepresenting in any manner the effect of any action taken by respondents on a debtor's credit standing.

8. Representing in any manner, directly or by implication, orally or in writing, that legal action has been initiated or is being initiated unless respondents have in fact instituted the legal action represented; or misrepresenting in any manner that legal action will be initiated, including but not limited to, attachment or garnishment proceedings, unless respondents are able to establish that, at the time the representation was made, respondents intended in good faith to institute the legal action represented.

9. Representing in any manner, directly or by implication, orally or

in writing, that judgment may be entered against a debtor without the debtor having notice of the legal action and an opportunity to appear and defend himself or herself in a court of law.

10. Informing a debtor of a creditor's post judgment rights without disclosing at the same time that no judgment may be entered against the debtor unless the debtor has first been given notice and an opportunity to appear and defend himself or herself in a court of law.

11. Representing in any manner, directly or by implication, orally or in writing, the post judgment rights of a creditor unless said rights are in fact as specifically represented in the jurisdiction in which collection is sought; or misrepresenting in any manner, directly or by implication, the post judgment rights of a creditor.

12. Using abusive or obscene language when talking with or writing to debtors.

13. Placing any telephone call to any debtor, or orally contacting debtors in any manner, between the hours, in the time zone of the debtor, of 9:00 p.m. and 7:00 a.m. on weekdays, including Saturdays, and between the hours of 9:00 p.m. and 12:00 noon on Sundays.

14. Initiating more than two (2) oral conversations with any debtor in any one week regarding the collection of the same debt.

*It is further ordered*, That respondents, their successors and assigns, with respect to oral or written communications to persons other than the alleged debtor, cease and desist from:

(a) Communicating or threatening to communicate, or implying the fact or existence of any debt to a debtor's employer prior to any judgment;

(b) Communicating with or threatening to communicate, or implying the fact or existence of any debt to any other third parties, including former employers of the debtor other than one who might be reasonably expected to be liable therefor except with the written permission of the debtor or except where legal documents are being served according to law;

(c) Reporting a debt or an alleged debt to a consumer reporting agency unless respondents also promptly report to said consumer reporting agency the subsequent payment of said debt or alleged debt, or the resolution of any dispute concerning said debt, or alleged debt.

*It is further ordered*, That said respondents shall maintain for a period of three (3) years with respect to each debtor, records which shall consist of copies of all collection letters, dunning notices, requests for information and similar correspondence delivered to such debtor or third parties, or any indication of what items or documents were sent; a record or tabulation of all telephone calls made to or about the debtor showing the identity of the caller, the date of the call, the telephone number called, the purpose and result of the call and any notes or reports made in connection therewith when obtained; and copies of all documents pertaining to collection efforts such as referrals to lawyers or other agencies and legal documents utilized in collection efforts, or any indication of what items were sent.

## II

*It is ordered,* That National Account Systems, Inc., NAS Creditors Service, Inc., National Account Systems of Milwaukee, Inc., and A. B. Hartman, Inc., their successors and assigns, their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or branch, or other device, in connection with any consumer credit transaction, including, but not limited to, transactions involving the deferment of the payment of debts and/or the refinancing of any existing extension of credit or the increasing of existing obligations, as these terms are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act [15 U.S.C. 1601–65 (1970), *as amended,* 15 U.S.C. 1601–65(a), (Supp. IV, 1974)], do forthwith cease and desist from:

1. Failing to disclose the finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, expressed and identified as an annual percentage rate, as "annual percentage rate" is defined in Section 226.2 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.
2. Failing to disclose the date on which the finance charge begins to accrue, as required by Section 226.8(b)(1) of Regulation Z.
3. Failing to disclose the number, amount and due dates or periods of payments scheduled to repay the indebtedness and the sum of such payments using the term "total of payments" as is required by Section 226.8(b)(3) of Regulation Z.
4. Failing to disclose the total amount of finance charges, with a description of each amount included, using the term "finance charge", as required by Section 226.8(d)(3) of Regulation Z.
5. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.
6. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.
7. Failing to make the disclosures required by Section 226.8 of

Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

8. Failing in any consumer credit transaction to make all disclosures, required by Sections 226.6, 226.7, 226.8, and 226.9 of Regulation Z, and failing to make all disclosures, determined in accordance with Section 226.4 and Section 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, and 226.9 of Regulation Z.

## III

*It is further ordered*, That:

(a) Respondents shall deliver a copy of this amended order to all present and future employees and their agents engaged in debt collection and to any other person or entity connected with respondents to whom respondents presently refer or assign and to whom in the future respondents may refer or assign matters for debt collection;

(b) Respondents shall provide each of their employees with a form returnable to respondents clearly stating the employee's intention to conform his or her business practices to the requirements of this amended order; respondents shall require said persons to agree in writing on said form to conform his or her business practices to the requirements of this amended order and shall retain said statement during the period said person is so engaged, and for three (3) years thereafter, and make said statement available to representatives of the Federal Trade Commission for inspection and copying upon request;

(c) In the event such person will not agree to sign and file the form set forth in paragraph (b) above with respondents and conform to the provisions of this amended order, respondents shall not use or engage or continue the use or engagement of such person to collect debts or aid or assist respondents in the collection of debts;

(d) Respondents shall inform each person and entity described in paragraph (a) above that respondents shall not use or engage or shall terminate the use or engagement of any such person or entity unless such person or entity's business practices conform to the requirements of this amended order; and that respondents are obligated by this amended order to terminate the use or engagement of those persons or entities who engage on their own in the acts or practices prohibited by this amended order;

(e) Respondents shall institute a program of reasonable surveillance of their officers, employees and their agents engaged in debt collection, adequate to reveal whether the business practices of each said person conform to the requirements of this amended order;

(f) Upon receiving information from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) indicating reasonable proof of a violation of any provision of this amended order by any person or entity described in paragraph (a) above, respondents shall within 72 hours notify such person or entity by certified mail, return receipt requested, that such violation of this amended order has occurred ("Termination Notice"), and that respondents shall forthwith discontinue dealing with said person or entity. Immediately after such notification, respondents shall permanently discontinue dealing with said person or entity;

(g) Respondents shall retain evidence of compliance with this amended order and all Termination Notices and make such evidence available to representatives of the Federal Trade Commission for inspection and copying upon request;

(h) Respondents shall prepare and maintain a list of all employees containing the names of all such persons and their aliases, if any, and their last known addresses and telephone numbers for three (3) years following the date of their last employment with respondents; such list shall be made available to representatives of the Federal Trade Commission for inspection and copying upon request.

## IV

*It is further ordered,* That respondents National Account Systems, Inc., a corporation, NAS Creditors Service, Inc., a corporation, National Account Systems of Milwaukee, Inc., a corporation, A. B. Hartman, Inc., a corporation, Payco American Corporation, a corporation, and The Diners Club, Inc., a corporation, the former owner of the stock of National Account Systems, Inc., hereinafter referred to as respondents, shall not use independent agents or other entities knowingly for the purpose of circumventing any provision of this amended order.

*It is further ordered,* That respondents shall notify the Commission at last thirty (30) days prior to any proposed change in any of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the amended order.

*It is further ordered,* That the respondents herein shall within sixty (60) days after service upon them of this amended order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this amended order.

*It is further ordered,* That no provision of this amended order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with more restrictive agreements, orders or directives of any kind obtained by any other governmental agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this amended order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

## IN THE MATTER OF

# SCHERING-PLOUGH CORPORATION

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

*Docket C-2986. Complaint, Aug. 10, 1979 — Decision, Aug. 10, 1979*

**This consent order, among other things, requires a Kenilworth, N.J. manufacturer of various drugs, including athlete's foot products, to divest, within one year, the assets acquired as a result of its acquisition of Scholl, Inc. and utilized by Scholl primarily for the manufacture, distribution or sale in the United States of Solvex athlete's foot products. Additionally, the order requires the company to furnish the acquirer with specified assistance, and prohibits the firm, for ten years, from acquiring any business engaged in the manufacture, sale or distribution of athlete's foot products.**

## *Appearances*

For the Commission: *Geoffrey Walker.*

For the respondent: *Edward Wolfe, White & Case,* New York City.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent, subject to the jurisdiction of the Commission, has acquired Scholl, Inc., a corporation, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

## I. DEFINITION

1. For purposes of this complaint, the following definition shall apply:

1. "Athlete's foot products" means nonprescription fungicidal or fungistatic pharmaceutical products manufactured, distributed or sold primarily for the treatment of athlete's foot (*tinea pedis*).

## II. RESPONDENT

2. Schering-Plough Corporation (Schering-Plough) is a corporation organized, existing and doing business under and by virtue of the laws

of the State of New Jersey with its principal office and place of business at 2000 Galloping Hill Road, Kenilworth, New Jersey.

3. In 1977, Schering-Plough had consolidated sales which amounted to $940.8 million.

4. Schering-Plough is a diversified company which manufactures and markets, on a worldwide basis, principally, ethical pharmaceuticals and proprietary medicines, cosmetics, toiletries and household products. In 1977, Schering-Plough sold approximately $212.9 million worth of drugs through pharmacies and was the eighth largest supplier to pharmacies of ethical and proprietary drugs.

5. Schering-Plough is the largest manufacturer of athlete's foot products in the United States, with 1977 sales in the United States of approximately $12.8 million.

6. At all times relevant herein, respondent has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

## III. Acquisition Agreement

7. On August 9, 1978, Schering-Plough entered into a letter agreement with Scholl, Inc. providing for Schering-Plough to acquire Scholl, Inc. and to merge Scholl, Inc. into a subsidiary of Schering-Plough. The merger was consummated on April 2, 1979. The transaction is valued at more than $127.4 million.

## IV. Target Corporation

8. Scholl, Inc., (Scholl) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business at 213 West Schiller St., Chicago, Illinois. At the time of acquisition, Scholl was engaged primarily in the manufacture and sale of foot and leg care products, shoes and footwear and adhesive products.

9. In 1977, Scholl had net sales of $216.4 million. Scholl is the fourth largest manufacturer of athlete's foot products in the United States, with 1977 sales of approximately $1.5 million.

10. At all times relevant herein, Scholl has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

## V. Trade and Commerce

11. For the purposes of this complaint, the relevant product market

is the manufacture and sale of athlete's foot products and the relevant geographic market is the United States.

12. Athlete's foot products are used primarily to treat dermatophytosis of the foot, tinea pedis.

13. Sales of athlete's foot products in the United States are substantial, in 1977, amounting to $30 million.

14. Schering-Plough and Scholl are and have been for many years substantial and actual competitors in the manufacture and sale of athlete's foot products.

15. At the time of the acquisition agreement, Schering-Plough and Scholl ranked approximately first and fourth respectively, in total sales of athlete's foot products; Schering-Plough accounted for more than 40 percent and Scholl accounted for an estimated 5 percent of total sales of such products.

16. The athlete's foot products market is concentrated. In 1977, the four top firms accounted for more than 80 percent of sales in the United States.

17. Entry into the manufacture and sale of athlete's foot products is difficult, requiring significant financial resources, sophisticated technological skills, quality control and effective marketing and distribution.

## VI. Effects of Acquisition: Violations Charged

18. The effect of the acquisition of Scholl by respondent may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of athlete's foot products in the United States in violation of the Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

a. Actual and potential competition between respondent and Scholl in the manufacture and sale of athlete's foot products has been eliminated;

b. Actual competition between competitors generally in the manufacture and sale of athlete's foot products may be lessened;

c. Scholl as a substantial, independent competitive factor in the manufacture and sale of athlete's foot products has been eliminated;

d. The leading position of respondent in the manufacture and sale of athlete's foot products may be further entrenched;

e. Concentration in the manufacture and sale of athlete's foot products will be maintained or increased, and the possibility of deconcentration may be diminished;

f. Existing barriers to new entry may be increased substantially;

g. Additional acquisitions and mergers in the industry may be encouraged;

h. Independent manufacturers and sellers of athlete's foot products may be deprived of a fair opportunity to compete with the combined resources and market position of respondent and Scholl;

i. Members of the consuming public may be deprived of the benefits of free and unrestricted competition in the manufacture and sale of athlete's foot products.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton and Federal Trade Commission Acts; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Schering-Plough Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 2000 Galloping Hill Road, in the town of Kenilworth, State of New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

For the purpose of this order, the following definitions shall apply:

A. "Solvex" means the *Solvex* trademark registered under the Lanham Act or any predecessor federal statute. The term "Solvex" does not include any rights, title or interest in the name or trademark *Dr. Scholl's* or Scholl or in any distinctive packaging associated with the name Scholl or with any Scholl product.

B. "Athlete's foot products" means nonprescription fungicidal or fungistatic pharmaceutical products manufactured, distributed or sold primarily for the treatment of athlete's foot (*tinea pedis*).

### I

*It is ordered*, That, subject to the prior approval of the Federal Trade Commission, respondent Schering-Plough, through its officers, directors, agents, representatives, employees, subsidiaries, affiliates, divisions, successors and assigns, shall, within one (1) year from either the date Schering-Plough acquires Scholl or service of this order, whichever occurs later, divest the assets, tangible and intangible, acquired, improved or added by respondent as a result of its acquisition of Scholl and utilized by Scholl primarily for the manufacture, distribution or sale in the United States of Solvex athlete's foot products. Such assets shall include all raw material reserves, inventory, machinery, equipment, trade names, trademarks, patents, licenses, research and development projects, good will and other property of whatever description.

### II

*It is further ordered*, That, at the option of the acquirer (the option to be exercised at the time of the contract), Schering-Plough shall assist the acquirer in the manufacture, distribution or sale of athlete's foot products so that they are comparable in quality to the Solvex products manufactured by Scholl at the time of the acquisition by respondent, in one or more of the following ways:

A. Schering-Plough shall provide acquirer with Scholl's formulations, specifications and manufacturing procedures, including Scholl's quality control standards and methods, relating to such Solvex products;

B. Schering-Plough shall provide the acquirer with all of Scholl's written know-how and scientific research data relating to athlete's foot products;

C. For no longer than three (3) years from the date of the contract with the acquirer, Schering-Plough shall provide the acquirer, at reasonable cost, with the assistance of such technical and production personnel as may be necessary in establishing or expanding the acquirer's facility for the production of such Solvex products; and

D. Schering-Plough shall use its best efforts to assist the acquirer in obtaining raw materials required to manufacture such Solvex products; *provided, however*, that nothing in this provision shall require Schering-Plough (1) to participate in, to guarantee or to stand behind any financial arrangement between the acquirer and the suppliers of raw materials, or (2) to furnish any such materials except as specifically provided elsewhere herein.

E. Schering-Plough shall provide the acquirer with all Scholl's Solvex customer lists, sales and promotional materials, proprietary market research materials (except for materials from A.C. Nielsen Co. and Towne-Oller and Associates, Inc. that are subject to a contractual agreement not to disclose) and sales training materials and devices relating thereto.

F. As an interim measure, pending the establishment or expansion of the acquirer's manufacturing capability and for no longer than three (3) years from the date of the contract with the acquirer, Schering-Plough shall agree to supply the acquirer, at reasonable cost, with its bulk requirements of products the same or similar to those manufactured by Scholl in the United States under the Solvex trademark at the time of the acquisition by respondent.

## III

*It is further ordered*, That, until all the requirements of Paragraph I of this order have been accomplished, Schering-Plough, its subsidiaries, affiliates, divisions, successors and assigns, shall not take any action which diminishes the value of the products or other assets, tangible or intangible, that are subject to this order or which in any way impairs Schering-Plough's ability to comply with the requirements of this order; *provided, however*, that nothing in this provision shall prohibit or prevent Schering-Plough, its subsidiaries, affiliates, divisions, successors or assigns, from competing in the manufacture, distribution or sale of athlete's foot products.

## IV

*It is further ordered*, That, pursuant to the requirements of Paragraph I of this order, none of the assets, property, rights or privileges, tangible or intangible, acquired or added by respondent shall be divested, directly or indirectly, to anyone who is at the time of divestiture an officer, director, employee or agent of, or under the control, direction or influence of, respondent or its subsidiaries or affiliated corporations, or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of the respondent.

## V

*It is further ordered,* That, for a period of ten (10) years from the date this order becomes final, or until June 30, 1989, whichever occurs first, Schering-Plough, its subsidiaries, affiliates, divisions, successors and assigns, shall not acquire directly or indirectly, without prior approval of the Federal Trade Commission, any stock, share capital, actual or potential equity interest or right of participation in the earnings of any concern, corporate or non-corporate, engaged in, or the assets of any concern relating to, the manufacture, distribution or sale in the United States of athlete's foot products; *provided, however,* that nothing in this paragraph shall require prior approval of the merger of Scholl into any subsidiary of Schering-Plough or other reorganization of Schering-Plough or its subsidiaries, affiliates and divisions.

## VI

*It is further ordered,* That Schering-Plough shall, within sixty (60) days after the date of service upon it of this order, and every sixty (60) days thereafter until Schering-Plough has fully complied with Paragraph I of this order, and annually thereafter for the duration of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Schering-Plough intends to comply, is complying or has complied with this order. All compliance reports shall include, among other things that are from time to time required, a summary of contacts or negotiations with anyone for the assets, property, rights and privileges specified in Paragraph I of this order, the identity of all such persons, and copies of all written communications between such persons and Schering-Plough.

## VII

*It is further ordered,* That Schering-Plough shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporate identity of Schering-Plough, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect compliance obligations arising out of the order.

## IN THE MATTER OF

## UNION CARBIDE CORPORATION — DOCKET C–2557
## HERCULES INCORPORATED — DOCKET C–2558
## FMC CORPORATION — DOCKET 8961

### MODIFYING ORDERS IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Modifying Orders, Aug. 13, 1979*

**This order reopens proceedings and modifies the 1975 consent orders entered against Union Carbide Corporation, (86 F.T.C. 1231, Dec. 2, 1975); Hercules Incorporated, (86 F.T.C. 1236, Dec. 2, 1975); and FMC Corporation, (86 F.T.C. 897, Oct. 8, 1975), by deleting provisions requiring companies to include in their advertising a general warning statement apprising users that pesticides can be harmful unless used as directed.**

## ORDER REOPENING AND MODIFYING CEASE AND DESIST ORDERS

In petitions filed during March, April, and May 1978, and supplementary papers filed in June 1978, the Union Carbide Corporation (Union Carbide), Hercules Incorporated (Hercules), and FMC Corporation (FMC) requested the Commission, pursuant to Section 3.72(b)(2) of its Rules of Practice, to reopen the proceedings and modify orders entered in Dkt. Nos. C–2557, C–2558, and 8961. Respondents seek relief from provisions in those orders which require specified warning statements to be included in subject advertising. The provisions at issue read as follows:[1]

> *It is further ordered*, That respondent. . ., its successors and assigns and respondent's officers, representatives, agents, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale or distribution of such products do forthwith cease and desist from disseminating or causing the dissemination of:
>
> A. Any print advertising or print promotional material which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes in such print advertising or print promotional material the following statement:
>
> STOP! ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED. READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.
>
> B. Any broadcast advertisement more than 30 seconds in length which contains any

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[1] The contested provisions appear as Section IV of the modified Union Carbide order (86 F.T.C. 1231, 1233–34 (1975)), Section III of the modified Hercules order (86 F.T.C. 1236, 1238–39 (1975)), and Section III of the FMC order (86 F.T.C. 897, 903–04 (1975)). Hercules also seeks deletion of the last full paragraph of Section IV of its order and Union Carbide urges the excision of the reference to Section IV which appears in Section III of its order.

> use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes the following statement:
>
> ALL PESTICIDES CAN BE HARMFUL TO HEALTH AND THE ENVIRONMENT IF MISUSED. READ THE LABEL CAREFULLY AND USE ONLY AS DIRECTED.
>
> C. Any broadcast advertisement of 30 seconds or less in length which contains any use or efficacy claim or any environmental or safety claim for any such products unless it clearly and conspicuously includes the following statement:
>
> ALL PESTICIDES CAN BE HARMFUL. READ THE LABEL. USE AS DIRECTED.
>
> *Provided*, That in television advertisements not more than 10 seconds in length which contain no direct representations concerning product safety, the requirements of the term "clearly and conspicuously" shall in all cases be met by including the above statement in the video portion of the advertisement.
>
> *Provided, however*, That for purposes of enforcing Paragraph III of this order any advertisement, statement, claim or representation that such products may be employed for a crop or plant use registered under FIFRA, or any other approved use based upon evidence filed in connection with registration under FIFRA shall not be deemed sufficient to require the disclosure of any statement otherwise required under the provisions of Paragraph III: *Provided further*, That this exception shall be limited to advertisements which promote the respondent's corporate image, which only incidentally promote the sale or distribution of such products and which are published or disseminated for publication by respondent's corporate headquarters' officers in conjunction with respondent's other nonpesticide products.[2]

Respondents' petitions would not disturb the prohibitory provisions of the orders.

Section 3.72(b)(2) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b)(2), permits the filing of petitions to reopen proceedings whenever a party subject to a final rule or order "is of the opinion that changed conditions of fact or law require that said rule or order be altered, modified, or set aside, or that the public interest so requires. . . ." Petitioners have advanced a number of considerations intended to illustrate such "changed conditions" and to demonstrate the public interest in modification. They allege changed conditions of fact or law in the Commission's failure to promulgate a trade regulation rule concerning pesticide advertising, in the amendment of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and more comprehensive regulations issued pursuant thereto by the Environmental Protection Agency (EPA), and in recent Commission staff findings about pesticide consumers. As public interest factors for modification, respondents cite the competitive disadvantage (and presumably consequent consumer harm) which they claim compliance forces upon them, the lack of necessity for the warning statement, and the possibility if not likelihood of confusion to the public from inclusion on some pesticide products of dual warnings, one mandated by the FTC and the other by the EPA.

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[2] The *Provided, however* paragraph is not included in the Union Carbide order and the last part of the *Provid* *further* sentence, beginning with the words "and which are published. . .," does not appear in the Hercules order.

Having considered the petitions and supporting papers and the staff's answer thereto, the Commission has concluded that the petitions should be granted and that the unmodified provisions of the orders will be sufficient to safeguard the public interest, particularly in light of the Commission's 1977 announcement that it would continue to monitor pesticide advertising closely and to deal with law violations on a case-by-case basis. In reaching its conclusion, the Commission has taken into account the 1972 FIFRA amendments and subsequent EPA regulatory activity, the dramatic decline in absolute safety advertising which had provided the impetus for the warning statement requirement, the findings of greatly increased consumer sophistication with regard to the hazards of pesticide products, the decrease in pesticide-related fatalities, and the possibility of the warning's creating a burden upon competition. The Commission's determination does not, however, signify acceptance of petitioners' contentions that the Commission decision not to promulgate a pesticide advertising TRR either constitutes a change in fact or law or represents the failure of any sort of implied condition precedent to these orders. Therefore,

*It is ordered,* That these matters be reopened for the limited purpose requested and that the following modifications be made:

> In Dkt. No. C-2557, change the words "I, II, and IV" in Section III of the cease and desist order to "I and II," and delete Section IV of the order.
>
> In Dkt. No. C-2558, delete Section III of the cease and desist order, change the words "I, II, and III" to "I and II" in the first paragraph of Section IV of the order, and delete the second paragraph of Section IV.
>
> In Dkt. No. 8961, delete Section III of the cease and desist order.

*It is further ordered,* That the foregoing modifications shall become effective upon service of this order.

Commissioner Pitofsky did not participate.

### IN THE MATTER OF

# KORVETTE'S, INC.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND MAGNUSON-MOSS WARRANTY ACTS

*Docket C-2987. Complaint, Aug. 16, 1979 — Decision, Aug. 16, 1979*

**This consent order would require a New York City department store chain, among other things, to cease failing to provide its stores with statutorily required warranty material; and to make the terms of written warranties on consumer products available to prospective purchasers prior to sale. The firm is further required to develop and implement a program to instruct its sales personnel about the availability and location of warranty information; and maintain adequate business records for a period of two years.**

## *Appearances*

For the Commission: *Stewart McCloud.*

For the respondent: *Charles Meyers,* New York City.

## COMPLAINT

Pursuant to the provisions of the Magnuson-Moss Warranty Act and Rule 702 (16 C.F.R. 702) promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Korvette's, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Rule 702 promulgated under the Magnuson-Moss Warranty Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, Pub. Law 93-637, 15 U.S.C. 2301 (Supp. 1975) and in Rule 702 (16 C.F.R. 702) promulgated thereunder, shall apply to the terms used in this complaint.

PAR. 2. Respondent Korvette's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 450 West 33rd St., New York, New York.

PAR. 3. Respondent is now and has been engaged in the operation of a chain of department stores throughout the United States. Its volume of business has been and is substantial. In the operation of its department stores, respondent is now and has been distributing, advertising, offering for sale and selling among other items, appliances, including but not limited to household appliances, radios, stereos, and televisions which are consumer products. Therefore, respondent is both a supplier and seller of consumer products.

PAR. 4. Respondent, in the course and conduct of its aforesaid business, now causes and has caused consumer products to be distributed in commerce.

PAR. 5. The Federal Trade Commission, pursuant to Title I, Section 109 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2309, has duly promulgated on December 31, 1975 [40 F.R. 60189] the Rule concerning the Pre-Sale Availability of Written Warranty Terms (16 C.F.R. 702 (1977)), effective January 1, 1977. A copy of the Rule* is marked and attached as Appendix A, and is incorporated in this complaint by reference as if fully set forth verbatim.

## COUNT I

Alleging violations of the Magnuson-Moss Warranty Act and the implementing rule promulgated under that Act, and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Five are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 6. In the ordinary course and conduct of its aforesaid business, respondent regularly offers and has offered written warranties on consumer products. Therefore, respondent is a warrantor of consumer products.

PAR. 7. In the further course and conduct of its business as warrantor of consumer products actually costing more than $15.00 respondent has failed to provide its department stores with the warranty materials required by 16 C.F.R. 702.3(b)(1) which are necessary for such stores to comply with the requirements for sellers of consumer products as set forth in 16 C.F.R. 702.3(a).

PAR. 8. Respondent's failure to comply with the provisions of 16 C.F.R. 702 constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), as amended.

## COUNT II

Alleging violations of the Magnuson-Moss Warranty Act and the implementing rule promulgated under that Act, and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Five are incorporated by reference in Count II as if fully set forth verbatim.

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* Not reproduced herein for reasons of economy.

PAR. 9. In the ordinary course and conduct of its aforesaid business, respondent regularly sells or offers for sale consumer products for purposes other than resale or use in the ordinary course of the buyer's business. Therefore, respondent is a seller of consumer products.

PAR. 10. On or after January 1, 1977, respondent, in the ordinary course of its aforesaid business as a seller of consumer products actually costing more than $15.00 and manufactured on or after January 1, 1977 has failed to make the terms of written warranties available to the consumer prior to sale through utilization of one or more of the methods required by 16 C.F.R. 702.3(a)(1) by:

A. Clearly and conspicuously displaying the text of the written warranty in close conjunction with the product;

B. Maintaining a binder system readily available to the consumer along with conspicuous signs noting the location of binders where the binders themselves are not in plain view;

C. Displaying the warranty package in such a way that the text of the warranty is visible; and

D. Placing a sign with the warranty terms in close proximity to the product.

PAR. 11. Respondent's failure to comply with the provisions of 16 C.F.R. 702 constituted and now constitutes a violation of the Magnuson-Moss Warranty Act and, pursuant to Section 110(b) thereof, an unfair or deceptive practice under Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), as amended.

## APPENDIX A

### COMPARE WARRANTIES BEFORE YOU BUY!

**There's a binder with warranties in this department. If you can't find the warranty binder, ask for it.**

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, the Magnuson-Moss Warranty Act, and the Pre-Sale Availability Rule promulgated thereunder; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts and Rule, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Korvette's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 450 West 33rd St., in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty Act, Pub. Law 93-637, 15 U.S.C. 2301 (Supp. 1975) and in Rule 702 (16 C.F.R. 702.1) promulgated thereunder shall apply to the terms in this order.

## I

*It is ordered*, That respondent Korvette's, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or indirectly through any corporation, subsidiary, division or any other device in connection with its business as a seller and warrantor of consumer products distributed in commerce as "seller", "warrantor", and "consumer product" are defined in Rule 702 (16 C.F.R. 702.1) of the Magnuson-Moss Warranty Act (15 U.S.C. 2301) do forthwith cease and desist from:

A. Failing, in the further course and conduct of its business as warrantor of consumer products actually costing more than $15.00, to provide its department stores with the warranty materials required by 16 C.F.R. 702.3(b)(1) which are necessary for such stores to comply with the requirements for sellers of consumer products, as set forth in 16 C.F.R. 702.3(a).

B. Failing, in its course of business as a seller of consumer products, to make the terms of written warranties on consumer products actually costing more than $15.00 and manufactured on or after January 1, 1977, available to the consumer prior to sale through utilization of one or more means specified in 16 C.F.R. 702.3(a)(1).

## II

*It is further ordered,* That for those departments in which respondent chooses to use a binder system to comply with seller's duties under 16 C.F.R. 702.3(a), respondent shall:

A. Maintain a permanently affixed binder system in each such department which provides the consumer with ready access; and either

B. Label and display such binders in a manner reasonably calculated to elicit the consumer's attention and accessible for consumer use without the assistance of store personnel; or

C. Place permanently affixed signs, not smaller than 8–1/2 inches by 11 inches advising the consumer of the availability of the binders, in a prominent location in each such department. The content of these permanently affixed signs is included in this order as Appendix A.

## III

*It is further ordered,* That respondent shall:

A. Deliver a copy of this order to cease and desist to all present regional and store managerial employees engaged in the sale of consumer products on behalf of respondent.

B. Instruct all present and future regional and store managerial employees engaged in the sale of consumer products on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty Act (15 U.S.C. 2301) and under this order relating to the requirements about the availability and location of warranty information for customers.

C. Develop and implement a program to instruct its sales personnel about the availability and location of warranty information.

D. Maintain, for a period of not less than two (2) years from the effective date of the order, adequate business records to be furnished upon request to the staff of the Federal Trade Commission, relating to the manner and form of its continuing compliance with the terms and provisions of this order.

E. Notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

F. Within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

## APPENDIX A

### COMPARE WARRANTIES BEFORE YOU BUY!

There's a binder with warranties in this department. If you can't find the warranty binder, ask for it.

## IN THE MATTER OF

# HOWARD JOHNSON COMPANY

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2988. Complaint, Aug. 16, 1979 — Decision, Aug. 16, 1979*

**This consent order requires a Boston, Mass. restaurant chain, among other things, to cease requiring its licensees to purchase food products, or other products or services from the company, or from particular sources. The firm is additionally required to cancel or delete from its franchising agreements all provisions which fail to conform with the terms of the order.**

## *Appearances*

For the Commission: *Harold F. Moody* and *Joanne M. Neale*.

For the respondent: *Walter W. Curcio*, Boston, Mass. and *Malcolm D. Perkins, Herrick & Smith*, Boston, Mass.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Howard Johnson Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint the following definitions shall apply:

"Ice cream products" means ice cream, ice milk, sherbert, ice cream cake, ice cream pie, frostee, thick shake mix, frozen yogurt, and yogurt mix;

"Food products" means all foodstuffs; including, but not limited to, syrups and toppings, condiments, candy, bakery products, dry mixes, processed foods, raw and prepared meats, fish and poultry, chowders, gravies, soups and ice cream products; and

"Howard Johnson's" restaurant means a restaurant operated by Howard Johnson Company or its licensee under the trademark "Howard Johnson's."

PAR. 2. Respondent Howard Johnson Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at One Howard Johnson Plaza, Boston, Massachusetts.

PAR. 3. Respondent is now and has been engaged in the franchising or licensing of persons with respect to the operation of "Howard Johnson's" restaurants bearing, among others, the registered trademarks and service marks "Howard Johnson's," "Host of the Highways," "Landmark for Hungry Americans," "Someone You Know Wherever You Go," the distinctive Howard Johnson's roof and cupola, and the unregistered trade name "The Flavor of America." There are approximately 253 licensed "Howard Johnson's" restaurants located throughout the United States and Puerto Rico. Respondent also owns and operates approximately 645 "Howard Johnson's" restaurants throughout the United States.

Respondent is engaged in the manufacture and preparation of food products other than ice cream products, at several plant locations in Massachusetts, Florida, New York, and Pennsylvania, and in the distribution of said food products from distribution centers located in California, Florida, Georgia, Illinois, Maryland, Massachusetts, Ohio, Pennsylvania, and Texas. Respondent is also engaged in the manufacture and distribution of ice cream products from ice cream plants located in Massachusetts, Maryland, Florida, and Illinois. These food products are furnished to "Howard Johnson's" restaurants operated by the respondent and sold to licensed "Howard Johnson's" restaurants.

Respondent reported gross sales of approximately $600 million by company-operated "Howard Johnson's" restaurants during the inclusive period of time from August 30, 1975 through September 30, 1977, and sales by licensed "Howard Johnson's" restaurants for 1976 of approximately $100 million. Sales of food and supplies by respondent to its licensees totaled approximately $55 million for the inclusive period of time from August 30, 1975 through September 30, 1977.

PAR. 4. In the course and conduct of respondent's business of licensing the use of the "Howard Johnson's" trademarks, service marks and trade names, both registered and unregistered, and of manufacturing and selling food products, respondent causes and has caused its food products to be shipped from distribution centers and manufacturing plants located in various states to both company owned and licensed "Howard Johnson's" restaurants located in various other states. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. Except to the extent that competition has been lessened by reason of the practices hereinafter alleged, respondent is in substantial competition with other persons, firms and corporations engaged in the manufacture and sale at wholesale of food products, the sale of food products at retail to the public, and the licensing of trademarks, trade names, and service marks for use in connection with restaurant businesses in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended. Licensees of "Howard Johnson's" restaurants are in substantial competition with respondent, with one another, and with other firms, persons and corporations engaged in the sale of food products at retail to the public in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 6. In the course and conduct of its business, respondent has engaged in and is continuing to engage in the following unfair methods of competition and unfair acts and practices, among others, enumerated in this paragraph:

1. For several years, at least since September 1975, respondent has pursued a plan or policy, the purpose of which is to require that "Howard Johnson's" restaurant licensees purchase from respondent a substantial portion of the food products used by the licensees in their restaurant business.
2. In furtherance of this plan or policy, respondent has included and continues to the present time to include in its Operator's Agreements provisions requiring that "Howard Johnson's" restaurant licensees purchase from respondent a substantial portion of the food products sold to the licensees' restaurant customers.

PAR. 7. The above acts and practices have the capacity and tendency to lessen competition with the following effects, among others:

1. "Howard Johnson's" restaurant licensees are required to purchase from respondent a substantial portion of their requirements of food products, including their total requirements of approximately 170 food products enumerated in the respondent's Operator's Agreement.
2. Competition between respondent and other suppliers of such food products has been lessened.

PAR. 8. The aforesaid acts and practices of the respondent have the tendency to unduly hinder competition, have lessened actual and potential competition, and thus are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce and unfair acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Howard Johnson Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at One Howard Johnson Plaza, in the City of Boston, Commonwealth of Massachusetts.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

### I

### DEFINITIONS

For the purposes of this order the following definitions shall apply: "Ice cream products" means ice cream, ice milk, sherbert, ice cream cake, ice cream pie, frostee, thick shake mix, frozen yogurt and yogurt mix;

"Food products" means all foodstuffs, including, but not limited to, syrups and toppings, condiments, candy, bakery products, dry mixes, processed foods, raw and prepared meats, fish and poultry, chowders, gravies, soups and ice cream products; and

"Howard Johnson's" restaurant means a restaurant operated by Howard Johnson Company or its licensee under the trade name "Howard Johnson's."

*It is ordered*, That Howard Johnson Company, a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with its operation of a food manufacturing business and franchising or licensing of persons to operate a "Howard Johnson's" restaurant business, do forthwith cease and desist from requiring in any manner or by any means, directly or indirectly, its licensees to purchase food products (with the exception of the products listed in Appendix A attached hereto which are manufactured by Howard Johnson Company itself) or any other products or services from respondent or from any other source.

*Provided*, that nothing in this order shall prohibit respondent from establishing reasonable and uniform standards of manufacture, specifications, recipes or formulae for products sold or used in its licensed restaurants, if such standards, specifications, recipes or formulae are made available without charge to manufacturers desiring to produce products for "Howard Johnson's" restaurant licensees pursuant to them. Furnishing of standards, specifications, recipes or formulae may be made subject to assurance of confidential treatment by those to whom they are provided.

*Provided further* that if, subsequent to the date on which this order becomes final, respondent wishes to present to the Commission any reasons why the provisions of this order should not apply to any other product manufactured by respondent, it shall submit to the Commission a written statement setting forth said reasons and shall not require licensees to purchase said product from Howard Johnson Company or any other source without the prior approval of the Federal Trade Commission.

## II

*It is further ordered*, That respondent herein shall, within thirty (30) days after service upon it of this order, mail or deliver a copy of this order to each of its operating divisions and to each of its present officers, and shall secure a signed statement acknowledging receipt of said order from each such entity or person.

## III

*It is further ordered,* That respondent herein shall, within thirty (30) days after service upon it of this order, mail or deliver a copy of this order to each present licensee under cover of the letter annexed hereto as Appendix B, and furnish the Commission proof of mailing thereof.

## IV

*It is further ordered,* That the respondent shall within thirty (30) days after service upon it of this order, take all necessary action to effect the cancellation or deletion of each provision of every contract or agreement between respondent and any of its "Howard Johnson's" restaurant licensees which is contrary to, or inconsistent with, any provision of this order.

## V

*It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

## VI

*It is further ordered,* That respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

## APPENDIX A

*Syrups and Toppings*

Chocolate syrup, Fudge and Butterscotch topping

*Ice Cream Products*

(Ice cream, ice milk, sherbert, ice cream cake, ice cream pie, frostee, thick shake mix, frozen yogurt and yogurt mix.)

*Bakery Products*

Coconut Layer Cake, Fudge Layer Cake, Apple, Blueberry, Cherry, Peach, Pecan and Squash Pies, Brownies, Chocolate Chip Cookies, Corn and Blueberry Toastees.

*Prepared Foods*

Beef Burgundy, Beef Stroganoff, Chicken Pie, Clam Chowder

*Other*

Frying Clams, Frankforts

Candy in Howard Johnson's trademark packages or wrappers. [Licensee is free to purchase candy from other sources in whatever quantity it chooses provided it is not identified as "Howard Johnson's".]

## APPENDIX B

(Howard Johnson Company Letterhead)

Dear Sir/Madame:

Howard Johnson Company has entered into an agreement with the Federal Trade Commission relating to the company's policy requiring that licensees purchase certain food products only from the company. A copy of the consent order entered into pursuant to that agreement is attached hereto.

Howard Johnson Company has entered into this agreement solely for settlement purposes, and the agreement and consent order are not to be construed as an admission by Howard Johnson's that it has violated any of the laws administered by the Commission, or that any of the allegations of the complaint are true and correct. Instead, the order merely relates to the activities of the company in the future.

The consent order prohibits Howard Johnson Company from requiring you to purchase from it food products (other than those products which are manufactured by Howard Johnson Company and listed in Appendix A attached to the order) or any other products or services. Therefore, the products listed in Appendix A are the only food products you are required to purchase from Howard Johnson Company, and any provisions of your license agreement requiring you to purchase other food products from Howard Johnson Company or any other source are hereby deleted and cancelled.

Howard Johnson's retains the right to establish reasonable standards of manufacture, reasonable specifications or reasonable recipes or formulae for products sold in Howard Johnson's restaurants operated by licensees. The company will supply any standards, specifications, recipes or formulae so established, without cost, to other manufacturers who may desire to sell the products to Howard Johnson's licensees.

Sincerely,

Howard B. Johnson
Chairman of the Board and President
Howard Johnson Company

## IN THE MATTER OF

# J. WALTER THOMPSON COMPANY

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9104. Complaint, Nov. 4, 1977 — Decision, Aug. 28, 1979*

This consent order, among other things, requires a New York City advertising agency to cease disseminating advertisements which contain unsubstantiated performance claims for any "product," as the term "product" is defined in the order.

### *Appearances*

For the Commission: *Robert Barton, Ronald Bogard, L. Hahn, Louise Kotoshirodo* and *Mitchell Paul.*

For the respondent: *Arthur Medow,* Chicago, Ill., *Donald Green, Wald, Harkrader & Ross,* Washington, D.C., *Howard Abrahams,* New York City and *Burton Y. Weitzenseld, Arnstein, Gluck, Weitzenseld & Minow,* Chicago, Ill.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sears, Roebuck and Co., and J. Walter Thompson Company, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sears, Roebuck and Co. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at Sears Tower, Chicago, Illinois.

PAR. 2. Respondent J. Walter Thompson Co. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 420 Lexington Ave., New York, New York.

PAR. 3. Respondent Sears, Roebuck and Co., now, and for some time last past has been, engaged in the distribution, sale, and advertising of portable and undercounter dishwashers and other consumer products to the public.

PAR. 4. Respondent Sears, Roebuck and Co. causes the said products, when sold, to be transported from its places of business in various

States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent Sears, Roebuck and Co. at all times mentioned herein has been and now is in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of dishwashers and other consumer products.

PAR. 6. Respondent J. Walter Thompson Co. is now, and for some time last past has been, an advertising agency of respondent Sears, Roebuck and Co., and now and for some time past has prepared and placed for dissemination, advertising material to promote the sale of various consumer products including Sears dishwashers.

PAR. 7. Respondent J. Walter Thompson Co. at all times mentioned herein has been, and is now, in substantial competition in or affecting commerce with other advertising agencies.

PAR. 8. In the course and conduct of their businesses, and for the purpose of inducing the sale of Sears dishwashers and other consumer products of respondent Sears, Roebuck and Co., respondents have disseminated and caused the dissemination of advertising in national magazines distributed by the mail and across state lines, and in television broadcasts transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines. In addition, respondent Sears has disseminated across state lines advertising in newspapers and in catalogs distributed by the mail, and by other means, and through various other outlets including point of sale.

PAR. 9. Typical of advertisements so disseminated or caused to be disseminated by respondents are the advertisements attached as Exhibits A (print ad) and B (television ad).

PAR. 10. Said Exhibits A and B and others, represent, directly or by implication, that the Sears Lady Kenmore dishwasher will completely remove, without prior rinsing or scraping, all residue and film from dishes and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers, when such dishes, pots and pans are placed in the bottom rack of the dishwasher for one complete set of washing and rinsing cycles.

PAR. 11. At the time that respondents made the representations alleged in Paragraph Ten, they did not possess and rely on a reasonable basis for such representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 12. In truth and in fact, contrary to respondents' representations in Paragraph Ten, the Sears Lady Kenmore dishwasher will not completely remove, without prior rinsing or scraping, all residue and film from all dishes, and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers, when such dishes, pots and pans are placed in the bottom rack of the dishwasher for one complete set of washing and rinsing cycles. Therefore, said advertisements are deceptive or unfair.

PAR. 13. Said Exhibit A, and others represent directly or by implication, that dishes in the top rack of the dishwasher will get as clean as those on the bottom rack after one complete set of washing and rinsing cycles, without prior rinsing or scraping.

PAR. 14. In truth and in fact, at the time respondents made the representations as alleged in Paragraph Thirteen, the respondents had no reasonable basis for making said representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 15. Said Exhibit A and others, by stating that the "Sani-Wash" cycle gets dishes, pots and pans hygienically clean by giving them an extra hot 155° final rinse, represents, directly or by implication, that this cycle destroys all harmful and other bacteria and microorganisms on the dishes, pots and pans.

PAR. 16. At the time respondents made the representations alleged in Paragraph Fifteen, they did not possess and rely on a reasonable basis for such representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 17. In truth and in fact, contrary to respondents' representations in Paragraph Fifteen, the "Sani-Wash" cycle does not destroy all harmful and other bacteria and microorganisms on dishes, pots and pans. Therefore, the said advertisements are deceptive or unfair.

PAR. 18. Said Exhibits A and B and others represent directly or by implication, that the demonstrations depicted and referred to in Exhibit A and Exhibit B prove that Sears Lady Kenmore dishwashers will completely remove, without prior rinsing or scraping, all residue and film remaining on all dishes, pots and pans after cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers.

PAR. 19. In truth and in fact, the said demonstrations do not prove that the Sears Lady Kenmore will completely remove, without prior rinsing or scraping, all residue and film from all dishes, and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers. Therefore, the said advertisements are deceptive or unfair.

PAR. 20. As alleged in Paragraph Ten of this complaint, said Exhibits A and B and others represent, directly or by implication, that it is unnecessary to scrape or rinse dishes, pots or pans prior to washing them in the Sears Lady Kenmore. In contrast, the Sears owners manual, which is provided to consumers after they purchase a Sears dishwasher, instructed the user to pre-soak or scour firmly cooked or baked-on foods.

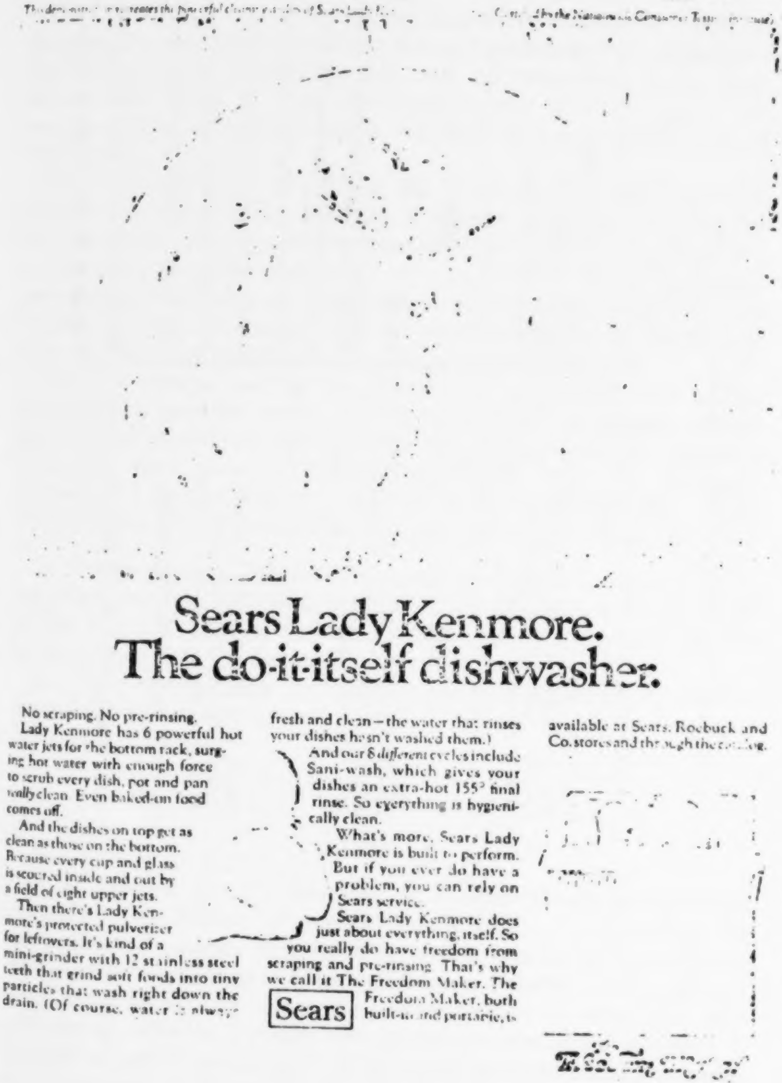
PAR. 21. (a) Such instructions are a material fact in light of the representation made in advertising as set forth in Paragraph Ten. Said advertisements fail to reveal a fact material in light of the representation made, and are therefore deceptive or unfair. (b) Such instructions are materially inconsistent with the advertising representation set forth in Paragraph Ten. Therefore, the said advertisements are deceptive or unfair.

PAR. 22. Said Exhibits A and B and others, represent directly or by implication, that respondent had a reasonable basis for making, at the time they were made, the representations as alleged in Paragraphs Ten, Thirteen and Fifteen whereas in truth and in fact respondent had no reasonable basis for such representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 23. The use by respondents of the aforesaid false, misleading, deceptive or unfair statements, representations, and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of dishwashers sold by respondent Sears by reason of said erroneous and mistaken belief.

PAR. 24. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair or deceptive acts or practices in commerce and unfair methods of competition, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

Exhibit A



[illegible] creates the powerful cleaning action of Sears Lady [illegible] Certified by the National [illegible] Consumer Testing [illegible]

# Sears Lady Kenmore. The do-it-itself dishwasher.

No scraping. No pre-rinsing.

Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan really clean. Even baked-on food comes off.

And the dishes on top get as clean as those on the bottom. Because every cup and glass is scoured inside and out by a field of eight upper jets.

Then there's Lady Kenmore's protected pulverizer for leftovers. It's kind of a mini-grinder with 12 stainless steel teeth that grind soft foods into tiny particles that wash right down the drain. (Of course, water is always fresh and clean—the water that rinses your dishes hasn't washed them.)

And our 8 *different* cycles include Sani-wash, which gives your dishes an extra-hot 155° final rinse. So everything is hygienically clean.

What's more, Sears Lady Kenmore is built to perform. But if you ever do have a problem, you can rely on Sears service.

Sears Lady Kenmore does just about everything, itself. So you really do have freedom from scraping and pre-rinsing. That's why we call it The Freedom Maker. The Freedom Maker, both built-in and portable, is available at Sears, Roebuck and Co. stores and through the catalog.

Sears

Exhibit B

J. WALTER THOMPSON COMPANY
875 NORTH MICHIGAN AVENUE CHICAGO ILLINOIS 60611

TELEVISION COMMERCIAL

| | |
|---|---|
| FILM CODE: 2684<br>CLIENT: SEARS, ROEBUCK AND COMPANY<br>PRODUCT: LADY KENMORE DISHWASHER<br>DATE: "A" 6/5/72 | TITLE: "BIRTHDAY CAKE"<br>LENGTH: 30 SECONDS<br>STATUS: AS FILMED<br>SEARS #: N6-1072-6530 |

| VIDEO | AUDIO |
|---|---|
| MOTHER FINISHES FROSTING A CAKE. LITTLE GIRL LICKS FROSTING BOWL. CU DISHES GOING INTO DISHWASHER. | (MUSIC)<br>ANNCR (VO): Sears Lady Kenmore Dishwasher gives you freedom from scraping and freedom from pre-rinsing. Because it has |
| INSIDE SHOT OF DISHWASHER CLEANING. SUPER: DEMONSTRATION CERTIFIED BY NATIONWIDE CONSUMER TESTING INSTITUTE. | two hot water jets that scour dishes and a stainless steel pulverizer for soft |
| CU DISHWASHER, SUPER: THE FREEDOM MAKER | food waste. We call Sears Lady Kenmore |
| CU MOTHER, LITTLE GIRL AND CAKE. | THE FREEDOM MAKER. Because it gives you freedom to do more important things. |

## DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission issued, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(c) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent J. Walter Thompson Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and a principal place of business located at 420 Lexington Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

### PART I

*It is ordered,* That respondent J. Walter Thompson Company (hereafter "J. Walter Thompson" or "JWT"), a corporation, its successors and assigns, either jointly or individually, and its officers, representatives, and agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with advertising, offering for sale, distribution or sale of the products as defined in Part II, paragraph 3 of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication that any product will clean, without prior rinsing or scraping, all dishes, pots and pans used

in cooking and baking according to normal consumer recipes and under circumstances normally and expectably encountered by consumers, unless JWT has a reasonable basis for such representation.

2. Making any statement or representation directly or by implication concerning the performance of the product, unless JWT has a reasonable basis for such statement or representation.

*It shall be* an affirmative defense to any compliance action alleging a violation of paragraphs 1 or 2 of Part I of the order for JWT to show that, prior to disseminating an advertisement containing the statement or representation challenged in such compliance action, JWT submitted to its client in writing all the performance claims which it reasonably believed were contained in the advertising prepared by it and exercised due care to assure itself that the advertiser possessed and relied upon a reasonable basis for those claims.

3. Advertising any such product by referring to or presenting evidence, including a test, experiment, demonstration, study, survey or report, which evidence is represented, directly or by implication, as showing or proving the performance of the product, when such evidence does not show or prove such performance.

*It shall be* an affirmative defense to any compliance action alleging a violation of paragraph 3 of Part I of this order for JWT to show that, prior to disseminating an advertisement containing the reference or presentation of evidence challenged in such compliance action, JWT submitted to its client in writing all the performance claims which it reasonably believed were shown or proven by the reference or presentation of such evidence in advertising prepared by it and exercised due care to assure itself that this evidence did show or prove such performance claims.

4. Making any statement or representation, directly or by implication, in connection with the advertisement of any such product which it knows or has reason to know is inconsistent in any material respect with any statement or representation concerning the performance of the product made, directly or by implication, in post-purchase material(s) supplied to the purchaser of such product. For purposes of this order, post-purchase material(s) is defined as any product operating manuals and other written material typically made available by JWT's client to an individual who purchase the model of product identified in the advertising prepared by JWT; provided that this paragraph shall only appeal to JWT during the time the advertisement is created and first placed by JWT.

*Provided, however*, that nothing in this order shall be deemed to deny or limit JWT with respect to any right, defense, or other affirmative defense to which JWT may otherwise be entitled by law in a compliance action or any other action; nor shall any inference adverse to JWT be drawn in any case from its failure to invoke the affirmative defenses provided in this Part or to rely on the procedures provided herein.

## PART II

For purposes of this order, each of the terms listed below, as applied to an advertising agency, is defined as follows:

1. A "reasonable basis" shall consist of a competent and reliable scientific test or tests, or other competent and reliable evidence including competent and reliable opinions of scientific, engineering, or other experts who are qualified by professional training and experience to render competent judgments in such matters.

2. A competent and reliable "scientific test" is one in which one or more persons, qualified by professional training, education and experience, formulate and conduct a test and evaluate its results in an objective manner using testing procedures which are generally accepted in the professions to attain valid and reliable results. The test may be conducted or approved by (a) a reputable and reliable organization which conducts such tests as one of its principal functions, (b) by an agency or department of the government of the United States, or (c) persons employed or retained by JWT's client if they are qualified (as defined above in this paragraph) and can conduct and evaluate the test in an objective manner.

3. The term "product" shall be defined as follows:

(a) dishwashers; and

(b) for paragraphs 2, 3 and 4 of Part I, and for Part II and Part III, the major home appliances identified in the Stipulation of Fact attached hereto, entered on June 7, 1978 (and incorporated herein by reference), but only in the event and to the extent that the Commission hereafter enters an order to cease and desist against Sears in this matter covering each of these products and said order becomes final.

4. The term "performance of the product" shall be defined as follows:

(a) cleaning performance; and

(b) for paragraphs 2, 3 and 4 of Part I, and for Part II and Part III, all other performance claims of the major home appliances identified in the Stipulation of Fact attached hereto, entered on June 7, 1978 (and incorporated herein by reference), but only in the event and to the extent that the Commission hereafter enters an order to cease and desist against Sears in this matter covering such other performance claims of these products and said order becomes final.

## PART III

*It is further ordered,* That:

For the period of three years after JWT last placed the advertisements for dissemination, JWT shall retain all tests results, data, and other documents on which it relied for advertisements of products covered by this order which were in its possession during either creation or placement by JWT of the advertisements.

JWT shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

JWT shall forthwith distribute a copy of this order to each of its operating divisions, and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements of the products covered by this order.

JWT shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

## STIPULATION OF FACT

Undersigned complaint counsel and counsel for J. Walter Thompson Company ("JWT") stipulate as follows:

(1) Between January 1, 1971 and December 31, 1975 J. Walter Thompson prepared and disseminated advertisements for Sears, Roebuck and Co. ("Sears") featuring the following major home appliances: air conditioning units (room or built-in), disposers, dishwashers and trash compactors.

(2) JWT was not involved in the preparation or dissemination of any other advertisement featuring any other Sears major home appliance between January 1, 1971 and December 31, 1975.

(3) For purposes of Part II, paragraph 3(b) of the Agreement Containing Consent Order To Cease And Desist, covering JWT in this proceeding, the major home appliances are all makes of air conditioning units (room or built-in), disposers, dishwashers and trash compactors.

The above Stipulation Of Fact is entered solely and exclusively for purposes of this proceeding and for any Federal Trade Commission order that may issue in this proceeding.

/s/ *Robert Barton*
Complaint Counsel

/s/ *Mark Schattner*
Counsel for
J. Walter Thompson Company

Dated: June 7, 1978

## IN THE MATTER OF

# LONE STAR INDUSTRIES, INC., ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

*Docket 9122. Complaint, Jan. 25, 1979 — Decision, Aug. 23, 1979*

**This consent order requires a Greenwich, Conn. manufacturer of portland cement and masonry cement, and the Keystone Portland Cement Co., an Allentown, Pa. competitor, among other things, to provide the Commission with evidence that their acquisition agreement has been terminated, and all non-public documents exchanged during negotiations returned. Respondents are also required to provide the Commission with 60 days' advance notice and liberal discovery rights, should merger plans be resumed before Dec. 31, 1981.**

## *Appearances*

For the Commission: *Bert L. Slonim* and *Nicholas P. Kostopulos, Jr.*

For the respondents: *Melvin C. Garbow* and *D. Bonderman, Arnold & Porter,* Washington, D.C. for Lone Star Industries, Inc. and *Ralph W. Brenner* and *T. Michael Mather, Montgomery, McCracken, Walker & Rhodes,* Philadelphia, Pa. for Keystone Portland Cement Co.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into a merger agreement, which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

## I. DEFINITIONS

1. For the purpose of this complaint the following definitions shall apply:

a. The term "portland cement" means Types I through V of portland cement as specified by the American Society for Testing Materials.

b. The term "masonry cement" means masonry cement as defined by the American Society for Testing Materials.

c. The term "three-state regional market" refers to Eastern Pennsylvania, New Jersey and Delaware.

d. The term "Eastern Pennsylvania" refers to that part of Pennsylvania identified by the Bureau of Mines as Eastern Pennsylvania.

## II. Lone Star Industries, Inc.

2. Lone Star Industries, Inc. ("Lone Star") is a corporation organized and existing under the laws of the State of Delaware with its principal office at One Greenwich Plaza, Greenwich, Connecticut.

3. Lone Star manufactures and sells a variety of construction-related products, including cement, concrete, home improvement fixtures and lumber.

4. In 1977, Lone Star, the nation's largest cement producer, operated (domestically) nine cement production plants in eight states, including a plant in Nazareth, Pennsylvania.

5. In the fiscal year ending December 31, 1977, Lone Star had total assets of $667,538,000 and total net sales of $864,905,000, which generated a net income of $29,710,000.

## III. Keystone Portland Cement Co.

6. Keystone Portland Cement Company ("Keystone") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal office at 2200 Hamilton St., Allentown, Pennsylvania.

7. Keystone is a one-plant company with a 660,000-ton cement production facility located at Bath, Pennsylvania, which is four miles away from Lone Star's Nazareth plant. Keystone manufactures and sells cement and also sells construction aggregates and coal.

8. In the fiscal year ending December 31, 1977, Keystone had total assets of $16,817,444 and total net sales of $16,673,677, which generated a net income of $176,992.

## IV. Jurisdiction

9. At all times relevant herein, Lone Star and Keystone have been engaged in the production and sale of portland cement and masonry cement in or affecting interstate commerce and said companies are engaged in or are affecting commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affects commerce, as "commerce" is

defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## V. The Merger Agreement

10. On or about October 20, 1978, Lone Star and Keystone entered into a merger agreement whereby Keystone's assets would be sold to Lone Star for $7.5 million plus an assumption of Keystone's disclosed liabilities. The merger is scheduled for consummation on January 30, 1979.

## VI. Trade and Commerce

11. The relevant lines of commerce are the manufacture and sale of portland cement and the manufacture and sale of masonry cement.

12. The relevant sections of the country are the areas of present competition between Lone Star and Keystone, including but not limited to the three-state regional market.

13. The manufacture and sale of portland cement is concentrated, with the combined market shares of the four largest firms estimated to be approximately 50.5%.

14. The manufacture and sale of masonry cement is concentrated, with the combined market shares of the four largest firms estimated to be approximately 68.8%.

## VII. Actual Competition

15. Lone Star and Keystone are presently and have been for many years actual competitors in the manufacture and sale of portland cement and masonry cement within certain geographic markets and submarkets thereof, including but not limited to the three-state regional market.

## VIII. Effects: Violations Charged

16. The effects of the agreement, if consummated, may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. actual competition between Lone Star and Keystone in the manufacture and sale of portland cement and masonry cement will be eliminated;

b. actual competition between competitors generally in the manufacture and sale of portland cement and masonry cement may be lessened;

c. Keystone will be eliminated as an actual substantial independent competitor in the manufacture and sale of portland cement and masonry cement;

d. concentration in the manufacture and sale of portland cement and masonry cement will be increased, and the possibilities for eventual deconcentration may be diminished; and

e. mergers or acquisitions between other portland cement and masonry cement producers may be fostered, thus causing a further substantial lessening of competition in the manufacture and sale of portland cement and masonry cement.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Lone Star Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Greenwich Plaza, in the City of Greenwich, State of Connecticut.

2. Respondent Keystone Portland Cement Co., is a corporation

organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 2200 Hamilton St., in the City of Allentown, Commonwealth of Pennsylvania.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### I

*It is ordered*, That Lone Star Industries, Inc. ("Lone Star") and Keystone Portland Cement Company ("Keystone") shall forthwith provide evidence that the acquisition agreement between them has been and is terminated and further, that any and all non-public documents provided by either Lone Star or Keystone to the other in connection with the acquisition agreement be returned. This paragraph shall not relieve any party from any obligation of confidentiality imposed by agreement between them or by operation of law.

### II

*It is further ordered*, That until December 31, 1981 neither Lone Star nor Keystone shall acquire, directly or indirectly, all or any part of the assets (except in the ordinary course of business), or securities of the other until sixty (60) days following the receipt by the Director of the Bureau of Competition of the Federal Trade Commission of written notice of the proposed acquisition, which notice shall specifically refer to this order. If during the first thirty (30) days of the aforesaid sixty (60) day period, the Commission staff has issued any discovery request (including requests for the production of documents or witnesses) to either Lone Star or Keystone to which a complete response has not been made on or before the fiftieth (50th) day of the aforesaid sixty (60) day period, then the proposed acquisition shall not be consummated until ten (10) days after a complete response to such discovery request has been made. Neither the aforesaid sixty (60) day period nor the discovery provisions of this paragraph are in derogation of any of the rights conferred upon the Commission by statute or rule, and shall not be construed as supplanting any of these rights.

### III

*It is further ordered*, That Lone Star and Keystone each shall notify the Commission at least (30) days prior to any proposed corporate change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change, which may affect compliance obligations arising out of this order.

## IV

*It is further ordered,* That Lone Star and Keystone each shall, within sixty (60) days after service upon it of this order file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

Commissioners Clanton and Pitofsky did not participate.

## IN THE MATTER OF

# ITT CONTINENTAL BAKING COMPANY, INC.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 AND SEC. 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2989. Complaint Aug. 24, 1979 — Decision, Aug. 24, 1979*

**This order, among other things, requires a Rye, N.Y. manufacturer and seller of bakery products to cease disseminating advertisements which contain unsubstantiated comparative claims regarding the dietary fiber content of "Fresh Horizons" bread and other such food products; or which fail to include a statement disclosing that fiber ingredient in Fresh Horizons is derived from tree pulp. Such statement is required for two and one-half years in all advertisements for food products containing wood fiber. The order also prohibits the company from representing that an ingredient in Fresh Horizons or in other food products has been recommended or approved by a doctor or scientist unless that party has been fully informed of the ingredient's identity and derivation. Additionally, respondent is required to review and conform to the terms of the order all advertising claims for bakery and/or cereal-based products prepared or financed by its corporate parent.**

## *Appearances*

For the Commission: *Maryanne S. Kane, Robert L. Patterson* and *Sandra N. Hammer.*

For the respondent: *Gordon Thomas,* Rye, N.Y.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that ITT Continental Baking Company, Inc. ("ITT Continental"), a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. ITT Continental is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located on Halstead Ave., Rye, New York.

PAR. 2. Respondent ITT Continental, a wholly-owned subsidiary of International Telephone and Telegraph Corporation, is now and has been engaged in the manufacturing, advertising, offering for sale, sale and distribution of a bakery product designated by the trade name, "Fresh Horizons." This product as advertised, is a "food" within the meaning of Section 12 of the Federal Trade Commission Act, 15 U.S.C. 52.

Par. 3. In the course and conduct of its business, respondent ITT Continental causes its food product, Fresh Horizons when sold, to be transported from respondent's places of business located in various States of the United States to purchasers thereof located in various other States of the United States and the District of Columbia. Respondent ITT Continental maintains, and at all times mentioned herein has maintained, a substantial course of trade in its bakery products, including Fresh Horizons. The volume of business for Fresh Horizons alone, in or affecting such commerce, has been and is substantial.

Par. 4. In the course and conduct of its business, respondent has disseminated or caused the dissemination of various advertisements for Fresh Horizons by the United States mail and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including advertisements inserted in magazines and newspapers and also advertisements broadcast by television and radio stations located in various States of the United States and in the District of Columbia that have sufficient power to carry such broadcasts across state lines into other States of the United States. The purpose of all of these advertisements has been to induce, directly or indirectly, the purchase of Fresh Horizons and it is likely that these advertisements have succeeded in inducing consumers to purchase this product.

Par. 5. Typical of the statements and representations in said advertisements are those found in Exhibits A–F attached to this complaint.

Par. 6. Through the use of said advertisements referred to in Paragraphs Four and Five, and other advertisements not specifically set forth herein, and because of the nature of the Fresh Horizons product, respondent has represented and now represents, directly or by implication, that

a. Fresh Horizons is a product made only with ingredients commonly used in the manufacture of bread or that it does not contain any major ingredient not commonly used, or anticipated by consumers to be commonly used, in bread;

b. The fiber in Fresh Horizons is the same kind of fiber as that in whole wheat bread or 100% all-bran cereal.

Par. 7. Through the use of said advertisements referred to in Paragraphs Four and Five, and other advertisements not specifically set forth herein, respondent ITT Continental has represented and now represents directly or by implication, that

a. Fresh Horizons, in a one slice serving, contains five times the amount of fiber contained in one slice of 100% whole wheat bread; and

b. Fresh Horizons, in a one slice serving, contains as much fiber as one serving of 100% all-bran cereal.

PAR. 8. In truth and in fact:

a. Fresh Horizons is not made only with ingredients commonly used in the manufacture of bread, but rather contains as one of its major ingredients fiber derived from wood, an ingredient not commonly used, nor anticipated by consumers to be commonly used, in bread;

b. Fresh Horizons, in a one slice serving, does not contain five times the amount of fiber contained in one slice of 100% whole wheat bread; and

c. Fresh Horizons, in a one slice serving, does not contain as much fiber as one serving of 100% all-bran cereal.

Respondent's statements and representations as set forth in Paragraphs Six and Seven are false, deceptive, and misleading. These representations, rendered and now renders the advertisements referred to in Paragraphs Four and Five false, deceptive, misleading and unfair. These advertisements constituted and now constitute false advertisements.

PAR. 9. Furthermore, respondent marketed and advertised Fresh Horizons without disclosing to the purchasing public through its advertising that the product is made with fiber derived from wood or that its extra fiber is fiber derived from wood.

PAR. 10. Respondent's failure to identify the fiber found in Fresh Horizons is misleading in a material respect, in that disclosure of this fact to consumers would be likely to affect their decisions of whether or not to purchase said product. Since consumers would not expect to find fiber derived from wood as an ingredient in a bread or bakery product, respondent's failure to disclose this material fact rendered and now renders, the advertisements referred to in Paragraphs Four and Five false, deceptive, misleading and unfair.

PAR. 11. Furthermore, through the use of said advertisements referred to in Paragraphs Four and Five and other advertisements not specifically set forth herein, respondent ITT Continental has represented directly or by implication, that three out of five doctors recommend Fresh Horizons for its fiber alone.

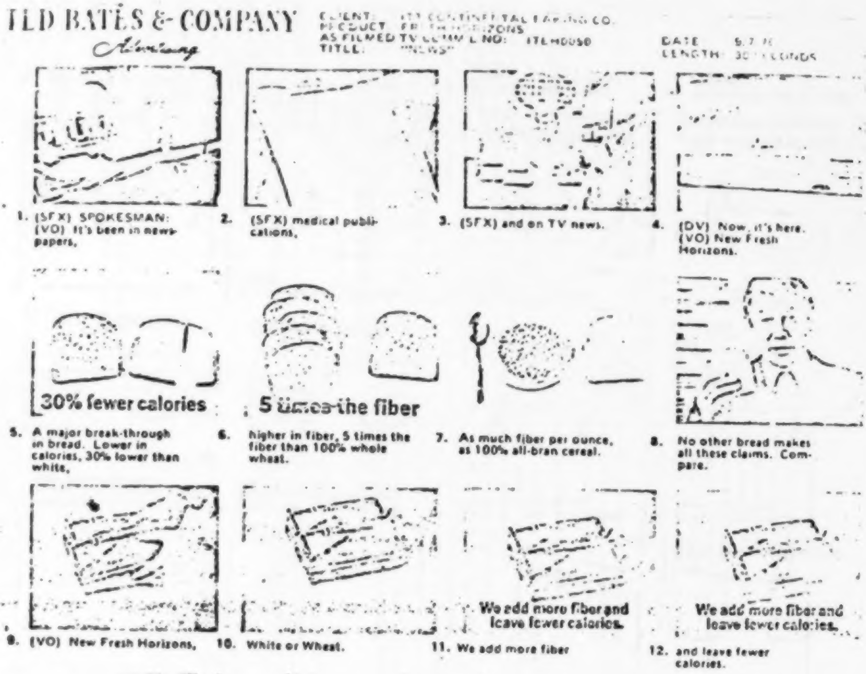
PAR. 12. At the time of the first dissemination of the representation contained in Paragraph Eleven, respondent ITT Continental did not possess and rely upon a reasonable basis for making this representation. Therefore, the making and dissemination of this representation, as alleged, without a reasonable basis therefor, constituted and now constitutes unfair or deceptive acts or practices in or affecting commerce.

PAR. 13. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent ITT Continental has been, and now is, in substantial competition in commerce, with various corporations, firms, and individuals engaged in the sale of food products of the same general kind and nature as those advertised and/or sold by respondent.

PAR. 14. The use by respondent of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of said food product by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondent, as herein alleged including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Commissioner Clanton did not participate.



TED BATES & COMPANY
Advertising

CLIENT: ITT CONTINENTAL BAKING CO.
PRODUCT: FRESH HORIZONS
AS FILMED TV COMM'L NO: ITEH0050
TITLE: "NEWS"
DATE: 5.7.7[illegible]
LENGTH: 30 SECONDS

1. (SFX) SPOKESMAN: (VO) It's been in newspapers,

2. (SFX) medical publications,

3. (SFX) and on TV news.

4. (DV) Now, it's here. (VO) New Fresh Horizons.

5. A major break-through in bread. Lower in calories, 30% lower than white,

6. higher in fiber, 5 times the fiber than 100% whole wheat.

7. As much fiber per ounce, as 100% all-bran cereal.

8. No other bread makes all these claims. Compare.

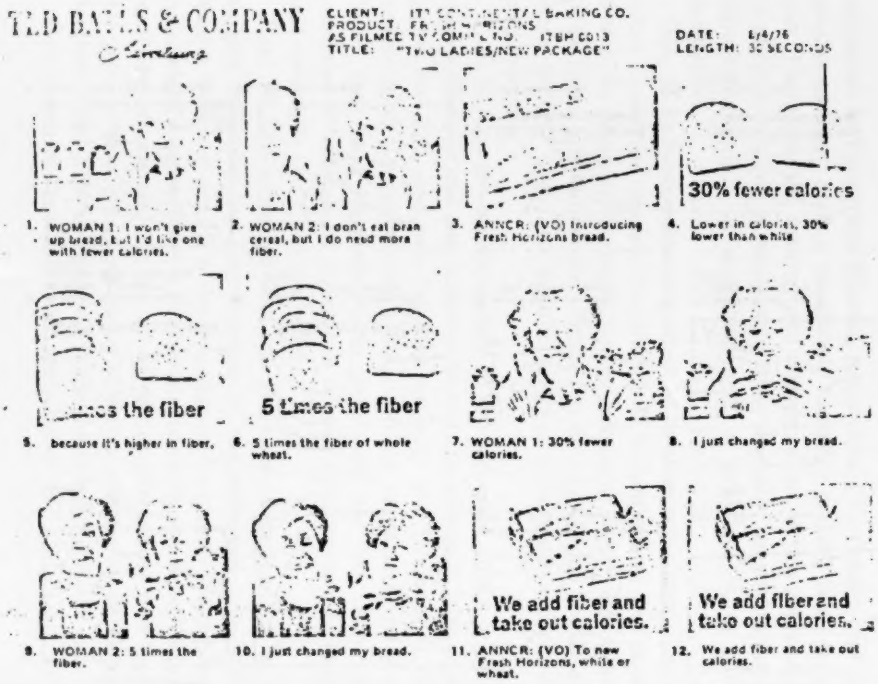
9. (VO) New Fresh Horizons,

10. White or Wheat.

11. We add more fiber

12. and leave fewer calories.

30% fewer calories
5 times the fiber
We add more fiber and leave fewer calories.
We add more fiber and leave fewer calories.



TED BATES & COMPANY

CLIENT: ITT CONTINENTAL BAKING CO.
PRODUCT: FRESH HORIZONS
AS FILMED TV COMM'L NO.: ITBH 6013
TITLE: "TWO LADIES/NEW PACKAGE"

DATE: 6/4/76
LENGTH: 30 SECONDS

1. WOMAN 1: I won't give up bread, but I'd like one with fewer calories.

2. WOMAN 2: I don't eat bran cereal, but I do need more fiber.

3. ANNCR: (VO) Introducing Fresh Horizons bread.

4. Lower in calories, 30% lower than white

5. because it's higher in fiber,

6. 5 times the fiber of whole wheat.

7. WOMAN 1: 30% fewer calories.

8. I just changed my bread.

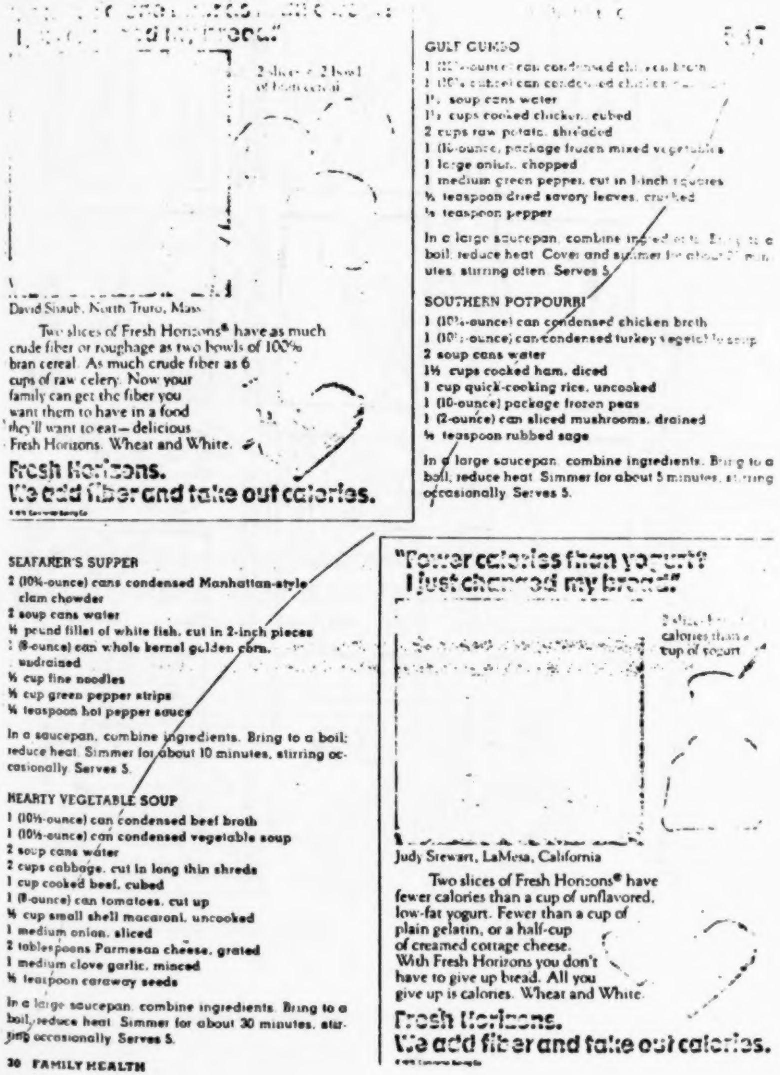
9. WOMAN 2: 5 times the fiber.

10. I just changed my bread.

11. ANNCR: (VO) To new Fresh Horizons, white or wheat.

12. We add fiber and take out calories.

30% fewer calories
imes the fiber
5 times the fiber
We add fiber and take out calories.
We add fiber and take out calories.



I [illegible] my bread.”

2 slices = 2 bowl of bran cereal

David Shaub, North Truro, Mass.

Two slices of Fresh Horizons® have as much crude fiber or roughage as two bowls of 100% bran cereal. As much crude fiber as 6 cups of raw celery. Now your family can get the fiber you want them to have in a food they'll want to eat—delicious Fresh Horizons. Wheat and White.

**Fresh Horizons.**
**We add fiber and take out calories.**

**GULF GUMBO**

1 (10¾-ounce) can condensed chicken broth
1 (10¾-ounce) can condensed chicken [illegible]
1½ soup cans water
1½ cups cooked chicken, cubed
2 cups raw potato, shredded
1 (10-ounce) package frozen mixed vegetables
1 large onion, chopped
1 medium green pepper, cut in 1-inch squares
½ teaspoon dried savory leaves, crushed
⅛ teaspoon pepper

In a large saucepan, combine ingredients. Bring to a boil; reduce heat. Cover and simmer for about [illegible] minutes, stirring often. Serves 5.

**SOUTHERN POTPOURRI**

1 (10¾-ounce) can condensed chicken broth
1 (10¾-ounce) can condensed turkey vegetable soup
2 soup cans water
1½ cups cooked ham, diced
1 cup quick-cooking rice, uncooked
1 (10-ounce) package frozen peas
1 (2-ounce) can sliced mushrooms, drained
¼ teaspoon rubbed sage

In a large saucepan, combine ingredients. Bring to a boil; reduce heat. Simmer for about 5 minutes, stirring occasionally. Serves 5.

**SEAFARER'S SUPPER**

2 (10¾-ounce) cans condensed Manhattan-style clam chowder
2 soup cans water
½ pound fillet of white fish, cut in 2-inch pieces
1 (8-ounce) can whole kernel golden corn, undrained
½ cup fine noodles
½ cup green pepper strips
¼ teaspoon hot pepper sauce

In a saucepan, combine ingredients. Bring to a boil; reduce heat. Simmer for about 10 minutes, stirring occasionally. Serves 5.

**HEARTY VEGETABLE SOUP**

1 (10½-ounce) can condensed beef broth
1 (10½-ounce) can condensed vegetable soup
2 soup cans water
2 cups cabbage, cut in long thin shreds
1 cup cooked beef, cubed
1 (8-ounce) can tomatoes, cut up
½ cup small shell macaroni, uncooked
1 medium onion, sliced
2 tablespoons Parmesan cheese, grated
1 medium clove garlic, minced
¼ teaspoon caraway seeds

In a large saucepan, combine ingredients. Bring to a boil; reduce heat. Simmer for about 30 minutes, stirring occasionally. Serves 5.

“Fewer calories than yogurt? I just changed my bread.”

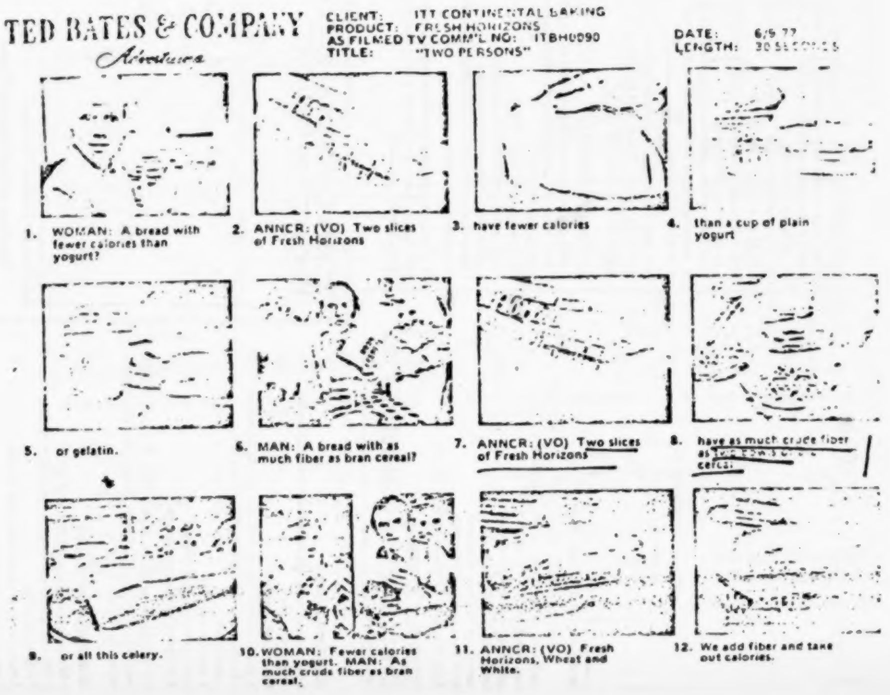
2 slices [illegible] calories than a cup of yogurt

Judy Stewart, LaMesa, California

Two slices of Fresh Horizons® have fewer calories than a cup of unflavored, low-fat yogurt. Fewer than a cup of plain gelatin, or a half-cup of creamed cottage cheese. With Fresh Horizons you don't have to give up bread. All you give up is calories. Wheat and White.

**Fresh Horizons.**
**We add fiber and take out calories.**

30 FAMILY HEALTH



TED BATES & COMPANY
Advertising

CLIENT: ITT CONTINENTAL BAKING
PRODUCT: FRESH HORIZONS
AS FILMED TV COMM'L NO: ITBH0090
TITLE: "TWO PERSONS"

DATE: 6/9/77
LENGTH: 30 SECONDS

1. WOMAN: A bread with fewer calories than yogurt?

2. ANNCR: (VO) Two slices of Fresh Horizons

3. have fewer calories

4. than a cup of plain yogurt

5. or gelatin.

6. MAN: A bread with as much fiber as bran cereal?

7. ANNCR: (VO) Two slices of Fresh Horizons

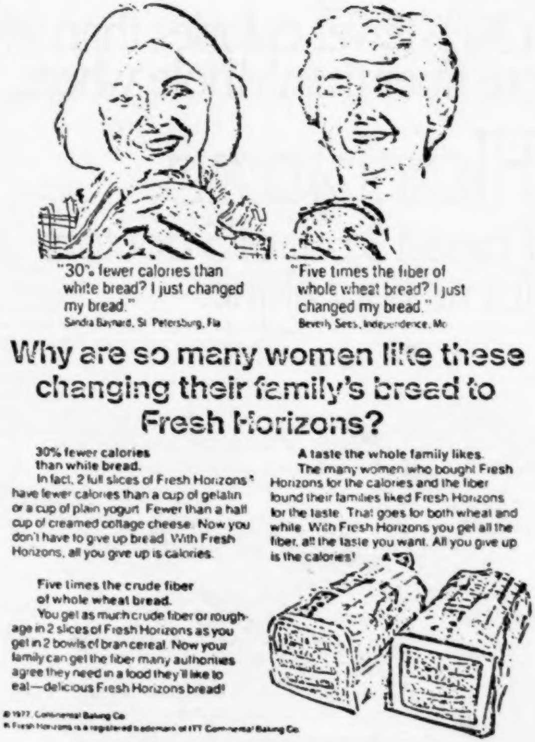
8. have as much crude fiber as two bowls of bran cereal.

9. or all this celery.

10. WOMAN: Fewer calories than yogurt. MAN: As much crude fiber as bran cereal.

11. ANNCR: (VO) Fresh Horizons, Wheat and White.

12. We add fiber and take out calories.



"30% fewer calories than white bread? I just changed my bread."
Sandra Baynard, St. Petersburg, Fla

"Five times the fiber of whole wheat bread? I just changed my bread."
Beverly Sets, Independence, Mo

## Why are so many women like these changing their family's bread to Fresh Horizons?

**30% fewer calories than white bread.**

In fact, 2 full slices of Fresh Horizons® have fewer calories than a cup of gelatin or a cup of plain yogurt. Fewer than a half cup of creamed cottage cheese. Now you don't have to give up bread. With Fresh Horizons, all you give up is calories.

**Five times the crude fiber of whole wheat bread.**

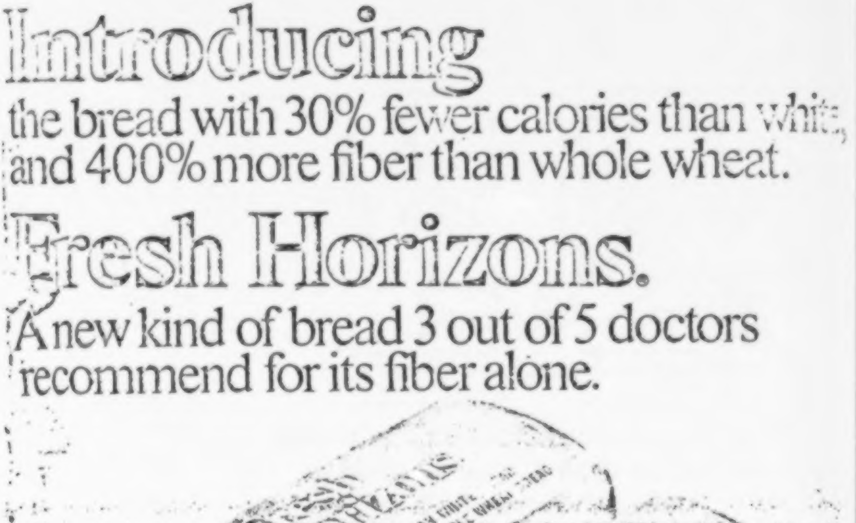
You get as much crude fiber or roughage in 2 slices of Fresh Horizons as you get in 2 bowls of bran cereal. Now your family can get the fiber many authorities agree they need in a food they'll like to eat—delicious Fresh Horizons bread!

**A taste the whole family likes.**

The many women who bought Fresh Horizons for the calories and the fiber found their families liked Fresh Horizons for the taste. That goes for both wheat and white. With Fresh Horizons you get all the fiber, all the taste you want. All you give up is the calories!

© 1977, Continental Baking Co.
® Fresh Horizons is a registered trademark of ITT Continental Baking Co.

Advertised in Reader's Digest - July, 1977



# Introducing

the bread with 30% fewer calories than white,
and 400% more fiber than whole wheat.

# Fresh Horizons.®

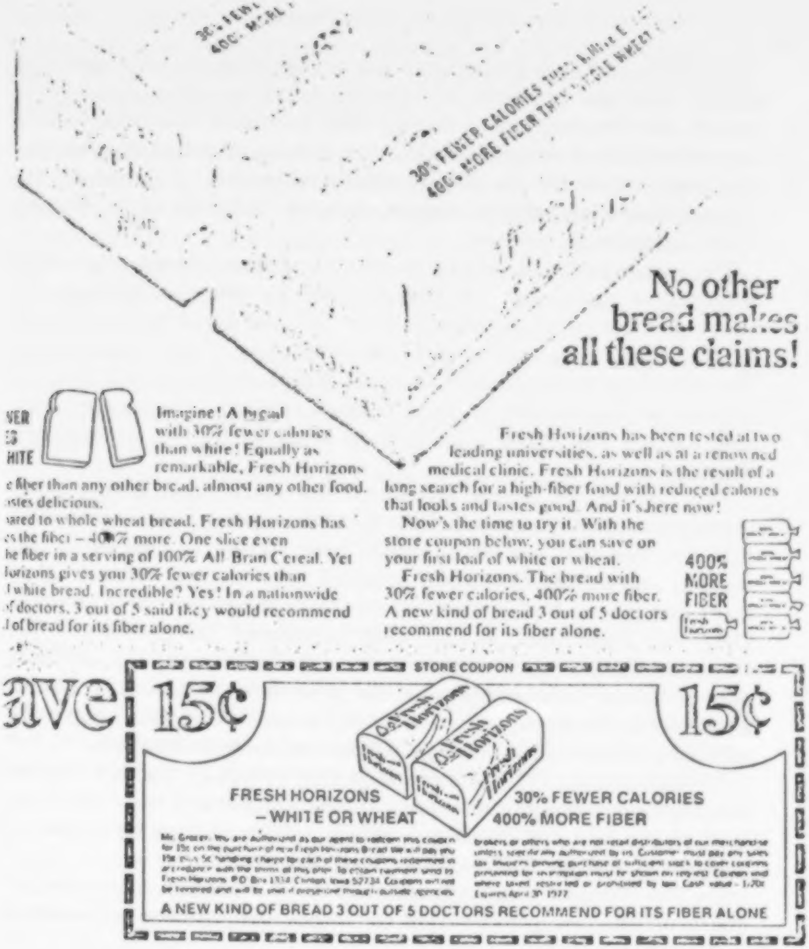
A new kind of bread 3 out of 5 doctors
recommend for its fiber alone.

Fresh Horizons
30% FEWER CALORIES THAN WHITE BREAD
400% MORE FIBER THAN WHOLE WHEAT BREAD
Fresh Horizons
30% FEWER CALORIES THAN WHITE BREAD
400% MORE FIBER THAN WHOLE WHEAT BREAD

No other
bread makes
all these claims.

30% FEWER

Imagine! A bread



## No other bread makes all these claims!

VER
S
HITE

Imagine! A bread with 30% fewer calories than white! Equally as remarkable, Fresh Horizons
e fiber than any other bread, almost any other food.
astes delicious.
ared to whole wheat bread, Fresh Horizons has
es the fiber – 400% more. One slice even
he fiber in a serving of 100% All Bran Cereal. Yet
lorizons gives you 30% fewer calories than
l white bread. Incredible? Yes! In a nationwide
f doctors, 3 out of 5 said they would recommend
l of bread for its fiber alone.

Fresh Horizons has been tested at two leading universities, as well as at a renowned medical clinic. Fresh Horizons is the result of a long search for a high-fiber food with reduced calories that looks and tastes good. And it's here now!

Now's the time to try it. With the store coupon below, you can save on your first loaf of white or wheat.

Fresh Horizons. The bread with 30% fewer calories, 400% more fiber. A new kind of bread 3 out of 5 doctors recommend for its fiber alone.

FRESH HORIZONS
– WHITE OR WHEAT

30% FEWER CALORIES
400% MORE FIBER

A NEW KIND OF BREAD 3 OUT OF 5 DOCTORS RECOMMEND FOR ITS FIBER ALONE

Ad No. 206-16-001A REV. 1 8/13/76
This ad prepared by
GREY ADVERTISING, INC.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of each agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, *and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules*, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent ITT Continental Baking Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located on Halstead Ave., Rye, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

### I

*It is ordered*, That respondent ITT Continental Baking Company, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of a bakery product called Fresh

Horizons or any other food product, do forthwith cease and desist from disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce which, directly or indirectly:

A. Makes any comparative claim regarding the amount of fiber in any such product, as compared with that in any other food product, unless the claim is based on measurement of "dietary fiber" by the neutral detergent fiber method with an amylase modification. The neutral detergent fiber method with an amylase modification shall be used until such time as the Food and Drug Administration officially adopts a method for measuring dietary fiber in foods. At that time, the officially approved method for measuring dietary fiber shall be used for comparative quantity claims.

B. Makes any representation regarding the fiber content of any such product, unless respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence for each such representation.

## II

*It is further ordered*, That respondent ITT Continental Baking Company, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of a bakery product called Fresh Horizons or any other food product, do forthwith cease and desist from disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce which, directly or indirectly, makes any representation that any such product or any ingredient in such product has been recommended or approved by any doctor(s) or scientist(s), unless:

A. Before giving such recommendation or approval for such product, the doctor(s) or scientist(s) had been fully informed of the identity and derivation of all of the ingredients in such product, except those incidental ingredients which are added to assist in the food processing function which amount to less than 2% each of the final product on a weight basis, or

B. Before giving such recommendation or approval for any such ingredient, the doctor(s) or scientist(s) had been fully informed of the identity and derivation of that ingredient.

## III

*It is further ordered,* That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the bakery product called Fresh Horizons or any other bread product containing alpha cellulose derived from wood, do forthwith cease and desist from disseminating or causing the dissemination of any advertisement, by means of the United States mail or by any means in or affecting commerce, which fails to disclose clearly and conspicuously in each advertisement in the *exact* language listed below for two and one-half years from the effective date of this order:

> The source of (this/the) fiber is wood; or
> Contains fiber derived from pulp of trees.

Upon the expiration of this two and one-half year period respondent shall disclose clearly and conspicuously in each such advertisement for such bakery product in no more than ten (10) words that the source of the fiber in such product is wood or that such product contains fiber derived from the pulp of trees.

Either of these disclosures shall be required so long as wood continues to be a fiber component of such product.

Coupons without any advertising claims and point of purchase advertising without general text are exempt from the requirements of this provision. Advertisements which make advertising claims and also contain a coupon are subject to the requirements of this order.

## IV

*It is further ordered,* That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any bakery product or cereal-based product do forthwith cease and desist from disseminating or causing the dissemination of any advertisement, by means of the United States mail or by any means in or affecting commerce, which represents directly or by implication that such product contains only ingredients commonly used, or anticipated[*] by

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[*] An ingredient shall be considered "commonly used or anticipated" for purposes of this order:

(1) if it is enumerated under 21 C.F.R. 170.3(n) or,

(2) it it is included under 21 C.F.R. 170.3(o) and meets the requirements of the definition of common usage.

*Provided* that for substances containing an ingredient which is included under 21 C.F.R. 170.3(o) to be considered "commonly used or anticipated," such substances must be used in amounts which do not exceed levels of common usage when performing the same function in other foods.

*(Continued)*

consumers to be commonly used, in the making of such a product, unless

A. such is the case;

B. the total of the unanticipated and uncommonly used ingredients in the final product is 4 percent or less by weight;** or

C. the presence, identity, and source of each unanticipated or uncommonly used ingredient is disclosed clearly and conspicuously when the total of the unanticipated and uncommonly used ingredients in the final product is greater than 4 percent of that product by weight.**

## V

*It is further ordered,* That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device review and conform all advertising claims for any bakery and/or cereal-based product prepared and/or financed by the International Telephone and Telegraph Corporation, its subsidiaries or divisions, to the provisions of this order.

## VI

*It is further ordered,* That respondent forthwith distribute a copy of this order to each of its operating divisions.

## VII

*It is further ordered,* That the respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate status such as dissolution, emergence of a successor corporation, the creation or dissolution of subsidiaries, and assignment or sale of the business, or any other change in the corporate respondent that may affect compliance obligations arising out of this order.

## VIII

*It is further ordered,* That the respondent shall within sixty (60) days after service of this order, submit to the Commission a report, in

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For purposes of this order, common usage shall mean a history of consumption of a substance by a significant number of consumers in the United States.

** For purposes of cumulating the 4% threshold:

(a) when a subsection (o) substance is used to perform a function for which there is no common usage of that substance for that function in foods, the entire amount of the substance shall be cumulated;

(b) when a subsection (o) substance is used to perform a function for which there is common usage of that substance for that function in foods, the amount which exceeds the highest previous level which has been commonly used to perform that function shall be cumulated.

writing, setting forth in detail the manner and form in which it has complied with this order. The effective date of Parts I–VI shall be the sixtieth day after service of this order.

## IX

*It is further ordered*, That the respondent maintain all files and records related to the requirements of Parts I–V of this order for a period of three (3) years after the dissemination of any advertisement of any product covered by this order, and that such material shall be made available to the Federal Trade Commission or its staff for inspection and copying upon reasonable demand.

Commissioner Clanton did not participate.

## IN THE MATTER OF

# BANKERS LIFE AND CASUALTY COMPANY, ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9075. Complaint, Feb. 26, 1976 — Decision, Aug. 27, 1979*

**This consent order, among other things, requires Bankers Life and Casualty Company (Bankers Life), an individual, and eleven corporate associates, all engaged in the advertising, promotion and sale of undeveloped land, to cease misrepresenting that undeveloped land purchase is a safe investment; involves little financial risk; and is a means of achieving financial security. The order requires that all advertising, promotional materials and sales contracts include specified disclosures regarding risks involved in undeveloped land investment; the advisability of consulting with a real estate specialist prior to contracting; the availability and cost of utilities; and the identity of lots in flood plain areas. Respondents must provide purchasers with cooling-off periods and information regarding their right to cancellation and refund. The firms are also prohibited from mortgaging any subdivision in the future, without ensuring that paid-up purchasers of lots in that subdivision will receive their warranty deeds, and be permitted to retain their rights. Additionally, the order requires respondents to make prescribed restitution to eligible purchasers who defaulted on their payments; and provide all active and paid-in-full purchasers, who had contracted for land at particular subdivisions during a certain time period, with an opportunity to cancel their contracts and receive specified refunds. The order holds Bankers Life responsible for assuring that proper restitution is made.**

## *Appearances*

For the Commission: *Gerald H. Jaggers, William K. Hickey, John T. Hankins* and *Jay W. Madden.*

For the respondents: *William T. Kirby* and *James T. Griffin, Hubachek, Kelley, Rauch & Kirby,* Chicago, Ill. for Bankers Life and Casualty Company, *Robert D. Inman, Inman & Flynn,* Denver, Colo. for San Luis Valley Ranches, Inc., Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Top of the World, Inc., Materic, Inc., G-R-P Corporation, and Richard Greenberg, *Alan H. Bucholtz, Quiat, Bucholtz, Bull & Laff,* Denver, Colo. for Colorado Properties, Inc. and Milco Associates, Inc., *J. Wallace Adair* and *John F. Bruce, Howrey & Simon,* Washington, D.C. for Southern Realty & Utilities Corporation, Hartsel Ranch Corporation and Estates of the World, Inc. and *Jeffrey P. Berg, Berg & Spire,* Beverly Hills, Calif. for Alice Holguin.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties as set forth in the caption hereof, hereinafter sometimes referred to as respondents, have violated provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect in the enumerated paragraphs below.

Allegations in the enumerated paragraphs of respondents' present acts and practices include respondents' past acts and practices. Allegations in said paragraphs of respondents' representations include such representations in advertising, promotional materials or sales communications made orally, visually or in writing, directly or by implication.

PARAGRAPH 1. Respondent Bankers Life and Casualty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business located at 4444 West Lawrence Ave., Chicago, Illinois. It also conducts business at 1001 Park Ave., Lake Park, Florida. Respondent Bankers Life and Casualty Company dominates and controls the acts and practices of respondents Southern Realty & Utilities Corp., Hartsel Ranch Corporation and Estates of the World, Inc.

Respondent Southern Realty & Utilities Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 1001 Park Ave., Lake Park, Florida. Respondent Bankers Life and Casualty Company has a majority ownership interest in respondent Southern Realty & Utilities Corp.

Respondent Hartsel Ranch Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal place of business located at 1001 Park Ave., Lake Park, Florida. It is a wholly-owned subsidiary of respondent Southern Realty & Utilities Corp.

Respondent Estates of the World, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Hawaii, with its principal place of business located at 4810 North Kenneth Ave., Chicago, Illinois. Respondent Bankers Life and Casualty Company has a majority ownership interest in respondent Estates of the World, Inc.

Respondent John D. MacArthur is an individual and an officer, former officer or Chairman of the Board of Directors of corporate respondents Bankers Life and Casualty Company, Southern Realty & Utilities Corp., and Hartsel Ranch Corporation. He owns all of the outstanding stock of Bankers Life and Casualty Company. He dominates and controls the acts and practices of the said corporate respondents and their subsidiaries. His address is 101 Ocean Ave., Palm Beach Shores, Florida.

Respondent Larwill Costilla Ranches, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business located at 2601 Biscayne Boulevard, Miami, Florida.

Respondent Rio Grande Ranches of Colorado, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business located at 2601 Biscayne Boulevard, Miami, Florida. It is a wholly-owned subsidiary of respondent Larwill Costilla Ranches, Inc.

Respondent Trustees of Colorado Properties, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal place of business located at 2601 Biscayne Boulevard, Miami, Florida.

Respondent Top of the World, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business located at 2601 Biscayne Boulevard, Miami, Florida. It is a wholly-owned subsidiary of respondent Trustees of Colorado Properties, Inc.

Respondent Milco Associates, Inc. is a corporation organized, existing and doing business under and by virtue of the the laws of the State of Florida, with its principal place of business located at 2601 Biscayne Boulevard, Miami, Florida. It is the sales agent or broker for respondents Hartsel Ranch Corporation and Estates of the World, Inc.

Respondent Irving E. Miller is an individual and an officer of Milco Associates, Inc. He owns all of the stock in respondents Milco Associates, Inc., Trustees of Colorado Properties, Inc., and Larwill Costilla Ranches, Inc. He formulates, directs and controls the acts and practices of the said corporate respondents and their subsidiaries. His address is 2601 Biscayne Boulevard, Miami, Florida.

Respondent San Luis Valley Ranches, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business located at 201 Carson Ave., Alamosa, Colorado. It is the sales agent or broker for respondent Larwill Costilla Ranches, Inc.

Respondent G-R-P Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business located in Blanca, Colorado. It is the sales agent or broker for respondents Rio Grande Ranches of Colorado, Inc. and Top of the World, Inc.

Respondent Materic, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 8648 Wilshire Boulevard, Beverly Hills, California. It is the advertising agent for respondents Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Top of the World, Inc. and San Luis Valley Ranches, Inc.

Respondents Albert R. Linnick and Richard Greenberg are individuals and officers, directors or principal stockholders in respondents San Luis Valley Ranches, Inc., G-R-P Corporation and Materic, Inc. They formulate, direct and control the acts and practices of the said corporate respondents. Their address is 8648 Wilshire Boulevard, Beverly Hills, California.

PAR. 2. Respondents cooperate and act together in effecting the acts and practices as hereinafter set forth.

PAR. 3. Respondents are engaged, directly or through their wholly-owned subsidiaries, agents and other devices, in the business of acquiring undeveloped land, subdividing said land into lots, and advertising, offering for sale and selling said lots to the public. Respondents are in substantial competition with corporations, firms and individuals in the sale of land.

PAR. 4. Respondents' volume of business is substantial and their acts and practices, as hereinafter set forth, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the conduct of their aforesaid business, respondents represent that the lots which respondents offer for sale are good investments and that there is little or no financial risk involved in the purchase of said lots.

PAR. 6. In truth and in fact, a significant number of the aforesaid lots are not good investments involving little or no financial risk to purchasers from respondents. Therefore, the acts and practices described in Paragraph Five are unfair or deceptive.

PAR. 7. In the further conduct of their aforesaid business, respondents offer for sale and sell lots in their subdivisions without disclosing to prospective purchasers that the purchase of said lots is a risky investment in that, *inter alia*, the future value of said lots is uncertain and the purchaser will probably be unable to resell his or her lot at or above the purchase price. Therefore, respondents have failed to disclose material characteristics of their lots which would be likely to affect the consideration by purchasers of whether or not to purchase a lot from respondents. The failure to disclose such information is an unfair or deceptive act or practice.

PAR. 8. In the further conduct of their aforesaid business, respondents represent that the value of the undeveloped land and lots in their subdivisions is growing at a rate which corresponds to the growth rate of the value, at the undeveloped stage, of land and lots in more fully developed and populated areas.

PAR. 9. In truth and in fact, the growth rate of the value of the undeveloped land and lots in respondents' subdivisions does not correspond to the growth rate of the value, at the undeveloped state, of land and lots in more fully developed and populated areas referred to in Paragraph Eight. Therefore, the acts and practices described in Paragraph Eight are unfair or deceptive.

PAR. 10. In the further conduct of their aforesaid business, respondents represent that the lots in respondents' subdivisions are useable as homesites.

PAR. 11. In truth and in fact, all or most of the aforesaid lots are not useable as homesites because of, *inter alia*, the lack or unreasonable cost of utilities, the difficulty in obtaining home construction financing, the remote location of the property and the poor quality of the land. Therefore, the acts and practices described in Paragraph Ten are unfair or deceptive.

PAR. 12. In the further conduct of their aforesaid business, respondents offer for sale and sell lots in their subdivisions without disclosing to prospective purchasers the total cost of all utilities, that one or more utility services may not be available and that home construction financing is difficult to obtain. Therefore, respondents have failed to disclose material characteristics of their lots which would be likely to affect the consideration by purchasers of whether or not to purchase a lot from respondents. The failure to disclose such information is an unfair or deceptive act or practice.

PAR. 13. In the further conduct of their aforesaid business, respondents represent that the land in their subdivisions will soon be unavailable and that prospective buyers must purchase lots immediately or risk being unable to do so.

PAR. 14. In truth and in fact, respondents' land is not selling at such a rate that prospective buyers cannot wait a substantial period of time and still be able to obtain land in the subdivision being offered. Therefore, the acts and practices described in Paragraph Thirteen are unfair or deceptive.

PAR. 15. In the further conduct of their aforesaid business, respondents represent that the money paid to respondents by purchasers is fully protected or "Guaranteed" by respondents' refund plan.

PAR. 16. In truth and in fact, the money paid to respondents by purchasers is not fully protected or "Guaranteed" by respondents' refund plan because of the conditions required of purchasers to get refunds including, but not limited to, the conditions that purchasers must bear the cost of traveling to the property and that purchasers must request a refund immediately upon completion of a required company guided tour when it may not be possible for purchasers to determine if the property is as represented at that time. Therefore, the Acts and practices described in Paragraph Fifteen are unfair or deceptive.

PAR. 17. In the further conduct of their aforesaid business, respondents represent that their subdivision land and the area in which said land is located is similar or comparable to urban, metropolitan and industrial areas as well as to mountain resort areas and recreation areas.

PAR. 18. In truth and in fact, respondents' land is not similar or comparable either to urban, metropolitan and industrial areas or to mountain resort areas or to recreation areas. Therefore, the acts and practices described in Paragraph Seventeen are unfair or deceptive.

PAR. 19. In the further conduct of their aforesaid business, respondents use land sales contracts which contain declarations that the contract contains the entire agreement of the parties and that no representations were made to the lot purchaser to induce said purchaser to enter into the contract other than those representations expressed in the contract.

PAR. 20. Use by respondents of the contract declarations described in Paragraph Nineteen is an unfair or deceptive act and practice because respondents and their agents make representations which differ in material respects from, or which obscure, the rights and obligations of purchasers and respondents under said contracts.

PAR. 21. In the further conduct of their aforesaid business, respondents use land sales contracts which contain a provision that defaulting purchasers forfeit all payments previously made to respondents under the contract. When purchasers default and forfeit previously made payments, respondents retain and fail to offer refunds of those amounts of the purchasers' total payments which exceed respondents' reasonable damages caused by the defaults.

PAR. 22. Use by respondents of the contract provision described in Paragraph Twenty-One and the retaining by respondents of purchasers' payments in excess of reasonable damages are unfair acts or practices.

PAR. 23. In the further conduct of their aforesaid business, respondents use land sales contracts which contain a provision that prevents purchasers from acquiring title to the lot being purchased until said purchasers have paid the full purchase price of the lot. Further, respondents enter into mortgages and other security agreements among themselves in which the subdivision land is the security and which contain default provisions giving the secured party respondent the right to repossess the subdivision land and its title from the respondent nominally selling the subdivision while not requiring the secured party respondent either to honor the land sales contracts of the individual lot purchasers or to notify said purchasers that the subdivision selling respondent has lost its right or interest in the land. Thus, the interest in the land that lot purchasers may have can be cut off by implementation of the said security agreements among the respondents. The failure by respondents to protect the interest of lot purchasers is an unfair or deceptive act or practice.

PAR. 24. In the further conduct of their aforesaid business, respondents induce members of the public through the unfair and deceptive acts and practices, described in the enumerated paragraphs above, to pay to them, in advance of the passage of title, substantial sums of money toward the purchase of lots located within respondents' subdivisions. Said lots are of little or no use or value to purchasers as investments or as homesites. Respondents retain said sums of money.

PAR. 25. Respondents' retaining of the sums of money obtained through the acts and practices described in Paragraph Twenty-Four is an unfair act and practice.

PAR. 26. The use by respondents of the aforementioned unfair or deceptive statements, representations, and practices has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements are true and to cause the purchase of substantial numbers of respondents' lots because of said mistaken and erroneous belief.

PAR. 27. The aforementioned acts and practices, as herein alleged, are all to the prejudice and injury of the public and respondents' competitors and constitute unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Bankers Life and Casualty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business located at 4444 West Lawrence Ave., Chicago, Illinois.

Respondent Southern Realty & Utilities Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 1301 Copans Road, Pompano Beach, Florida.

Respondent Hartsel Ranch Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal place of business located at 1301 Copans Road, Pompano Beach, Florida.

Respondent Estates of the World, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Hawaii, with its principal place of business located at 4810 North Kenneth Ave., Chicago, Illinois.

Respondent San Luis Valley Ranches, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business located at 201 Carson Ave., Alamosa, Colorado.

Respondent Larwill Costilla Ranches, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business located at 201 Carson Ave., Alamosa, Colorado.

Respondent Rio Grande Ranches of Colorado, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business located at 201 Carson Ave., Alamosa, Colorado.

Respondent Top of the World, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business located at 201 Carson Ave., Alamosa, Colorado.

Respondent Materic, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 2049 Century Park East, Los Angeles, California.

Respondent G-R-P Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business located at 2049 Century Park East, Los Angeles, California.

Respondent Trustees of Colorado Properties, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal place of business located at 2601 Biscayne Boulevard, Miami, Florida.

Respondent Milco Associates, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal place of business located at 2601 Biscayne Boulevard, Miami, Florida.

Respondent Richard Greenberg is an individual whose address is 2049 Century Park East, Los Angeles, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

For purposes of this order, unless otherwise provided, the following definitions shall be applicable:

"Purchaser" shall mean a person to whom a respondent offers to sell or sells one or more lots in a subdivision; *provided, however*, that a "purchaser" shall not include a person who purchases land in a single transaction for a sum in excess of $25,000.

"Land" or "subdivision" shall mean any real property which is divided or proposed to be divided into 50 or more units, whether contiguous or not, for the purpose of sale or lease to purchasers as part of a common promotional plan.

"Contract" shall mean a written agreement for the sale of land to purchasers.

"Business day" shall mean any calendar day except Saturday, Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day and Christmas Day.

"Property Report" includes documents sometimes referred to as an Offering Statement or Prospectus.

"Respondent which sold the lot" shall mean the title owner or his sales agent.

"Inconsistent" shall mean mutually repugnant or contradictory one to the other.

For purposes of this order, a requirement to cease and desist from representing or misrepresenting shall include representing or misrepresenting directly or indirectly. For purposes of this order, all required disclosures shall be made in a clear and conspicuous manner.

## I.

*It is ordered,* That each of the respondents Bankers Life and Casualty Company, Southern Realty & Utilities Corp., Hartsel Ranch Corporation, Estates of the World, Inc., Milco Associates, Inc., Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Trustees of Colorado Properties, Inc., Top of the World, Inc., San Luis Valley Ranches, Inc., G-R-P Corporation and Materic, Inc., corporations, and their officers, successors, assigns, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other entity, in connection with the advertising, offering for sale or sale of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing:

1. That land or lots are a good or safe investment, or that the purchase of a lot is a good or safe investment.

2. That there is little or no financial risk involved in the purchase of lots.

3. That the resale of a purchased lot is not difficult.

4. That the value of, or demand for, any land, including lots being offered for sale or previously sold, has increased, or will increase, or that purchasers have made, or will in the future make, a profit by reason of having purchased such land.

5. That the prices of lots periodically rise or that prices of said lots are increasing, have increased or will increase, without disclosing at the same time, and by the same medium by which the price increases are communicated, that the price increases of lots do not in any way relate to the value of said lots.

6. That the purchase of a lot is a way to achieve financial security or prosperity, to deal with inflation or to become wealthy.

7. That the land in any subdivision will soon be unavailable or that prospective purchasers must purchase a lot in a subdivision immediately to ensure that such lot will be available.

8. That subdivision land and the area surrounding it are comparable, similar or analogous either to urban, metropolitan and industrial areas or to mountain resort areas or to recreation areas.

9. That the growth in land values or potential growth in land values at a subdivision corresponds to or will correspond to the growth in land values at any other locality. The word "locality" includes, but is not limited to, cities, towns, counties, townships, boroughs, states and regions.

*Provided, however,* it shall be a defense that at the time a representation was made, it was true and the maker of the representation possessed data substantiating the representation. Such substantiating data shall be maintained for at least three years from the making of the representation it substantiates and shall be made available to the Commission upon request.

B. Including in any contract for the sale of subdivision land, or in the documents shown or provided to purchasers or prospective purchasers of subdivision land:

1. Language to the effect that no express or implied representations have been made in connection with the sale or offering for sale of such land, other than those set forth in the contract.

2. Language to the effect that upon a failure of the purchaser to pay any installment due under the contract or otherwise to perform any obligation under the contract, the respondent which sold the lot shall be entitled to retain sums previously paid thereunder by the purchaser, except as provided in Section V of this order.

3. Any waiver, limitation or condition on the right of a purchaser to cancel a transaction or receive a refund under any provision of this order, except as such waiver, limitation or condition is expressly allowed by this order.

C. Misrepresenting the right of a purchaser under any provision of this order or any applicable statute or regulation to cancel a transaction or receive a refund.

D. Making misrepresentation concerning the rights or obligations of a respondent or purchaser which differs in any respect from the rights or obligations of the parties as stated in the contract or Property Report.

E. Making any statement or representation concerning the proximity to any subdivision of any existing or future city, place, facility, body of water or road without disclosing, in immediate conjunction therewith and with the same conspicuousness as such statement of representation, the approximate distance to the nearest two (2) miles in road miles from the center of the subdivision to the downtown or geographical center of the city, place or facility referred to, or in the case of a body of water or a road, to the nearest point at which such body of water or road is accessible to entry and use by purchasers.

F. Making any statement or representation concerning any credit, refund or other monetary benefit or remuneration to purchasers or prospective purchasers from the respondent which sold the lot unless such is a fact and unless any conditions or limitations attached to such credit, refund, benefit or remuneration are disclosed.

## II.

*It is further ordered*, That each of the respondents Bankers Life and Casualty Company, Southern Realty & Utilities Corp., Hartsel Ranch Corporation, Estates of the World, Inc., Milco Associates, Inc., Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Trustees of Colorado Properties, Inc., Top of the World, Inc., San Luis Valley Ranches, Inc., G-R-P Corporation and Materic, Inc., corporations, and their officers, successors, assigns, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other entity, in connection with the advertising, offering for sale or sale of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith:

A. Set forth in all sales and promotional material and advertising relating to the sale of land, except billboards, the following statement:

**Risk Factor: Since land values are uncertain, you should consult a qualified professional before purchasing.**

B. Set forth as the title on the first page of any contract for the sale of land in 12-point boldface type "CONTRACT FOR THE PURCHASE OF LAND."

C. Set forth on the first page of all contracts for the sale of land in 10-point boldface type the following statement:

**THIS IS A CONTRACT BY WHICH YOU AGREE TO PURCHASE LAND.**

**THE FUTURE VALUE OF THIS LAND, AS WELL AS ALL UNDEVELOPED REAL ESTATE, IS UNCERTAIN. YOU SHOULD NOT ASSUME THAT THE VALUE OF LAND WILL INCREASE. DO NOT ASSUME THAT YOU WILL BE ABLE TO RESELL YOUR LAND WITHOUT SIGNIFICANT COMMUNITY DEVELOPMENT AND POPULATION GROWTH.**

D. Set forth on the first page of all contracts for the sale of lots such of the following statements as are applicable:

1. For contracts for the sale of lots where the respondent which sold the lot is not obligated to provide electricity, water, and sewage disposal by central systems, but where all such utilities are available by other means, the following statement:

> This undeveloped land has been planned for use as a vacation homesite. Electricity, water, and sewage disposal are available at the purchaser's expense. Electricity is obtainable by generator, water by well, and sewage disposal by septic tank. Access will be by unpaved roads.

*Provided* that, if a central system is provided instead of a generator or well or septic tank, then the above statement may be modified only to the extent necessary to so indicate.

*Provided further* that, if paved roads are provided, then the above statement may be modified only to the extent necessary to so indicate.

*Provided further* that, if roads are county accepted, then the above statement may be modified only to the extent necessary to so indicate.

2. For contracts for the sale of lots where the respondent which sold the lot is not obligated to provide any utilities and where utilities are not known to be available, the following statement in lieu of the above statement:

> This completely undeveloped land is being sold "as is." No improvements are planned for this subdivision other than county-approved and maintained roads. No representation is made as to the availability of water or sewer.

*Provided* that, if the roads are not county-approved and maintained, this statement shall be modified to disclose the status of the roads if any.

E. Set forth the following statement in any contract for land requiring a Property Report; immediately below the statement required by paragraph D. above.

> Note to Buyer: See page [insert page number] of the Property Report for statements relating to the additional expense for improvements.

F. Set forth in any contract for the sale of land which does not require a Property Report, immediately below the statements required by paragraph D. above, a statement providing the cost of improvements.

G. Whenever prospective buyers are provided with a contract for the sale of land by any means other than by mailing said contract directly to such purchasers:

1. Furnish each purchaser, at the time the purchaser signs a contract for the sale of land, with two copies of a form, captioned in

boldface type "NOTICE OF CANCELLATION," which shall contain in boldface type the following information and statements:

**NOTICE OF CANCELLATION**

________________
Date of Transaction

________________
Contract Number

**YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE SHOWN ON THE CONTRACT.**

**IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT AND ANY NEGOTIABLE INSTRUMENT ISSUED BY YOU WILL BE RETURNED WITHIN TWENTY BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE.**

**TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO [name of respondent which sold the lot], AT [address of said respondent's place of business] NOT LATER THAN MIDNIGHT OF [date].**

**I (WE) HEREBY CANCEL THIS TRANSACTION (EACH PURCHASER MUST SIGN THIS NOTICE.)**

| | |
|---|---|
| ________________<br>Signature of Purchaser | ____<br>Date |
| ________________<br>Signature of Purchaser | ____<br>Date |

2. Before furnishing copies of the above "Notice of Cancellation" to the purchaser, complete both of the copies by entering the name of the respondent which sold the lot, the address of said respondent's place of business, the date of the transaction, the contract number and the date by which the purchaser may give notice of cancellation, but in no event may such date be earlier than the tenth business day following the date of the transaction.

3. Where a timely notice of cancellation is received and said notice is not properly signed and the respondent which sold the lot does not intend to honor the notice, immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of his error and stating clearly and conspicuously that a notice signed by the purchaser must be mailed by midnight of the seventh business day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

4. Where the signature of a prospective purchaser is solicited

during the course of a sales presentation, inform each person orally, at the time he signs the contract, of his right to cancel as stated in paragraph II.G.5. of this order.

5. Include clearly and conspicuously in each contract for the sale of land the following statement in boldface type:

**PURCHASER HAS THE RIGHT TO CANCEL THE CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT. SEE THE ATTACHED "NOTICE OF CANCELLATION" FOR AN EXPLANATION OF THIS RIGHT.**

6. Within twenty business days after the receipt of a timely notice of cancellation signed by a purchaser, refund all payments made under the contract, and cancel and return any monies paid by the purchaser in connection with the contract.

H. Furnish any report required to be furnished to a purchaser at or before the signing of a contract by Federal or State law or by this order (i) with the first written materials furnished to a prospective purchaser in connection with the sale of a lot or (ii) during the first contact which the prospective purchaser has with any agent or employee of the respondent which is offering the lot for sale, in connection with the sale of a lot.

I. Inform all prospective purchasers that a bank or other lender located near the subdivision should be consulted prior to the purchase of land if the purchaser intends to finance the building of a house on that land.

J. If a refund is offered contingent upon the purchaser taking a company-guided inspection tour or making a registered inspection of the property in which the purchaser's lot is located:

1. Provide the purchaser three business days after taking said tour or making said inspection within which to request a refund.

2. Include in any contract with the original purchaser, in immediate proximity to the provision setting forth the availability of a refund upon the completion of a company-guided tour or registered inspection of the property, the following statements:

**If you take a company-guided tour of the property within [designate time period] months of your purchase and you have not been declared in default, you will have three days after the tour to cancel your purchase and get your money back.**

**You, the purchaser, pay your own expenses for travel to the property in order to take the tour.**

3. Furnish each purchaser at the completion of the tour or inspection a completed form in duplicate, captioned "NOTICE OF

CANCELLATION," which shall contain in boldface type the following statements:

**NOTICE OF CANCELLATION**

______________

**Date of Company-Guided Inspection Tour or Registered Inspection of Property**

______________

**Contract Number**

**YOU MAY CANCEL YOUR CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE ABOVE DATE.**

**IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TWENTY BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE.**

**TO CANCEL YOUR CONTRACT, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO [name of respondent which sold the lot], AT [address of said respondent's place of business] NOT LATER THAN MIDNIGHT OF [date].**

**I (WE) HEREBY CANCEL THE CONTRACT. (EACH PURCHASER MUST SIGN THIS NOTICE.)**

| | |
|---|---|
| ______________ | ______ |
| **Signature of Purchaser** | **Date** |
| ______________ | ______ |
| **Signature of Purchaser** | **Date** |

4. Before furnishing copies of the above "Notice of Cancellation" to purchaser, complete both copies by entering the name of the respondent which sold the lot and the address of said respondent's place of business, the date of the company-guided inspection tour or the registered inspection of the property, the contract number and the date by which the purchaser may give notice of cancellation, but in no event may such date be earlier than the third business day following the date of said tour or inspection.

5. Where a timely notice of cancellation is received but said notice is not properly signed and the respondent which sold the lot does not intend to honor the notice, immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of his error and stating clearly and conspicuously that a notice signed by the purchaser must be mailed by midnight of the

seventh day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

K. Disclose in each instance where all or part of any printed article, publication, endorsement or testimonial is used, published or referred to, the date when such article, publication, endorsement or testimonial was originally published or made and the source of such article, publication, endorsement or testimonial.

L. Notify prospective purchasers of any lot offered for sale in a flood plain area that said lot is in a flood plain area.

## III.

*It is further ordered,* That each of the respondents Bankers Life and Casualty Company, Southern Realty & Utilities Corp., Hartsel Ranch Corporation, Estates of the World, Inc., Milco Associates, Inc., Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Trustees of Colorado Properties, Inc., Top of the World, Inc., San Luis Valley Ranches, Inc., G-R-P Corporation and Materic, Inc., corporations, and their officers, successors, assigns, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other entity, in connection with the advertising, offering for sale or sale of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing that any land may be used now or in the future:

A. As a homesite, unless the contracts or Property Reports accurately set forth:

1. That water is available to the purchaser by drilling a well or by central water system.

2. That sewage disposal is available to purchasers by installation of a septic tank or by hook-up to a central sewage system.

3. That electricity will be available to the purchaser from a utility company.

B. As a vacation homesite, unless the contracts or Property Reports set forth:

1. That water is available to the purchaser by drilling a well.

2. That percolation on the property purchased is sufficient to support a septic tank.

3. That electricity is available to the purchaser by installing a generator.

## IV.

*It is further ordered,* That, where applicable, each of the respondents, Bankers Life and Casualty Company, Southern Realty &

Utilities Corp., Hartsel Ranch Corporation, Estates of the World, Inc., Milco Associates, Inc., Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Trustees of Colorado Properties, Inc., Top of the World, Inc., San Luis Valley Ranches, Inc., G-R-P Corporation and Materic, Inc., corporations, and their officers, successors, assigns, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other entity, which has or obtains, prior to the payment by the purchaser of the total purchase price, either a security interest or title in the land:

A. Shall execute and record a covenant providing that, if the purchaser pays the total purchase price pursuant to the terms of a contract for the purchase of land, then a general warranty deed free of liens will be delivered conveying title in accordance with said contract.

1. With respect to land in which it has a security interest or title as of the effective date of this order, within 90 days of the effective date of this order.

2. With respect to land in which it obtains a security interest or title after the effective date of this order, at the same time such security interest or title is recorded.

B. Shall not grant a lien or security interest on land to any third party unless it is provided in the instrument granting said lien or security that, if the purchaser pays the total purchase price pursuant to the terms of the contract for the purchase of land, then a general warranty deed free of liens will be delivered conveying title.

## V.

For purposes of Section V of this order, the following shall be applicable:

The subdivision land to be covered is presently known as Hartsel Ranch, Estates of the World, Rio Grande Ranches, Larwill Costilla Ranches, Top of the World, and San Luis Valley Ranches.

*It is further ordered*, That:

A. Each of the respondents Hartsel Ranch Corporation, Estates of the World, Inc., Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Top of the World, Inc., San Luis Valley Ranches, Inc., with respect to the refund of monies to each purchaser who entered into a contract for the purchase of land in its own subdivision between January 1, 1971 and January 1, 1974, who was an active or deeded account and had not been notified of a default on his present contract as of the date the agreement containing this order was accepted by the Commission, shall:

1. Within ninety (90) days of the effective date of this order cause a

letter to be sent by first class mail to all such purchasers, said letter to be in the form as set forth in Exhibit A attached hereto.

2. In the event that the letter referred to in subparagraph 1 above is returned undelivered, promptly review its files and make other reasonable efforts such as contacting credit bureaus, telephone and utility companies, in order to obtain the present address of each such purchaser whose letter was not delivered, and to those purchasers for whom a present address is obtained by these means or otherwise, send the letter required by subparagraph 1 above within sixty days of obtaining the purchaser's present address; *provided, however,* that all obligations to send the letter required by subparagraph 1 above shall terminate twenty-four months after the effective date of this order.

3. Cause refunds to be made in accordance with the terms of the letter sent pursuant to subparagraphs 1 and 2 above. *Provided, however,* that refunds under this subparagraph may be conditioned upon purchaser's execution of a quit-claim deed, release or other document necessary to free any and all liens or encumbrances to effect a full release of any interest or right whatsoever flowing from the terms of the contract.

4. Maintain, for three years after the effective date of this order or three years after the last refund payment is made, whichever occurs last, records which are adequate to disclose said respondent's compliance with subparagraph 3 above, such records to be furnished by said respondent to the Federal Trade Commission upon request.

B. Each of the respondents Hartsel Ranch Corporation, Estates of the World, Inc., Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Top of the World, Inc., and San Luis Valley Ranches, Inc., with respect to the refund of monies to defaulted purchasers who entered into contracts for the purchase of land in its own subdivision between January 1, 1971 and January 1, 1974 shall:

1. Compile a list of the names and last-known addresses of all identifiable such purchasers, who defaulted on said contracts prior to the date the Agreement containing this order was accepted by the Commission and who forfeited payments in excess of 30% of the cash purchase price.

2. Send a letter within six months of the effective date of this order, by first class mail, to each purchaser referred to in subparagraph 1 above, advising him of his right to a refund, the approximate time period and manner in which such refund will be made, the need to execute and return within 30 days the enclosed quit-claim deed, release or similar document, if such is required for the purchaser to obtain a refund, and the need for notifying said respondent of any future change of residence or address where such refund can be delivered.

3. Enclose with the letter referred to in subparagraph 2 above a form for notification of any change of the purchaser's address and any quit-claim deed, release or other document which is required to be executed by the purchaser for the purchaser to receive a refund.

4. In the event that the letter referred to in subparagraph 2 above is returned undelivered, promptly review its files and make other reasonable efforts such as contacting credit bureaus, telephone and utility companies, in order to obtain the present address of each such purchaser whose letter was not delivered, and to those purchasers for whom a present address is obtained by these means or otherwise, send the letter required by subparagraph 2 above within sixty days of obtaining the present address; *provided, however,* that all obligations to send the letter required by this subparagraph shall terminate twenty-four months after the effective date of this order.

5. Refund to each purchaser, for whom a current mailing address has been obtained pursuant to subparagraph 2 or 4 above, all payments paid by such purchaser in excess of 30% of the cash purchase price disclosed in the contract. *Provided, however,* that refunds under this subparagraph may be conditioned upon purchaser's execution of a quit-claim deed, release or other document necessary to free any and all liens or encumbrances to effect a full release of any interest or right whatsoever flowing from the terms of the contract.

6. Refund the amount due under subparagraph 5 above between 12 months and 24 months after the effective date of this order.

7. Maintain, for three years after the effective date of this order or three years after the last refund payment is made, whichever occurs last, records which are adequate to disclose said respondent's compliance with subparagraph 5 above, such records to be furnished by said respondent to the Fedral Trade Commission upon request.

C. Respondent Bankers Life and Casualty Company shall guarantee that the refunds required by Paragraphs A and B above are made in the time required therein.

D. With respect to purchasers who contract to buy land after the effective date of this order, the sales contract shall contain a provision that in the event purchaser thereafter defaults, if purchaser's total payments exceed 40% of the cash purchase price, purchaser shall be entitled to receive a refund of 65% of payments made in excess of 40% of the cash purchase price. *Provided, however,* that refunds hereunder may be conditioned upon purchaser's execution of a quit-claim deed, release or other document necessary to free any and all liens or encumbrances to effect a full release of any interest or right whatsoever flowing from the terms of the contract.

## VI.

For purposes of Section VI of this order, the following definitions shall be applicable:

"Subdivision business" shall mean the acquiring of land for subdividing, the dividing of land into subdivision lots, or the advertising, promotion or selling of subdivided lots to purchasers.

*It is further ordered,* That respondent Richard Greenberg, individually or as officer, director, stockholder, employee, agent or manager, of any corporation or other entity does forthwith cease and desist from engaging in the subdivision business unless such subdivision business is conducted with or through entities which agree to be bound by and which act in accordance with the Agreement Containing Consent Order to Cease and Desist entered in this proceeding between the Commission and Bankers Life and Casualty Company, Southern Realty & Utilities Corp., Hartsel Ranch Corporation, Estates of the World, Inc., Milco Associates, Inc., Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Trustees of Colorado Properties, Inc., Top of the World, Inc., San Luis Valley Ranches, Inc., G-R-P Corporation and Materic, Inc.

## VII.

*It is further ordered,* That if the Interstate Land Sales Full Disclosure Act, presently codified at 15 U.S.C. 1701–20 (1970), or any regulation that has been or may be promulgated pursuant thereto requires an act or practice that is prohibited by any provision of this order, or prohibits an act or practice that is required by any such provision, or is otherwise inconsistent with any such provision of this order, any such provision of this order shall be without legal force or effect.

## VIII.

*It is further ordered,* That in the event the Federal Trade Commission promulgates a valid Trade Regulation Rule applicable to respondents' sale of land, then to the extent there are any inconsistencies between this order and such Rule, the Trade Regulation Rule will govern.

## IX.

*It is further ordered,* That each of the respondents Bankers Life and Casualty Company, Southern Realty Utilities Corp., Hartsel Ranch Corporation, Estates of the World, Inc., Milco Associates, Inc., Larwill

best copy available

Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Trustees of Colorado Properties, Inc., Top of the World, Inc., San Luis Valley Ranches, Inc., G-R-P Corporation and Materic, Inc.:

1. Deliver, by hand or by certified mail, a copy of Sections I, II, and III of this order to each of their present or future employees and salesmen, and independent brokers, who sell or promote the sale of land to purchasers.

2. Provide each person so described in Paragraph 1 above with a form, returnable to said respondents, clearly stating such person's intention to be bound by and to conform his sales practices to the requirements of this order.

3. Inform each person described in Paragraph 1 above that said respondents shall not use any such person, or the services of any such person, unless such person agrees to and does file notice with said respondents that such person will be bound by the provisions contained in this order.

4. That in the event such person will not agree to so file notice with said respondents and to be bound by the provisions of this order, said respondents shall not use such person, or the services of such person.

5. Inform the persons described in Paragraph 1 above that said respondents are obligated by this order to discontinue dealing with those persons who engage on their own in the acts and practices prohibited by this order.

6. Institute a program of continuing surveillance adequate to reveal whether the sales practices of each of said persons described in Paragraph 1 above conform to the requirements of Sections I, II, and III of this order.

7. Discontinue dealing with any person described in Paragraph 1 above, revealed by the aforesaid program of surveillance, who repeatedly engages on his own in the acts or practices prohibited by Sections I, II, and III of this order; *provided, however*, that, in the event remedial action is taken, evidence of such dismissal or termination shall not be admissible against said respondents in any proceeding brought to recover penalties for alleged violation of any other paragraph of this order.

## X.

*It is further ordered*, That each of the respondents Bankers Life and Casualty Company, Southern Realty & Utilities Corp., Hartsel Ranch Corporation, Estates of the World, Inc., Milco Associates, Inc., Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Trustees of Colorado Properties, Inc., Top of the World, Inc., San Luis Valley Ranches, Inc., G-R-P Corporation and Materic, Inc., shall forthwith distribute a copy of this Order to each of their subsidiaries engaged in the sale of land.

### XI.

*It is further ordered*, That in the event that any of the respondents Hartsel Ranch Corporation, Estates of the World, Inc., Milco Associates, Inc., Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Trustees of Colorado Properties, Inc., Top of the World, Inc., San Luis Valley Ranches, Inc., G-R-P Corporation and Materic, Inc., transfers all or a substantial part of its subdivision land to any other corporation or to any other person engaged in subdivision land sales or transfers all or part of its ownership interest to wholly-owned subsidiaries, such respondent shall require the transferee to file promptly with the Commission a written agreement to be bound by all the terms of this Order; *provided*, that, if such respondent wishes to present to the Commission any reasons why said order should not apply in its present form to said transferee, such respondent shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

### XII.

*It is further ordered*, That each of the respondents Bankers Life and Casualty Company, Southern Realty & Utilities Corp., Hartsel Ranch Corporation, Estates of the World, Inc., Milco Associates, Inc., Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Trustees of Colorado Properties, Inc., Top of the World, Inc., San Luis Valley Ranches, Inc., G-R-P Corporation and Materic, Inc., notify the Commission at least thirty days prior to any proposed corporate change, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in said respondent which may affect compliance obligations arising out of this order.

### XIII.

*It is further ordered*, That each of the respondents Bankers Life and Casualty Company, Southern Realty & Utilities Corp., Hartsel Ranch Corporation, Estates of the World, Inc., Milco Associates, Inc., Larwill Costilla Ranches, Inc., Rio Grande Ranches of Colorado, Inc., Trustees of Colorado Properties, Inc., Top of the World, Inc., San Luis Valley Ranches, Inc., G-R-P Corporation, Materic, Inc., and Richard Greenberg shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which said respondent has complied with this order. Thereafter, each of said respondents, where applicable, will submit a supplemental compliance report on or before sixty (60) days after the date scheduled for the completion of the restitution provision of Section V.

## EXHIBIT A

Dear [Customer Name]:

Our records show that you purchased Lot[s] —————— in Block —————— of Section —————— of [development name] on [date] for [contract price]. At the present time we show a balance owed of $—————— and a paid-in amount [principal and interest] of $——————.

In settlement of litigation with the Federal Trade Commission, in which we admit no liability, we have agreed to offer you an opportunity to cancel your contract on the above lot on the following terms. If you elect to cancel your contract at this time you may obtain a 70% refund on [paid-in amount], or $——————, which will be paid to you in four quarterly payments commencing [date to be set within 120 days after date letter sent]. Of course, if you elect to cancel the contract, you do not need to make any more payments.

If you decide to accept our offer, sign the enclosed [quit-claim deed] [rescission and release agreement], have it notarized and return it within 30 days of receiving this letter. Also you should fill in the enclosed change of address card and send it to us if your mailing address changes.

See Attached Fact Sheet.

### FACT SHEET

WATER: The source of domestic water for the property is individual wells drilled by the owner at his expense. The cost of drilling a well is approximately [$10 per foot [North]] [$12 to $16 per foot [South]] plus the cost of a pump; and water is generally available from approximately 100 feet to 300 feet, depending on its location.

SEWAGE DISPOSAL: Sewage disposal is handled by the use of individual septic tanks which for most pieces of property cost from approximately $800 to $1500. Percolation tests have shown that most of the properties are well suited for such a system.

ELECTRICITY: Electric power is available from local cooperative power associations. The cost of such electric power may be impractical because of the distance from the nearest power line. Generators can be purchased new by the owner of the property from approximately $1,100 to $2,500.

TELEPHONE: Telephone service is available but may be impractical because of the distance from existing telephone lines.

ROADS: Roads were built by the developer to give access to the property but have not been maintained in areas where no development has occurred. Some of the roads were dedicated to the county which is responsible for maintaining them on evidence of need. The other roads will be maintained by the developer on evidence of need until dedicated to the county.

With regard to the future value of land such as that which you bought, the

Department of Housing and Urban Development requires the following statement in all Property Reports:

> The future value of land is uncertain; do not count on appreciation. You should consider the competition which you may experience from the developer in attempting to resell your lot and the possibility that real estate brokers may not be interested in listing your lot.

## ORDER DISMISSING COMPLAINT AS TO RESPONDENT ALICE HOLGUIN

By order of October 11, 1978, Administrative Law Judge Lewis F. Parker (the "ALJ") substituted Alice Holguin for Albert R. Linnick as a party in this proceeding. Respondent Holguin is executrix of the estate of Mr. Linnick, who died in January, 1978.

On January 3, 1979, the Commission entered an order affirming the ALJ's substitution of the executrix. The Commission's order of January 3 indicated that the purpose of substitution was to preserve access to the assets of the decedent as a potential source of redress for injured consumers.

On March 15, 1979, this case was withdrawn from adjudication as to all but one of the fifteen respondents, and on May 2, 1979, the Commission accepted an Agreement Containing a Consent Order covering thirteen respondents. The parties' Joint Motion for Withdrawal from Adjudication recorded the agreement of complaint counsel and the consenting respondents that the complaint should be dismissed as to Ms. Holguin. Furthermore, the Agreement provides that the relief set forth in the contemplated Order "fully satisfies any claim for consumer redress . . . arising out of the acts and practices alleged in the complaint . . ."

By its acceptance of the Agreement and by its issuance of the contemplated order, the Commission has foregone any claim for additional consumer redress arising out of the complaint in this matter. Since the purpose of substituting Ms. Holguin was to preserve access to a potential source of redress and since further redress is precluded, there is no reason to retain Ms. Holguin as a respondent. Accordingly,

*It is ordered*, That as to respondent Alice Holguin, the complaint in the above-captioned matter be, and it hereby is, dismissed.

## IN THE MATTER OF

## UNNAMED DEBT COLLECTION AGENCIES, CREDITORS OR OTHERS

*File No. 782 3078. Interlocutory Order, Aug. 31, 1979*

## ORDER DENYING MOTION TO REIMBURSE COSTS OF COMPLYING WITH SUBPOENA DUCES TECUM

Creditors Service Bureau of El Paso, Inc. (CSB), moves that it be reimbursed for expenses incurred in complying with a subpoena duces tecum issued on January 22, 1979, which required the production of documents relating, *inter alia*, to the practices used by CSB to collect consumer debts. The instructions appended to the subpoena provided for the submission of verified copies in lieu of originals for any of the responsive documents.

A subpoena respondent is not automatically entitled to the reimbursement of expenses incurred in complying with Commission process. Rather, subpoenaed parties are expected to absorb reasonable expenses of compliance as a cost of doing business. *SEC* v. *Arthur Young & Co.*, 584 F.2d 1018, 1033 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 841 (1979); *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 881–82 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977) (modification of investigative subpoenas is not justified "unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business").

To justify its claim for reimbursement, CSB must demonstrate that the costs of complying with the Commission subpoena are unreasonable (see *FTC* v. *Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979); *United States* v. *Tivian Labs, Inc.*, 589 F.2d 49, 55 (1st Cir. 1978); *United States* v. *Davey*, 543 F.2d 996, 1000 (2d Cir. 1976)), and in determining whether a subpoena respondent has met that burden, we consider chiefly the costs of compliance in relation to the size and resources of the producing party. *E.g.*, *FTC* v. *Carter*, 464 F. Supp. 633, 641 (D.D.C. 1979), *appeal docketed*, No. 79–1331 (D.C. Cir. Mar. 27, 1979). The costs incurred by CSB in responding to the subpoena—$847.37—seem minor in relation to the financial position of the firm. Moreover, we note that the subpoena calls in substantial part for the production of corporate, operating, and other business records which are incident to the conduct of CSB's business and under such circumstances, a claim for reimbursement is difficult to sustain. See *FTC* v. *Rockefeller*, *supra*, 591 F.2d at 191. Finally, CSB has not shown that its decision to incur copying expenses ($100.00) was based on a business need for continued access to the originals. See *SEC* v. *Arthur Young & Co., supra,* 584 F.2d at 1033–34.[1]

*It is ordered,* That the motion be, and it hereby is, denied.

By order of the Commission.

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[1] The cases cited by CSB, *United States* v. *Farmers & Merchants Bank,* 397 F. Supp. 418 (C.D. Cal. 1975), and *United States* v. *Friedman,* 532 F.2d 928 (3d Cir. 1976), provide no support for CSB's reimbursement claim. In *Farmers & Merchants Bank,* the court's decision to require reimbursement was based on the fact that the Internal Revenue Service subpoena was directed not to the target of an investigation (as here) but to the target's wholly uninvolved bank (a "mere [repository] of information performing a service for the government in complying with the [subpoena]", *FTC* v. *Rockefeller,* 591 F.2d 182, 191 (2d Cir. 1979)), and that compliance with the subpoena was "not predictably part of the banking business." 397 F. Supp. at 420. Moreover, other courts which have considered a bank's entitlement to reimbursement for costs incurred in complying with an IRS summons have disallowed such claims based on the reasonableness of the expenditures and the duty to comply with agency process. *E.g., United States* v. *Continental Bank & Trust Co.,* 503 F.2d 45, 48 (10th Cir. 1974); *United States* v. *Covington Trust & Banking Co.,* 431 F. Supp. 352, 354–356 (E.D. Ky. 1977); *United States* v. *Mellon Bank,* 410 F. Supp. 1065, 1069–70 (W.D. Pa. 1976); *United States* v. *Bremicker,* 365 F. Supp. 701, 703 (D. Minn. 1973); *United States* v. *Jones,* 351 F. Supp. 132, 134 (M.D. Ala. 1972); *cf. California Bankers Ass'n.* v. *Shultz,* 416 U.S. 21, 50 (1974). In *Friedman,* the court stated that such claims require findings on the extent of the burden of the record search and observed: "A bank, whose business is the facilitation of financial transactions, and which keeps records of all customer dealings as a matter of course, if not law [footnote omitted], may be required [as part of the cost of doing business, to make an unreimbursed record search]." 532 F.2d at 937.

CSB also relies on 5 U.S.C. § 503 (1977), and Fed. R. Civ. P. 45 and 81(a)(3), none of which is applicable here. 5 U.S.C. § 503 applies only to allowances (*e.g.,* for the cost of travel) for witnesses who appear at agency hearings pursuant to subpoena, and not to the costs of searching for and reproducing subpoenaed materials. The Federal Rules of Civil Procedure apply only to proceedings in United States district courts and not to proceedings before administrative agencies. *See FTC* v. *Kujawski,* 298 F. Supp. 1288, 1289 (N.D. Ga. 1969); Fed. R. Civ. P. 1.

## IN THE MATTER OF

# LIQUID AIR CORPORATION OF NORTH AMERICA, ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

*Docket C-2990. Complaint, Sept. 5, 1979 — Decision, Sept. 5, 1979*

This consent order, among other things, requires a San Francisco, Calif. producer and seller of industrial gases, to divest as a unit within two years, specified air separation plants and other operations located in the areas of major competitive overlap between the firm and Chemetron Corporation, a Chicago, Ill. subsidiary of Allegheny Ludlum Industries, Inc. To promote the viability of the divested package and completely eliminate any possible overlap in the Southeast, the firm must also divest Chemetron's Knoxville acetylene plant and Chemetron's Chattanooga hydrogen plant. Liquid Air is further required to divest its Texas carbon dioxide operations and certain Chemetron retail stores, together with the distribution equipment; customer, dealer and distributor contracts; and customer lists associated with these enterprises. Additionally, the three companies are prohibited from acquiring any air separation production facilities for ten years.

### *Appearances*

For the Commission: *Kenneth G. Starling, Stephen C. Garavito* and *Peter L. Feldman.*

For the respondents: *Miles W. Kirkpatrick, Morgan, Lewis & Bockius,* Washington, D.C.

### COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into an agreement which, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45) and that said agreement therefore constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and having found that a proceeding with respect to said violation is in the public interest, hereby issues its Complaint pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act, (15 U.S.C. 45(b)), stating its charges as follows:

I. Definitions

1. For purposes of this complaint, the following definitions shall apply:

(a) "Industrial gases" are gases, except for common fuel gases, sold in compressed, liquid, and solid form, including acetylene, carbon dioxide, carbon monoxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other medical gases, rare gases, and mixtures and combinations thereof.

(b) "Air separation gases" are oxygen, nitrogen and argon in gaseous or liquid form, or both.

(c) "Air separation gases producers" are those companies engaged in both (1) the production, and (2) the distribution and sale of the air separation gases.

(d) "Air separation plant" is a facility that produces air separation gases.

## II. Liquid Air Corporation of North America

2. Liquid Air Corporation of North America (Liquid Air) is a Delaware corporation with its principal place of business at 1 Embarcadero Center, San Francisco, California.

3. In the United States, Liquid Air sells industrial gases, and diving and industrial safety equipment through subsidiaries. Liquid Air also sells gases in Canada and Brazil through subsidiaries.

4. In 1977, Liquid Air's total domestic sales were approximately $157.3 million, its domestic air separation gases sales were approximately $47.3 million and its domestic carbon dioxide sales were approximately $8.2 million.

5. Approximately 79% of the common stock of Liquid Air is owned by L'Air Liquide S.A. (L'Air Liquide). L'Air Liquide is one of the largest industrial gases companies in the world. In 1977, L'Air Liquide's sales exceeded $1.4 billion and its assets were over $1.325 billion.

6. At all times relevant hereto, Liquid Air sold and shipped its products throughout the United States and engaged in business in or affecting commerce within the meaning of the Clayton Act, as amended, and engaged in business in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

## III. Allegheny Ludlum Industries, Inc.

7. Allegheny Ludlum Industries, Inc. (Allegheny) is a corporation organized under the laws of Pennsylvania with its principal place of business at 2700 Two Oliver Plaza, Pittsburgh, Pennsylvania.

8. Allegheny is engaged primarily in the manufacture and sale of

specialty steels and alloys, consumer products, industrial gases, welding products and other industrial products. Allegheny produces and sells industrial gases through Chemetron Corporation (Chemetron), a wholly-owned subsidiary that was acquired by Allegheny on November 30, 1977.

9. In 1977, Allegheny's total sales were approximately $1.002 billion, its net earnings were approximately $25.4 million, and its total assets were approximately $1.075 billion.

10. At all times relevant hereto, Allegheny sold and shipped products throughout the United States and engaged in business in or affecting commerce within the meaning of the Clayton Act, as amended, and engaged in business in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

## IV. Chemetron Corporation

11. Chemetron is a wholly-owned subsidiary of Allegheny. It is a Delaware corporation with its principal place of business at 111 East Wacker Drive, Chicago, Illinois. Chemetron is engaged primarily in the production and sale of industrial gases, welding products, piping components and specialty chemicals.

12. In 1977, Chemetron had total sales of $494 million.

13. In the United States, Chemetron sells its industrial gases through its Industrial Gases Division (IGD) and its Carbon Dioxide Division (Cardox).

14. In 1977, IGD's total domestic sales were approximately $83 million and its domestic air separation gases sales were approximately $58.8 million.

15. In 1977, Cardox's domestic carbon dioxide sales were approximately $41.8 million.

16. At all times relevant hereto, Chemetron sold and shipped products throughout the United States and engaged in business in or affecting commerce within the United States and engaged in business in or affecting commerce within the meaning of the Clayton Act, as amended, and engaged in business in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

## V. Agreement

17. On or about June 5, 1978, Liquid Air, Allegheny and Chemetron entered into an agreement under which Liquid Air would acquire the total domestic industrial gases assets of IGD. In return, Allegheny would acquire 3.335 million shares of Liquid Air, approxi-

mately 33% of Liquid Air's total outstanding common shares. The value of the transaction, based on the selling price of Liquid Air stock on the date of the agreement, was approximately $104 million.

18. Under the terms of the agreement, Allegheny would have four representatives out of fourteen on Liquid Air's Board of Directors.

## VI. Trade and Commerce

19. The relevant lines of commerce are the production, distribution and sale of air separation gases by air separation gases producers, and the production, distribution and sale of carbon dioxide.

20. Barriers to entry are high in each of the relevant lines of commerce.

### A. Air Separation Gases

21. The relevant sections of the country for the production, distribution and sale of air separation gases are Southern California, the Texas-Louisiana Gulf Coast, and the Middle Southeast.

22. The Southern California Air Separation Gases Market is the area within a 150 mile radius of Los Angeles.

23. The Texas-Louisiana Gulf Coast Air Separation Gases Market is the area encompassing the Gulf Coast concentration of air separation plants from Victoria, Texas to Lake Charles, Louisiana, and their normal marketing areas.

24. The Middle Southeast Air Separation Gases Market is the area encompassing the air separation plants in Tennessee, North Carolina, South Carolina, Georgia and northern Alabama, and their normal marketing areas.

25. Each of the relevant sections of the country for the production, distribution and sale of air separation gases is highly concentrated. Four-firm concentration in each section exceeds 84%.

26. Liquid Air and IGD occupy significant positions in each of the relevant sections of the country for the production, distribution and sale of air separation gases.

### B. Carbon Dioxide

27. The relevant section of the country for the production, distribution and sale of carbon dioxide is the area south of a line which extends from Lake Charles, Louisiana across Beaumont, Texas, west through Austin and San Antonio to the Mexican Border (Carbon Dioxide Gulf Coast Market).

28. The Carbon Dioxide Gulf Coast Market is highly concentrated. Four-firm concentration was approximately 99% in 1977. Liquid Air and Cardox each accounted for more than 33% of carbon dioxide sales in the Carbon Dioxide Gulf Coast Market in 1977.

## VII. Effects of the Proposed Transaction

29. The effects of the proposed transaction may be substantially to lessen competition or tend to create a monopoly in the relevant lines of commerce, in the relevant sections of the country, in the following ways, among others:

(a) Substantial direct competition between Liquid Air and Chemetron in the relevant lines of commerce will be eliminated;

(b) Already high concentration in the relevant lines of commerce will be increased;

(c) High barriers to entry into the relevant lines of commerce will be further raised;

(d) IGD will be eliminated as a significant independent competitive influence on the relevant lines of commerce;

(e) The likelihood of eventual deconcentration of the relevant lines of commerce may be substantially lessened;

(f) The likelihood of interdependent behavior among firms in the relevant lines of commerce will be substantially increased.

30. In addition to the effects alleged in Paragraph 29, the proposed acquisition is likely to produce anticompetitive effects in the production, distribution and sale of air separation gases, in geographic areas beyond the relevant sections of the country alleged in Paragraphs 22, 23 and 24.

## VIII. Violations Charged

31. The proposed acquisition of Liquid Air stock, would, if consummated, constitute a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

32. The proposed acquisition of Chemetron assets would, if consummated, constitute a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

33. By entering into the agreement giving rise to the violations described in Paragraph 31 and 32 herein, Allegheny, Chemetron and Liquid Air have violated Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Liquid Air Corporation of North America is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Embarcadero Center, in the City of San Francisco, State of California.

2. Respondent Allegheny Ludlum Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 2 Oliver Plaza, in the City of Pittsburgh, Commonwealth of Pennsylvania.

3. Respondent Chemetron Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business

located at 111 E. Wacker Drive, in the City of Chicago, State of Illinois.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

For purposes of this order, the following terms shall have the following meanings:

a) "Liquid Air" shall mean Liquid Air Corporation of North America, and all subsidiaries which it controls.

b) "Allegheny" shall mean Allegheny Ludlum Industries, Inc., and all subsidiaries which it controls.

c) "IGD" shall mean the Industrial Gases Division of Chemetron Corporation, a wholly-owned subsidiary of Allegheny.

d) "Industrial gases" shall mean gases, except for common fuel gases, sold in compressed, liquid, and solid form, including acetylene, carbon dioxide, carbon monoxide, argon, helium, hydrogen, nitrogen, oxygen, nitrous oxide, other medical gases, rare gases, and mixtures and combinations thereof.

e) "Air separation gases" shall mean oxygen, nitrogen and argon in gaseous or liquid form, or both.

f) "Air separation plant" shall mean a facility that produces air separation gases.

g) "Air separation gases asset" shall mean any asset used in the production, distribution or sale of any air separation gas.

h) "Acetylene" shall mean the gas produced by the combination of calcium carbide and water.

i) "Acetylene plant" shall mean a facility that produces acetylene.

j) "Air separation gases producer" shall mean a person who is engaged in both (1) the production, and (2) the distribution and sale of two or more of the air separation gases.

k) "Person" shall mean any individual, partnership, firm, corporation, association, or any other business or legal entity.

l) "Southern California" shall mean the area within a 150 mile radius of Los Angeles, California.

## I

*It is ordered*, That within two (2) years from the date of service of this order upon respondents, Liquid Air shall divest absolutely all the assets and operations described below, as a unit, to an acquirer that shall be subject to the prior approval of the Federal Trade

Commission, so as to transfer these assets and operations as a going enterprise and a viable, competitive concern engaged in the production, sale and distribution of industrial gases, *provided, however*, that during such period Liquid Air may seek the approval of the Commission for the divestiture of such assets and operations to two or more acquirers.

### Assets and Operations to be Divested

1. IGD's Mount Vernon, Indiana air separation plant;
2. IGD's Chattanooga, Tennessee air separation plant;
3. IGD's Richmond, Virginia air separation plant;
4. Liquid Air's La Porte, Texas air separation plant;
5. Liquid Air's Santa Fe Springs, California air separation plant;
6. IGD's Knoxville, Tennessee acetylene plant;
7. IGD's Chattanooga, Tennessee hydrogen plant;
8. IGD's six (6) retail stores in southern California, and one (1) retail store in Knoxville, Tennessee, and one (1) retail store in Richmond, Virginia.
9. IGD's existing customer, dealer and distributor contracts, customer lists, and distribution equipment associated with the Mount Vernon, Indiana, Richmond, Virginia, and Chattanooga, Tennessee air separation plants, Knoxville, Tennessee acetylene plant, and Chattanooga, Tennessee hydrogen plant.
10. IGD's existing customer contracts, customer lists and distribution equipment associated with the southern California, Knoxville, Tennessee, and Richmond, Virginia retail stores.
11. IGD's bulk liquid and cylinder customer and distributor contracts, customer lists and distribution equipment associated with:

    (a) IGD's southern California bulk liquid and cylinder sales operations to be divested with Liquid Air's Santa Fe Springs, California air separation plant, and
    (b) IGD's Stafford, Texas air separation plant to be divested with Liquid Air's La Porte, Texas air separation plant.

### II

*It is further ordered*, That within two (2) years from the date of service of this order upon respondents, Liquid Air shall divest its carbon dioxide assets and operations located in the State of Texas, including carbon dioxide plants, distribution equipment, existing customer, dealer, and distributor contracts, and customer lists, to one or more acquirers subject to the prior approval of the Federal Trade Commission, so as to transfer these assets and operations as viable competitive facilities engaged in the production, sale and distribution of carbon dioxide.

### III

*It is further ordered,* That respondents shall not cause or permit the wasting or deterioration of the assets and operations to be divested in accordance with Paragraphs I and II of this order in a manner that impairs the marketability of any such assets and operations or:

(a) impairs in any manner the viability of the assets and operations divested in accordance with Paragraph I as a going concern engaged in the production, sale and distribution of industrial gases;
(b) impairs in any manner the viability of the assets and operations divested in accordance with Paragraph II as viable competitive facilities engaged in the production, sale and distribution of carbon dioxide.

*Provided, however,* that deterioration in the ordinary course of operation and normal wear is not a violation of this paragraph.

### IV

*It is further ordered,* That for a period of nine (9) months after the divestiture of the assets and operations identified in Paragraph I, respondents shall not solicit customers divested pursuant to that paragraph.

### V

*It is further ordered,* That for a period commencing on the effective date of this Order and continuing for ten (10) years from and after the date of service upon respondents of this order, respondents shall cease and desist from acquiring, without prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock or share capital of any United States air separation gases producer, or any of the air separation gases assets of any United States air separation gases producer, *provided, however,* that nothing in this order shall prevent respondents from acquiring (a) gas or any product for resale, (b) transportation, delivery or storage equipment, (c) cylinders, (d) converters, (e) bulk customer stations, or (f) plant equipment not incorporated in an operating plant.

## VI

*It is further ordered,* That within sixty (60) days from the effective date of this order, and every sixty (60) days thereafter until it has fully complied with Paragraphs I and II of this order, Liquid Air shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by Liquid Air to make public its desire to divest the assets described herein, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said divestiture. Information to be supplied is subject to legally recognized privileges, and shall not be divulged by any representative of the Federal Trade Commission to any person except in response to a formal request from Congress or to compulsory process, or for the purpose of securing compliance with this order, or as is otherwise required by law.

## VII

*It is further ordered,* That on the first anniversary date of the effective date of this order and on each anniversary date thereafter until the expiration of the prohibitions in Paragraph V of this order, respondents shall submit a report in writing to the Federal Trade Commission listing all acquisitions, mergers and agreements to acquire or merge with air separation gases producers made by respondents, the date of each such acquisition, merger or agreement, the products or services involved and such additional information as may from time to time be required.

## VIII

*It is further ordered,* That respondents shall notify the Commission at least thirty (30) days prior to any proposed changes which may affect compliance obligations arising out of this order, such as dissolution, assignment or sale resulting in the emergence of successor corporations, and that this order shall be binding on any such successor.

### IN THE MATTER OF

# PERPETUAL FEDERAL SAVINGS & LOAN ASSOCIATION

### ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9083. Decision, Dec. 6, 1977 — Order, Sept. 6, 1979*

This order withdraws a Commission order issued December 6, 1977, 90 F.T.C. 608, against a Washington, D.C. savings and loan association for having as directors individuals who simultaneously serve as directors of competitive financial institutions. Further, the complaint in this matter has been dismissed.

## ORDER

On December 6, 1977 the Commission held that respondent Perpetual Federal Savings & Loan Association ("Perpetual") had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by having on its board of directors individuals who served simultaneously as directors of competing commercial banks. 90 F.T.C. 608, 648. Accordingly, the Commission issued a Final Order requiring Perpetual to cease and desist from having any individual serve as a director while at the same time serving as a director of any corporation engaged in the provision of any financial service in competition with Perpetual. 90 F.T.C. at 665–66. Perpetual filed a petition for review.

On November 14, 1978, this matter was remanded to the Commission by the United States Court of Appeals for the Fourth Circuit for reconsideration in light of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. Law 95–630, 92 Stat. 3641 (Nov. 10, 1978). Title II of that Act, the Depository Institution Management Interlocks Act of 1978, 92 Stat. 3672, codified at 12 U.S.C. 3201, *et seq.*, prohibits a range of interlocks between savings and loan associations and competing banks. Interlocks like those at issue in this proceeding are exempted from the Act's proscriptions for a period of ten years from the Act's enactment.

In the limited rebriefing that followed, both Perpetual and complaint counsel concurred that the December 6, 1977, Final Order should be withdrawn and the complaint dismissed. Complaint counsel construed Section 206 of Title II as impliedly exempting interlocks like Perpetual's from the reach of the Commission for ten years. According to Perpetual, passage of the Act confirmed that Commission jurisdiction over Perpetual's director interlocks was lacking, that its conduct did not violate the Federal Trade Commission Act and that its conduct would not constitute such a violation even when ten years have elapsed after Title II's enactment. Subsequent events have made it unnecessary to address these contentions.

Since the submission of briefs by the parties, a new law has been enacted, Pub. Law 96-37 (July 23, 1979) (to be codified at 15 U.S.C. 45, 46, 57), that amends Section 5 of the Federal Trade Commission Act to exempt savings and loan associations such as Perpetual from the jurisdiction of the Commission. Accordingly,

*It is ordered*, That the Commission's Final Order of December 6, 1977 be withdrawn and the complaint dismissed.

## IN THE MATTER OF

# AMERICAN DENTAL ASSOCIATION, ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9093. Complaint, Jan. 4, 1977 — Decision, Sept. 6, 1979*

**This consent order, among other things, provides that on entry of a final adjudicated order in the *American Medical Association (AMA)* case, four dental associations will be bound to a similar order which will be issued against them by the Commission. During the period preceding final resolution of the *AMA* matter, respondents are prohibited from restricting or declaring unethical any form of their members' advertising or solicitation of business which is not false or misleading. Additionally, the dental associations are required to print a statement in their code of ethics which advises members that advertising or solicitation of patients and business shall not be considered unethical or improper.**

### *Appearances*

For the Commission: *L. Barry Costilo, Daniel R. Barney, Bonita L. Maplethorpe* and *Ann Malester.*

For the respondents: *Peter M. Sfikas, Michael P. Tone* and *Clay H. Phillips, Peterson, Ross, Schloerb & Seidel,* Chicago, Ill. for American Dental Association, *Joseph B. Carney* and *Jerry R. Jenkins, Baker & Daniels,* Indianapolis, Ind. for Indiana Dental Association and Indianapolis District Dental Society, and *John P. Ackerly, III* and *Stephen A. Northup, Mays, Valentine, Davenport & Moore,* Richmond, Va. for Virginia Dental Association and Northern Virginia Dental Society.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41, et seq.) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents American Dental Association (hereinafter "ADA"), Indiana Dental Association (hereinafter "IDA"), Indianapolis District Dental Society (hereinafter "IDDS"), Virginia Dental Association (hereinafter "VDA"), and Northern Virginia Dental Society (hereinafter "NVDS") have violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding in respect thereof would be in the public interest, issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent American Dental Association is an

Illinois corporation with its principal place of business at 211 East Chicago Ave., Chicago, Illinois. ADA has approximately 124,000 members, of whom at least 106,000 are dentists engaged in the active practice of dentistry. Various state dental associations comprise ADA's "constituent" societies, and each constituent society includes various local "component" societies. Dentists, other than those in the federal dental services or engaged in advanced education, are required to be members of a constituent and a component dental society in order to be eligible for membership in ADA. ADA's activities, including those complained of, are directed by delegates from constituent state dental societies, including IDA and VDA.

PAR. 2. Respondent Indiana Dental Association is an Indiana corporation with its principal place of business at 402 Jefferson Building, 1 Virginia Ave., Indianapolis, Indiana. IDA has approximately 2000 dentist members. It is one of the constituent societies of ADA.

PAR. 3. Respondent Indianapolis District Dental Society is an Indiana corporation with its principal place of business at the Illinois Building, 17 West Market St., Indianapolis, Indiana. IDDS is a component society of IDA and ADA and has approximately 450 dentist members.

PAR. 4. Respondent Virginia Dental Association is a Virginia corporation with its principal place of business at Suite 331, 2015 Staples Mill Road, Richmond, Virginia. VDA has approximately 2100 dentist members. It is one of the constituent societies of ADA.

PAR. 5. Respondent Northern Virginia Dental Society is a Virginia corporation with its principal place of business at 1008 North Randolph, Arlington, Virginia. NVDS is a component society of VDA and ADA and has approximately 700 dentist members.

PAR. 6. Members of respondents are engaged in the business of providing dentist services for a fee. Except to the extent that competition has been restrained as herein alleged, dentist members of respondents have been and are now in competition among themselves and with other dentists.

PAR. 7. In 1975 approximately ninety-five percent of all active dentists in the United States were members of ADA and its constituent and component societies. In 1975 total expenditures for dentist services in the United States were approximately $7.5 billion. A substantial portion of the total expenditures for dentist services in the United States has been paid to and received by members of ADA and members of its constituent and component societies, including members of the respondents named herein.

PAR. 8. It is respondents' objective, *inter alia,* to represent the interests of their dentist members, including their economic interests. In the course of representing those interests and in the course of performing the acts and practices herein complained of, respondents have utilized the United States mail and other instruments of interstate commerce.

PAR. 9. Members of respondent ADA are located in every state. In the course and conduct of their business, members of ADA and members of IDA, IDDS, VDA and NVDS:

(A) Receive and treat patients from other states and countries;

(B) Receive substantial sums of money from the federal government and from private insurers for rendering dentist services, which money flows across state lines;

(C) Utilize and prescribe drugs and medicines which are shipped in interstate commerce;

(D) Utilize and prescribe devices and products which are shipped in interstate commerce; and

(E) Act in continuing association and cooperation with each other, with other state and local dental societies, and with individual dentists in every state, in furthering the agreements and concert of action described below, in the course of which association and cooperation they use the United States mail and other instruments of interstate commerce.

As a result of the conduct and activities of respondents and their members described above, the acts and practices herein complained of are in or affect "commerce" within the meaning of the Federal Trade Commission Act, and respondents are subject to the jurisdiction of the Federal Trade Commission.

PAR. 10. For many years past and continuing up to and including the date of the filing of this complaint, respondents and others have agreed, and participated in concerted action, to eliminate, prevent and hinder competition among dentists. This conduct includes agreements and concerted action to prevent or hinder dentists from:

(A) Soliciting business by advertising or otherwise;

(B) Engaging in price competition; and

(C) Otherwise engaging in competitive practices.

PAR. 11. In the course and as part of the above-described conduct, respondents and others have:

(A) Adopted, published and distributed the *Principles of Ethics* of the ADA, along with advisory opinions, and principles and codes of ethics and interpretations thereof of the ADA's constituent and component dental societies, including respondents IDA, IDDS, VDA and NVDS;

(B) Abided by the restrictions contained in the above-described principles and codes of ethics, and interpretations thereof; and

(C) Enforced, directly and indirectly, the restrictions contained in the above-described principles and codes of ethics, and interpretations thereof.

PAR. 12. The effects, among others, of the acts and practices alleged in Paragraphs Ten and Eleven are as follows:

(A) Prices of dentist services have been stabilized, fixed or otherwise interfered with;

(B) Competition among dentists in the provision of dentist services has been hindered, restrained, foreclosed and frustrated;

(C) Consumers of dentists services have been deprived of information pertinent to the selection of a dentist and of the benefits of competition;

(D) Dentists have been restrained in their ability to compete and to make dentist services readily and fully available to consumers; and

(E) Development of innovative systems for the delivery of dentist services has been hindered or restrained.

PAR. 13. The aforesaid acts, practices and methods of competition constitute unfair methods of competition and unfair acts or practices by respondents in violation of Section 5 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional allegations set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent American Dental Association ("ADA") is an Illinois corporation, with its principal place of business at 211 East Chicago Ave., Chicago, Illinois.

Respondent Indiana Dental Association ("IDA") is an Indiana corporation, with its principal place of business at 402 Jefferson Building, 1 Virginia Ave., Indianapolis, Indiana. IDA is a constituent society of ADA.

Respondent Indianapolis District Dental Society ("IDDS") is an Indiana corporation, with its principal place of business at 211 North Delaware St., Indianapolis, Indiana. IDDS is a component society of IDA and ADA.

Respondent Virginia Dental Association ("VDA") is a Virginia corporation, with its principal place of business at Suite 423, 2015 Staples Mill Road, Richmond, Virginia. VDA is a constituent society of ADA.

Respondent Northern Virginia Dental Society ("NVDS") is a Virginia corporation with its principal place of business at 1008 North Randolph, Arlington, Virginia. NVDS is a component society of VDA and ADA.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### Definitions

For purposes of this order, the following definitions shall apply:

"FTC Dkt. 9064" means Federal Trade Commission Dkt. 9064 and that matter as it may otherwise be denominated by a reviewing court.

"Final adjudicated order" means an adjudicated order or opinion of the Federal Trade Commission or of a reviewing court which either dismisses the complaint on the merits or for lack of jurisdiction as to, or grants relief against, the American Medical Association in FTC Dkt. 9064 and which has become final in accordance with Section 5(g)-(k) of the Federal Trade Commission Act, 15 U.S.C. 45(g)-(k).

"Respondents" means the American Dental Association ("ADA"), the Indiana Dental Association ("IDA"), the Indianapolis District Dental Society ("IDDS"), the Virginia Dental Association ("VDA"), and the Northern Virginia Dental Society ("NVDS"), individually or jointly, and their respective councils, departments, committees, divisions, subdivisions, trustees, officers, delegates, representatives, agents, employees, successors, and assigns.

"Constituent societies" means those dental societies or dental associations defined as constituent societies in the January 1, 1978, edition of the American Dental Association's *Constitution and Bylaws* and, in the event that the American Dental Association's *Constitution and Bylaws* is amended to denominate constituent societies differently or to describe a new category of dental societies which replace or are roughly equivalent to constituent societies, "constituent societies" means those dental societies as well.

"Component societies" means those dental societies or dental associations defined as component societies in the January 1, 1978, edition of the American Dental Association's *Constitution and Bylaws* and, in the event that the American Dental Association's *Constitution and Bylaws* is amended to denominate component societies differently or to describe a new category of dental societies which replace or are roughly equivalent to component societies, "component societies" means those dental societies as well.

## I

*It is ordered*, That:

(A) On entry of a final adjudicated order in FTC Dkt. 9064, the Commission will issue an order ("*ADA* order") against respondents in this proceeding which will consist of the provisions of the FTC Dkt. 9064 final adjudicated order, conformed to make such provisions fully applicable to respondents herein, consistent with Section I(C) of this order. Such conforming modifications will include, for purposes of illustration, but not be limited to, substituting the names of respondents and their ethical codes and publications for the names of the FTC Dkt. 9064 respondents and their ethical codes and publications, respectively, and substituting the words "dental" for "medical", "dentists" for "physicians" and "dentists' services" for "physicians' services". Respondents shall be bound by such *ADA* order and shall have no right to seek judicial review or otherwise challenge the validity of it unless it fails to conform substantially to the final adjudicated order in FTC Dkt. 9064, consistent with Section I(C) of this order, *provided, however:*

(B) In the event that the Commission issues a decision and order based on a consent agreement against the American Medical Association in FTC Dkt. 9064, the instant case shall immediately be reopened and returned to adjudicative status.

(C) No provisions in the final adjudicated order in FTC Dkt. 9064 which relate directly to physicians' contractual arrangements for the sale or distribution of their professional services or to the growth, development or operations of any prepaid health care delivery plan or of any other organization which offers physicians' services to the public shall be applicable to respondents, except to the extent that such provisions relate to advertising or solicitation of patients or business.

(D) In the event that the final adjudicated order in FTC Dkt. 9064 dismisses the complaint on the merits or for lack of jurisdiction, the Commission shall dismiss the complaint in this proceeding.

(E) For the purpose of clarifying Section I(A) of this order, respondents shall not be bound by any order entered pursuant to Section I(A) of this order based on an order of the Commission or a reviewing court which may be entered in FTC Dkt. 9064 unless and until such Dkt. 9064 order becomes a final adjudicated order.

## II

*It is further ordered,* That pending entry of a final adjudicated order, or Commission issuance of a decision and order based on a consent agreement against the American Medical Association in FTC Dkt. 9064, respondents in this proceeding shall not restrict, regulate, impede, declare unethical or improper, interfere with, or advise against any form of advertising or solicitation of patients or business by dentists or dental care delivery organizations which is not false or misleading in any material respect. Within sixty (60) days after entry of this order, respondents shall:

(A) State in a prominent place and manner in the ADA Principles of Ethics, ADA Official Advisory Opinions, NVDS Code of Ethics, and all other codes, guidelines, and other standards of dentist conduct issued by respondents that: "Advertising, solicitation of patients or business, or other promotional activities by dentists or dental care delivery organizations shall not be considered unethical or improper, except for those promotional activities which are false or misleading in any material respect. Notwithstanding any ADA Principles of Ethics or other standards of dentist conduct which may be differently worded, this shall be the sole standard for determining the ethical propriety of such promotional activities. Any provision of an ADA constituent or component society's code of ethics or other standard of dentist conduct relating to dentists' or dental care delivery organizations' advertising, solicitation, or other promotional activities which is worded differently from the above standard shall be deemed to be in conflict with the ADA Principles of Ethics."

(B) Add footnotes referring readers to the quoted statement in Section II(A) of this order after each provision of respondents' respective ethical codes, advisory opinions, interpretations, and guidelines which relates in any way to dentists' or dental care delivery organizations' advertising, solicitation, or promotional activities. These include the third paragraph of the preamble of the ADA Principles of Ethics and Sections 2, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 thereof. No version of respondents' respective ethical codes, advisory opinions, interpretations, or guidelines which lacks such footnote references shall be distributed.

(C) Delete from all copies of ethical codes and other publications which are distributed by respondents all references to the following ADA Official Advisory Opinions [of the ADA Principles of Ethics] (March 1977 rev.):

Advisory Opinion 2 of Section 2
Advisory Opinions 1 through 13 of Section 12
Advisory Opinions 1 through 6 of Section 13
Advisory Opinions 1 through 3 of Section 14
Advisory Opinion 1 of Section 16
Advisory Opinions 1 and 8 of Section 17
Advisory Opinions 1 through 9 of Section 19
Advisory Opinions 1 through 4 of Section 20

(D) Not thereafter amend, elaborate on, or add any ADA Principles of Ethics, ADA Official Advisory Opinions, or other standards of dentist conduct relating to dentists' or dental care delivery organizations' advertising, solicitation, or other promotional activities, except to conform such standards to the standard set forth in Section II(A) of this order.

(E) Not refer to or apply any standard of dentist conduct other than the standard set forth in Section II(A) of this order in responding to requests for advice, inquiries, and complaints from dental societies, dentists, or others relating to dentists' or dental care delivery organizations' advertising, solicitation, or other promotional activities. In all such responses, respondents shall enclose a copy of this order and a copy of the ADA Principles of Ethics and Official Advisory Opinions made consistent with Section II(A)-(D) of this order.

### III

*It is further ordered,* That at no time after entry of the final adjudicated order, or Commission issuance of a decision and order based on a consent agreement against the American Medical Association in FTC Dkt. 9064, shall respondents apply, in any formal or informal disciplinary proceeding, any standard of dentist conduct different from the standard set forth in Section II(A) of this order to those promotional activities which occur prior to entry of such final adjudicated order or consent order.

### IV

*It is further ordered,* That nothing in this order shall be construed to limit the Commission's authority to investigate, proceed administratively against, or seek court action against any constituent or component society of ADA which may be acting contrary to this order or in violation of any of the laws which the Federal Trade Commission is charged with enforcing.

### V

*It is further ordered,* That if the instant proceeding is returned to adjudicative status pursuant to Section I(B) of this order, no provision of this order other than Section III shall be given effect thereafter.

### VI

*It is further ordered,* That:

(A) Within sixty (60) days after this order becomes final, ADA shall publish its full text in a prominent place and manner in the *Journal of the American Dental Association* and *ADA News.* Within ninety (90) days after this order becomes final, the other respondents shall publish its full text in a prominent place and manner in their respective publications: IDA in the *IDA Journal;* IDDS in the *IDDS Newsletter;* VDA in the *VDA Journal;* and NVDS in *NOVA News.*

(B) Within sixty (60) days after this order becomes final, ADA shall send a letter in the form shown in Appendix A to this order to each of its members. During the period prior to entry of a final adjudicated order, or Commission issuance of a decision and order based on a consent agreement against the American Medical Association in FTC Dkt. 9064, ADA shall send the same form letter, together with a copy of this order, to each dentist who joins ADA, immediately upon his or her joining.

(C) Within sixty (60) days after this order becomes final, ADA shall send, by first class mail, a letter in the form shown in Appendix B to this order to the presidents, staff directors, and ethics committee chairpersons of each of its constituent and component societies, enclosing a copy of this order and a copy of the ADA Principles of Ethics and Official Advisory Opinions made consistent with Section II(A)–(D) of this order.

## VII

*It is further ordered,* That within ninety (90) days after service of this order and annually on the anniversary date of the original report, for each of the succeeding years prior to entry of a final adjudicated order or Commission issuance of a decision and order based on a consent agreement order against the American Medical Association in FTC Dkt. 9064, each respondent shall individually file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order. All such compliance reports shall include such other information and documentation as the Commission may require to show compliance with this order.

## VIII

*It is further ordered,* That nothing in this order shall be construed to exempt any respondent from compliance with the antitrust laws or the Federal Trade Commission Act, and the fact that any activity is not prohibited by this order shall not bar a challenge to it under such laws and statute.

## IX

*It is further ordered,* That each respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

## APPENDIX A

[ADA Regular Letterhead]

Dear Doctor:

As you are probably aware, in January of 1977, the Federal Trade Commission issued a complaint against the ADA, the Indiana Dental Association, the Indianapolis

District Dental Society, the Virginia Dental Association, and the Northern Virginia Dental Society. The administrative complaint alleged that certain portions of ADA's Principles of Ethics and advisory opinions regarding advertising and solicitation by dentists were in violation of the Federal Trade Commission Act.

We have entered into a consent order with the FTC, without admitting any violation of the law, which will provide an interim resolution of the matter pending the ultimate decision in a similar FTC case (Dkt. 9064) involving professional advertising and solicitation. The ADA and the FTC have agreed to be bound by the final outcome of the other case principally as it relates to FTC jurisdiction, ethical restrictions on advertising and solicitation, and relief. That case, which may ultimately be decided by a United States Court of Appeals or the United States Supreme Court, deals with a number of questions, but those which relate to the *ADA* case are principally whether the FTC has jurisdiction over the professional associations in that case and whether those professional associations may have violated the Federal Trade Commission Act through adoption and enforcement of ethical restrictions on advertising and solicitation.

Pending the final decision in that case, advertising, solicitation of patients or business, or other promotional activities by dentists or dental care delivery organizations shall not be considered unethical or improper, except for those promotional activities which are false or misleading in any material respect. Regardless of any standards of dentist conduct which may be worded differently, this shall be the sole standard for determining the ethical propriety of such promotional activities. The ADA Principles of Ethics and Official Advisory Opinions have been made consistent with the above stated standard through the addition of footnotes. Any provision of an ADA constituent or component society's code of ethics or other standard of dentist conduct relating to dentists' or dental care delivery organizations' advertising, solicitation, or other promotional activities which is worded differently from the above stated standard shall be deemed to be in conflict with the ADA Principles of Ethics.

We urge all of our members and constituent and component organizations to abide by the letter and spirit of this consent order, a copy of which is printed in the ______________ issue of the *ADA News* and which may be obtained from ADA headquarters or from your state or local dental society. A copy of the ADA Principles of Ethics and Official Advisory Opinions, as made consistent with the above stated standard, also may be obtained from these sources.

As part of the consent order, the FTC reserves the right to investigate, proceed administratively against, or seek court action against any constituent or component society of the ADA which may be acting contrary to the consent order or in violation of any of the laws which the FTC is charged with enforcing.

We will keep you advised on further developments as this matter proceeds toward its ultimate resolution.

Thank you for your cooperation.

Sincerely,
Joseph P. Cappuccio, D.D.S.
President

## APPENDIX B

[ADA Regular Letterhead]

Dear ______________:

As you are probably aware, in January of 1977, the Federal Trade Commission issued a complaint against the ADA, the Indiana Dental Association, the Indianapolis District Dental Society, the Virginia Dental Association, and the Northern Virginia Dental Society. The administrative complaint alleged that certain portions of ADA's Principles of Ethics and advisory opinions regarding advertising and solicitation by dentists were in violation of the Federal Trade Commission Act.

We have entered into a consent order with the FTC, without admitting any violation of the law, which will provide an interim resolution of the matter pending the ultimate decision in a similar FTC case (Dkt. 9064) involving professional advertising and solicitation. The ADA and the FTC have agreed to be bound by the final outcome of the other case principally as it relates to FTC jurisdiction, ethical restrictions on advertising and solicitation, and relief. That case, which may ultimately be decided by a United States Court of Appeals or the United States Supreme Court, deals with a number of questions, but those which relate to the *ADA* case are principally whether the FTC has jurisdiction over the professional associations in that case and whether those professional associations may have violated the Federal Trade Commission Act through adoption and enforcement of ethical restrictions on advertising and solicitation.

Pending the final decision in that case, advertising, solicitation of patients or business, or other promotional activities by dentists or dental care delivery organizations shall not be considered unethical or improper, except for those promotional activities which are false or misleading in any material respect. Regardless of any standards of dentist conduct which may be worded differently, this shall be the sole standard for determining the ethical propriety of such promotional activities. The ADA Principles of Ethics and Official Advisory Opinions have been made consistent with the above stated standard through the addition of footnotes (a copy is enclosed). Any provision of an ADA constituent or component society's code of ethics or other standard of dentist conduct relating to dentists' or dental care delivery organizations' advertising, solicitation, or other promotional activities which is worded differently from the above stated standard shall be deemed to be in conflict with the ADA Principles of Ethics.

We urge all of our members and constituent and component organizations to abide by the letter and spirit of the consent order, copies of which are enclosed.

All older editions of ADA's Principles of Ethics, Official Advisory Opinions, and constituent and component society ethical codes and interpretations which are worded differently from the above stated standard should no longer be distributed or enforced. Neither should any informal interpretations be given which do not accord with this standard.

As part of the consent order, the FTC reserves the right to investigate, proceed administratively against, or seek court action against any constituent or component society of the ADA which may be acting contrary to the consent order or in violation of any of the laws which the FTC is charged with enforcing.

We will keep you advised on further developments as this matter proceeds toward its ultimate resolution.

Thank you for your cooperation.

Sincerely,
Joseph P. Cappuccio, D.D.S.
President

Enclosures

## IN THE MATTER OF

# JAY NORRIS CORP., ET AL.

### MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9054. Decision, May 2, 1978 — Modifying Order, Sept. 10, 1979*

This order conforms an order issued on May 2, 1978, 91 F.T.C. 751, 43 FR 33900, to court-approved modifications by revising Part I of the original order to reflect that the term "full purchase price," as used in Paragraph 2, excludes postage incurred in placing an order or requesting a refund; deleting Paragraph 6; and by changing the notification period for corporate changes in Paragraph 2 of Part III of the order from the 30 days originally provided to five days.

## ORDER CONFORMING PREVIOUS FINAL ORDER TO COURT APPROVED MODIFICATIONS

After the Commission issued a cease and desist order in this matter on May 2, 1978, the respondents named in the order filed a petition for review of the order in the United States Court of Appeals for the Second Circuit. By motion dated February 21, 1979, the parties jointly requested the Court to modify Part I, Paragraph 2 and Part III, Paragraph 2 of the Commission's order and affirm the Commission's order as so modified (with the exception of Part I, Paragraph 6 of the order, which respondents continued to contest in the court proceeding). By consenting to the modified order the respondents agreed to severance of Part I, Paragraph 6 for purposes of finality so that the balance of the order would become immediately final and enforceable upon approval by the Court of the stipulated modifications. The "agreement" submitted to the Court with the joint motion also provided that "[u]pon entry of the Court's Order affirming the stipulation the Commission will enter a new Administrative Order in conformity with said Order."

On May 1, 1979, the Court of Appeals, *inter alia*, approved the stipulated modifications.[1] Accordingly, the Commission hereby enters the following order incorporating the modifications agreed to by the parties and approved by the Court.

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[1] The Court also rejected respondents' challenges to Part I, Paragraph 6, of the Commission's order, although it ordered changes in the wording of the language for purposes of clarification. That provision is not final as respondents have received from Mr. Justice Marshall of the United States Supreme Court an extension of time until September 14, 1979, for the filing of a petition for writ of certiorari. Part I, Paragraph 6 will be the subject of a separate administrative order if and when it becomes final in accordance with 15 U.S.C. 45(g).

## ORDER

### I

*It is ordered*, That Jay Norris Corp., a corporation, its successors and assigns, and Joel Jacobs and Mortimer Williams, individually and as officers of said corporation, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, trade style, or other device, in connection with the advertising, offering for sale, sale and distribution of general mail-order merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to refund the amount required by Paragraph 2, in connection with the return of merchandise purchased from respondents, within the time specified in respondents' advertisements. If no time is specified, such refund must be made within the time specified in Paragraph 5(E)(4) of this part.

2. Failing to refund the full purchase price of merchandise including postage, insurance, handling, shipping, or any other fee or charge paid by the purchaser any time a refund is made to such purchaser, unless respondents clearly state in their advertisement the exact nature of the refund including any items of the purchaser's expense that will not be refunded; *provided*, that the term full purchase price as used herein shall exclude postage incurred in ordering an item from respondents or in requesting a refund thereof.

3. (A) Soliciting any order for the sale of merchandise to be ordered by the buyer through the mail unless, at the time of the solicitation, respondents have a reasonable basis to expect that they will be able to ship any ordered merchandise to the buyer: (1) within the time clearly and conspicuously stated in any such solicitation, or (2) if no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer; and

(B) Providing any buyer with any revised shipping date, as provided in Paragraph 4 of this part unless, at the time any such revised shipping date is provided, respondents have a reasonable basis for making such representation regarding a definite revised shipping date; or

(C) Informing any buyer that they are unable to make any representation regarding the length of any delay unless (1) respondents have a reasonable basis for so informing the buyer and (2) respondents inform the buyer of the reason or reasons for the delay.

For purposes of this order, the failure of respondents to have records or other documentary proof establishing their use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this order will create a rebuttable presumption that the respondents lacked a reasonable basis for any expectation of shipment within said applicable time.

4. (A) Where respondents are unable to ship merchandise within the applicable time set forth in Paragraph 3(A) above, failing to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel his order and receive a prompt refund. Said offer shall be made within a reasonable time after respondents first become aware of their inability to ship within the applicable time set forth in Paragraph 3(A), but in no event later then said applicable time.

(1) Any offer to the buyer of such an option shall fully inform the buyer regarding his right to cancel the order and to obtain a prompt refund and shall provide a definite revised shipping date, but where respondents lack a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that respondents are unable to make any representation regarding the length of the delay.

(2) Where respondents have provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in Paragraph 3(A), the offer of said option shall expressly inform the buyer that, unless respondents receive, prior to shipment and prior to expiration of the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(3) Where the respondents have provided a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in Paragraph 3(A), or where the respondents are unable to provide a definite revised shipping date and therefore inform the buyer that they are unable to make any representation regarding the length of the delay, the offer of said option shall also expressly inform the buyer that his order will automatically be deemed to have been cancelled unless (a) respondents have shipped the merchandise within thirty (30) days of the applicable time set forth in Paragraph 3(A) above, and have received no cancellation prior to such shipment, or (b) respondents have received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the respondents inform the buyer that they are unable to make any representation regarding the length of the delay, the

buyer shall be expressly informed that, should he consent to an indefinite delay, he will have a continuing right to cancel his order at any time after the applicable time set forth in Paragraph 3(A) by so notifying respondents prior to actual shipment.

(4) Nothing in this paragraph shall prohibit respondents when they furnish a definite revised shipping date to Paragraph 4(A)(1) above, from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to Paragraph 4(A), the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date. *Provided, however,* that where respondents solicit consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the definite revised shipping date by so notifying respondents prior to actual shipment.

(B) Where respondents are unable to ship merchandise on or before the definite revised shipping date provided under Paragraph 4(A)(1), and consented to by the buyer pursuant to Paragraphs 4(A)(2) and 4(A)(3), failing to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further delay or to cancel the order and to receive a prompt refund. Said offer shall be made within a reasonable time after respondents first become aware of their inability to ship before the said definite revised date, but in no event later than the expiration of the definite revised shipping date. *Provided, however,* that where respondents previously have obtained the buyer's express consent to an unanticipated delay until a specific date beyond the definite shipping date, pursuant to Paragraph 4(A)(4) or to a further delay until a specific date beyond the definite revised shipping date pursuant to Paragraph 4(B), that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of Paragraph 4(B).

(1) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where respondents lack a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that respondents are unable to make any representation regarding the length of the further delay.

(2) The offer of a renewed option shall expressly inform the buyer that, unless respondents receive, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer specifical-

ly consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if respondents are in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date. *Provided, however,* that where respondents offer the buyer the option to consent to an indefinite delay the offer shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the old definite revised shipping date or any date superseding the old definite revised shipping date.

(3) Paragraph 4(B) shall not apply to any situation where respondents, pursuant to the provisions of Paragraph 4(A)(4), have previously obtained consent from the buyer to an indefinite extension beyond the first revised shipping date.

(C) Whenever a buyer has the right to exercise any option under this order or to cancel an order by so notifying respondents prior to shipment, failing to furnish the buyer with adequate means, at respondents' expense, to exercise such option or to notify respondents regarding cancellation. For the purposes of this order, the failure of respondents:

(1) To provide any offer, notice or action required by this order in writing and by first class mail will create a rebuttable presumption that the respondents failed to offer a clear and conspicuous offer, notice or option;

(2) To provide the buyer with the means in writing (by business reply mail or with postage prepaid by respondents) to exercise any option or to notify respondents regarding a decision to cancel, will create a rebuttable presumption that the respondents did not provide the buyer with adequate means pursuant to this Paragraph 4(C).

Nothing in Paragraph 4 of this part shall prevent respondents where they are unable to make shipment within the time set forth in Paragraph 3(A) or within a delay period consented to by the buyer, from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after they become aware of said inability to ship, together with a prompt refund.

5. Failing to deem an order cancelled and to make a prompt refund to the buyer whenever:

(A) Respondents receive, prior to the time of shipment, notification from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this order;

(B) Respondents have pursuant to Paragraph 4(A)(3), provided the buyer with a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in Paragraph 3(A) or have notified the buyer that respondents are unable to make any representation regarding the length of the delay and respondents (1) have not shipped the merchandise within thirty (30) days of the applicable time set forth in Paragraph 3(A), and (2) have not received the buyer's express consent to said shipping delay within said thirty (30) days;

(C) Respondents are unable to ship within the applicable time set forth in Paragraph 4(B) and have not received, within the said applicable time, the buyer's consent to any further delay;

(D) Respondents have notified the buyer of their inability to make shipment and have indicated their decision not to ship the merchandise; or

(E) Respondents fail to offer the option prescribed in Paragraph 4(A) and have not shipped the merchandise within the applicable time set forth in Paragraph 3(A).

For purposes of this Part:

(1) "Shipment" shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(2) "Receipt of a properly completed order" shall mean the time at which respondents receive an order from the buyer containing all the information requested by respondents and accompanied, where required, by the proper amount of money in the form of cash, check or money order. *Provided, however,* that where respondents receive notice that the check or money order tendered by the buyer has been dishonored or that the buyer does not qualify for a credit sale, "receipt of a properly completed order" shall mean the time at which (a) respondents receive notice that à check or money order for the proper amount tendered by the buyer has been honored, (b) the buyer tenders cash in the proper amount or (c) the seller receives notice that the buyer qualifies for a credit sale.

(3) "Refund" shall mean:

(a) Where the buyer tendered full payment for the unshipped merchandise in the form of cash, check or money order, a return of the full amount tendered in the form of cash, check, or money order;

(b) Where there is a credit sale:

(i) and the seller is a creditor, a copy of a credit memorandum or the like or an account statement reflecting the removal or absence of any remaining charge incurred as a result of the sale from the buyer's account;

(ii) and a third party is the creditor, a copy of an appropriate credit memorandum or the like to the third party creditor which will remove the charge from the buyer's account or a statement from the seller acknowledging the cancellation of the order and representation that he has not taken any action regarding the order which will result in a charge to the buyer's account with the third party;

(iii) and the buyer tendered partial payment for the unshipped merchandise in the form of cash, check or money order, a return of the amount tendered in the form of cash, check or money order.

(4) "Prompt refund" shall mean:

(a) Where a refund is made pursuant to definition (3)(a) or (3)(b)(iii) a refund sent to the buyer by first class mail within seven (7) working days of the date on which the buyer's right to a refund vests under the provisions of this order.

(5) The "time of solicitation" of an order shall mean that time when respondents have:

(a) Mailed or otherwise disseminated solicitation to a prospective purchaser;

(b) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like or on radio or television which cannot be changed or cancelled without incurring substantial expense; or

(c) Made arrangements for the printing of a catalog, brochure or the like which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.

6. [Severed from this order for purposes of finality.]

7. Misrepresenting that the nondelivery of merchandise ordered and paid for by a customer is caused by loss of the merchandise by the United States Postal Service.

8. Misrepresenting, directly or indirectly, the time or manner in which respondents' flame gun, or any other product used for the removal of snow or ice, will perform in the removal of snow or ice.

9. Misrepresenting, directly or indirectly, the time in which or the manner by which respondents' roach powder, or any other pesticide product, will kill or eliminate roaches.

10. Making any representation as to the safety of respondents' roach powder or other pesticide product without failing to clearly and conspicuously include the following statement in all advertisements and other promotional material for said products: "To use this product safely, you must follow the instructions on the label."

11. Misrepresenting, directly or indirectly, that respondents' TV antenna or any TV antenna will bring in sharp and clear reception and is superior to any other antenna.

12. Making any representation as to the life expectancy of flashlights or other battery operated product without failing to disclose, clearly and conspicuously in all advertisements and other promotional material for such products (a) the expected "on" life of the product; and (b) any limitations on the warranty of such product.

13. Representing, directly or indirectly, that the Lincoln-Kennedy penny was minted by the United States Treasury Department.

14. Representing, directly or indirectly, that the Lincoln-Kennedy penny is a coin of historical and numismatic significance which is likely to increase in value.

15. Representing, directly or indirectly, in connection with the sale of any product that another product is given "free" or as a gift without cost or charge in connection with:

a. any offer which runs for an indefinite term or continuously for a period in excess of one (1) year; or

b. any offer not covered by (a) above excluding introductory offers, unless as to such limited offer:

(1) a regular bona fide retail price is established for the product without the "free" product;

(2) a regular bona fide retail price is established for the "free" product, or in the absence of such price a determination is made of the cost to respondents of such other product; and

(3) the price of the product is reduced at least as much as the price or cost of the "free" product.

## II

*It is further ordered,* That Jay Norris Corp. and Pan Am Car Distributors Corp., corporations, their successors and assigns, and Joel Jacobs, Mortimer Williams and Kenneth Mann, individually and as officers of said corporations, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, trade style, or other device, in connection with the advertising, offering for sale, sale and distribution of used motor vehicles by mail-order in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting, directly or by implication, the ease or profit with which purchasers can resell respondents' motor vehicles;

2. Misrepresenting the mechanical and physical condition of said motor vehicles;

3. Misrepresenting that said motor vehicles are in safe mechanical and operating condition;

4. Misrepresenting the extent to which said motor vehicles have been inspected and repaired in preparation for sale and delivery to customers;

5. Misrepresenting that said motor vehicles are in sound condition and repair and will render normal, adequate and satisfactory service; and

6. Representing the safety or performance of said motor vehicles unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent and objective material available in written form.

## III

*It is further ordered,* That:

1. Respondents shall maintain records of all consumer complaints for a period of three (3) years after such complaint is received, including but not limited to the following information:

a. Name and address of the consumer;
b. Date of receipt of the complaint;
c. Transaction about which complaint is received;
d. Nature of the complaint; and
e. Date and disposition of the complaint.

2. Respondents shall notify the Commission within five (5) days of changes in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other changes in the corporation which may affect compliance obligations arising out of the order.

3. The individual respondents named herein, shall promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

4. Respondents shall deliver a copy of this order to cease and desist to all personnel or agents of respondents responsible for the preparation, creation, production or publication of the advertising of all products covered by this order.

5. No provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind

obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

6. Respondents herein shall, within sixty (60) days after service of this order, and annually for five (5) years thereafter, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order. The expiration of the obligation to file such reports shall not affect any other obligations arising under this order.

## IV

*It is further ordered,* That the allegations of the complaint are dismissed as to FEDERATED NATIONWIDE WHOLESALERS SERVICE, GARYDEAN CORP., t/a Nationwide Wholesalers Service, and P-N PUBLISHING COMPANY, INC.

## IN THE MATTER OF

# BENEFICIAL CORPORATION, ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 8922. Complaint,*[*] *Apr. 10, 1973 — Decision, Sept. 12, 1979*

This consent order requires, among other things, that two sellers of personal income tax preparation services, located respectively in Wilmington, Del. and Morristown, N.J., cease, in connection with the preparation of income tax preparation services or the extension of credit, from using the terms "Instant Tax Refund" or "Immediate Tax Refund;" and misrepresenting the terms and conditions of guarantees; and the competence and ability of their tax preparing staff. The order further prohibits respondents from misusing confidential information obtained from their customers.

## *Appearances*

For the Commission: *David C. Fix, Robert D. Friedman* and *R. Galler.*

For the respondent: *Edgar T. Higgins,* Morristown, N.J., *Timothy J. Bloomfield* and *George W. Wise, Hogan & Hartson,* Washington, D.C. and *E. Norman Veasey, Richards, Layton & Finger,* Wilmington, Del.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

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[*] Complaint previously published at 86 F.T.C. 119.

1. Respondent Beneficial Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 1300 Market St., Wilmington, Delaware. Respondent Beneficial Management Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at 200 South St., Morristown, New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

*It is ordered*, That respondents Beneficial Corporation and Beneficial Management Corporation, corporations, and their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation of income tax returns or the extension of consumer credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Instant Tax Refund" or "Immediate Tax Refund" or like phrases using words of similar import or meaning, unless such phrases include the word loan in immediate conjunction therewith and further the advertising includes language which clearly and conspicuously discloses that the loan being offered has no relationship with the individual's tax refund, and that such phrases refer to a loan which is "normal", "usual", "standard" or "regular" by using such terms or their equivalents, and that prospective borrowers will be expected to meet qualifications to borrow which are described in such material as "normal", "usual", "standard" or "regular" or words having the same or equivalent meaning.

2. Using any guarantee without clearly and conspicuously disclosing the terms, conditions and limitations of any such guarantee; or misrepresenting, in any manner, the terms and conditions of any guarantee.

3. Representing, directly or by implication, that respondents will reimburse their customers for any payments the customer may be required to make in addition to his initial tax payment, in instances where such additional payment results from an error by respondents in the preparation of the tax return; *provided, however,* that it shall be a defense in any enforcement proceeding for respondents to establish that they make such payments.

4. Failing to disclose, clearly and conspicuously, whenever respondents make any representation, directly or by implication, as to their responsibility for, or obligation resulting from, errors attributable to respondents in the preparation of tax returns, that respondents will not reimburse the taxpayer for any deficiency payment which results from said errors, *provided, however,* that it shall be a defense in any enforcement proceeding for respondents to establish that they make such payments.

5. Representing, directly or by implication, that the percentage of respondents' customers who receive tax refunds is demonstrably greater than the percentage of individual taxpayers at large who receive refunds; or misrepresenting, in any manner, the magnitude or frequency of refunds received by respondents' tax preparation customers.

6. Representing, directly or by implication, that respondents' tax preparing personnel are tax experts or unusually competent in the preparation of tax returns or the rendering of tax advice; or misrepresenting, in any manner, the competence or ability of respondents' tax preparing personnel.

7. Using information concerning any customers of respondents, including the name and/or address of the customer, for any purpose which is not essential or necessary to the preparation of a tax return if such information was obtained by respondents as a result of the preparation of the customer's tax return which includes any information given by the customer after he has indicated, in any way, that he is interested in utilizing respondents' tax preparation services, unless prior to obtaining such information respondents have both (1) specifically requested from the customer the right to use the tax return information of the customer and (2) have executed a separate written consent signed by the customer which shall contain:

A. Respondent's name;
B. The name of the customer;
C. The specific purpose for which the consent is being signed;
D. The exact information which will be used;

E. The particular use which will be made of such information;

F. The parties or entities to whom the information will be made available;

G. The date on which such consent is signed;

H. A statement that the tax return information may not be used by the tax return preparer for any purpose other than that stated in the consent, and;

I. A statement by the taxpayer that he consents to the use of such information for the specific purpose described in subparagraph (C) of this paragraph.

*Provided, however*, that nothing herein shall prohibit respondents from using names and addresses only of customers for the purpose of communication with such customers solely concerning respondents' income tax preparation business.

Nothing in the above provision is intended to relieve respondents of any further requirements imposed on them by the Revenue Act of 1971, Pub. Law 92-178, Title III, §316(a), December 10, 1971; 26 U.S.C. 7216 or regulations issued pursuant to it.

*It is further ordered*, That respondents herein shall forthwith distribute a copy of this order to each office of their respective domestic consumer finance subsidiaries.

*It is further ordered*, That respondents shall notify the Commission at least 30 days prior to any proposed change in the structure of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent corporations which may affect compliance obligations arising out of this order.

*It is further ordered*, That respondents shall, within 60 days after the effective date of this order, file with the Commission a written report, signed by respondents, setting forth in detail the manner and form of their compliance with this order.

## IN THE MATTER OF

# CALIFORNIA MILK PRODUCERS ADVISORY BOARD, ET AL.

### FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 8988. Complaint Aug. 1. 1974 — Final Order, Sept. 21, 1979*

This order dismisses a complaint issued against a Modesto, Calif. milk producers association and its New York City advertising agency, on grounds that it was unreasonable to condemn advertising claiming that "Every body needs milk" because of the small fraction of allergic people.

## *Appearances*

For the Commission: *Gerald E. Wright, Jerome M. Steiner, Peter C. Lagarias* and *Michael C. Weisberg.*

For the respondents: *William A. Wineberg, Jr., Thomas Paine* and *Ross H. Schulz, Broad, Khourie & Schulz,* San Francisco, Calif. and *Harvey B. Sindle, Katz, Leavy, Rosenzweig & Sindle,* New York City.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the California Milk Producers Advisory Board, an unincorporated association, and Cunningham & Walsh, Inc., a corporation, hereinafter referred to as "respondents", have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

1. "Advisory Board" means respondent California Milk Producers Advisory Board.
2. "Marketing Act" means The California Marketing Act of 1937, as amended, Agricultural Code of the State of California, Para. 58,601, *et seq.*
3. "Marketing Order" means the Marketing Order for Research, Education, and Promotion of Market Milk and Dairy Products In California, promulgated by Jerry W. Fielder, Director of Agriculture, October 9, 1969, as amended.

PAR. 2. Respondent Advisory Board is an unincorporated association organized, existing and doing business under and by virtue of the Marketing Order, under the authority of the Marketing Act, with its principal office and place of business located at 1213-13th St., Modesto, California. [2]

PAR. 3. Respondent Cunningham & Walsh, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 260 Madison Ave., New York, New York.

PAR. 4. Respondent Advisory Board is now and has been engaged in the development, implementation, and administration of advertising programs relating to milk. Said programs are operated for the pecuniary benefit of producers and producer-handlers of milk located in the State of California, and inure to the pecuniary benefit of producers and producer-handlers of milk located in the State of California, and in other states. The members of the Advisory Board are producers and producer-handlers of milk located in the State of California. Said producers and producer-handlers are persons, partnerships or corporations operating for profit or for the profit of their members.

Said advertising programs include, and have included, but are not and have not been limited to the dissemination, publication, and distribution of advertisements, including but not limited to the advertising referred to herein, to promote the sale of milk, which comes within the classification of "food", as said term is defined in the Federal Trade Commission Act.

PAR. 5. Respondent Cunningham & Walsh, Inc. is now, and for some time last past has been, an advertising agency for the Advisory Board and is now preparing and placing, and has prepared and placed for publication, and has caused the dissemination of advertising material, including but not limited to the advertising referred to herein, to promote the sale of milk, which comes within the classification of "food", as said term is defined in the Federal Trade Commission Act.

PAR. 6. In the course and conduct of their said activities and/or businesses, respondents have disseminated, recommended and/or caused the dissemination of certain advertisements concerning milk by the United States mail and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in magazines and other periodicals of general circulation, and by means of television and radio broadcasts transmitted by television and radio stations located in the State of California, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products; and have disseminated, recommended and/or caused the dissemination of, advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products in commerce as "commerce" is defined in the Federal Trade Commission Act. [3]

PAR. 7. Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are a number of television and radio commercials featuring endorsements of famous celebrities, and print media advertisements. These commercials and promotional materials contain messages concerning the uses, purposes, utility, characteristics and effects of milk. As representative of the aforementioned commercials, several such television, radio and print media advertisements are set forth in printed form in subparagraph A–E below:

A. One such television commercial, using a close-up of Mark Spitz, a well-known Olympic swimmer, states the following:

| VIDEO: | AUDIO: |
|---|---|
| 1. OPEN ON CU OF MARK SPITZ. | ***MARK*** **No, I don't get embarressed ordering milk. As a matter of fact I order it all the time. I think ordering milk whether you're 10 years old ot 100. . .I think uh, it's something that your body really needs. An uh I — I wouldn't get embarrassed at all.** |
| 2. DISS TO TITLE: MILK HAS SOMETHING FOR EVERYBODY | *ANNCR:* Milk has something for every body. |
| 3. DISS TO TITLE: Even Mark Spitz's. | Even Mark Spitz's |
| 4. DISS TO CU OF MARK SPITZ. ADD SUPER: CALIFORNIA-OREGON-WASHINGTON DAIRYMEN. | ***ANNCR:*** **You know, I say "two glasses please". (LAUGH) I wouldn't try to hide it and say, "I'll have a small" (LAUGHS)** |

B. Another such radio commercial, using Vida Blue, a well-known baseball player, states the following:

| AUDIO: |
|---|
| ***VIDA:*** **I do coach a Little League team, and it's in this same pasture that I used to play ball in. We'd come out after school** |

**and we play a little ball, and we have fun. And naturally I'll take 'em to my house afterwards, and I'll treat 'em to, uh, cookies and milk. So I try to influence kids about growing up and just, [4] uh, knowing the difference between right and wrong. And, uh. . .I've never told my Little League team that I drink two and a half gallons of milk, but I've just told them that I drink a lot of milk, and that it's good for you, and it's good for your body. And I'm just waiting for the day that I can see one of my little kids become a great professional athlete.**

AUDIO

*VO:* **Every body needs milk. Even Vida Blue's.**

*VIDA:* **. . .Try to stress to the kids, living a clean life and keeping your body in top physical condition and just growing up. . .an American. A *true* American.**

C. Another such television commercial, using a closeup of Ray Bolger, a well-known dancer, states the following:

| VIDEO: | AUDIO: |
|---|---|
| 1. OPEN ON CU OF RAY BOLGER. | *RAY:* **The big important thing in our business—the movement of the body—is to keep your calcium balance. The extremities, for instance; the hands. We use our hands in dancing, see? We must have a facility of having freedom of the hands. The hands are a beautiful thing when used properly. I mean when they're, ah. . .but they shouldn't look like your playing Dracula, you know. And so therefore you want them sort of free and easy and you can't have arthritic little joints. As a matter of fact, a person who does strenuous exercise. . .milk is, is. . .it's terribly important that you have your proper intake of milk. I suppose it would be obvious for me to say that I drink milk. But it's more than obvious; it's an absolute necessity for me.** |

| | |
|---|---|
| 2. DISS TO TITLE. | *ANNCR:* Every body needs milk. |
| 3. DISS TO TITLE. | Even Ray Bolger's. |
| 4. DISS TO CU OF BOLGER. | *RAY:* I never saw a ballet dancer that didn't drink milk. [5] |

D. Another such radio commercial, using Dear Abby, a famous newspaper columnist states:

AUDIO:

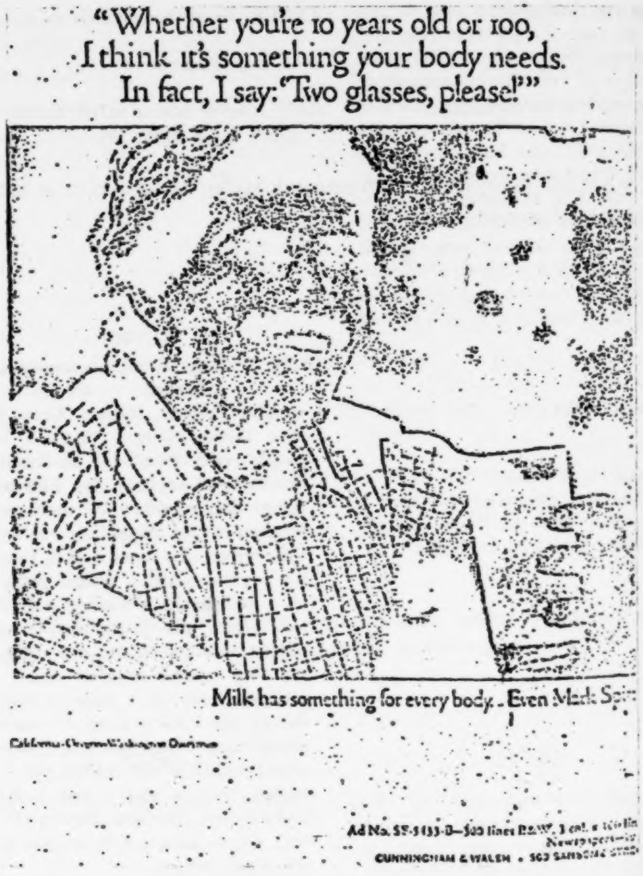
**ABBY:** **I'm only in daily newspapers, and I'm published around the world. . .Ireland, Buenos Aires. Fifty-Five million daily. . .That's a lot of people, really. People tell me things they wouldn't tell anybody else. Kids tell me things they wouldn't tell their parents; hubands tell me things they wouldn't tell their wives; vice versa. And it, I imagine it's a great outlet. . .people being able to. . .well, make a wailing wall out of me. When you know that fifty-five million eyes are on you every day, you are very careful of what you. . .what you say. And, uh, I have to keep my energy up. I have a lot of vitality; I always have. Thank heavens, I have very good health; I'm very seldom sick; I very seldom have a cold. . .and I think I probably can attribute that to the fact that I have been a milk drinker all my life. And I still am.**

**VO:** **Every body need milk.**

Even Dear Abby's.

**ABBY:** **I'm a really good ad for dairy products, because. . .I love cheese, whipped cream, milk. . .Milk goes with everything.**

E. One such print media advertisement is the following: [6]



"Whether you're 10 years old or 100,
I think it's something your body needs.
In fact, I say: 'Two glasses, please!'"

Milk has something for every body. Even Mark Sp

California-Oregon-Washington Dairymen

CUNNINGHAM & WALSH

[7] PAR. 8. Through the use of said advertisements and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents have represented and are now representing, directly and by implication that:

A. The consumption of milk is essential, necessary and needed by all individuals irrespective of the state of their health.

B. The consumption of milk is beneficial for all individuals.

C. The consumption of milk is beneficial in large or unlimited quantities.

D. The consumption of milk will prevent or will lessen the probabilities of contracting colds or arthritis.

PAR. 9. In truth and in fact:

A. The consumption of milk is not essential, necessary or needed by individuals with health problems such as certain allergies and symptomatic lactose intolerance.

B. The consumption of milk is detrimental to individuals with health problems such as certain allergies, and symptomatic lactose intolerance.

C. The consumption of milk in large or unlimited quantities is detrimental to individuals with health problems such as certain allergies, and symptomatic lactose intolerance.

D. The consumption of milk will not prevent and will not lessen the probabilities of contracting colds or arthritis.

Therefore, the statements and representations in said advertisements referred to in Paragraph Seven, and others similar thereto not specifically referred to herein, were and are misleading in material respects and constituted, and now constitute, "false advertisements," as that term is defined in the Federal Trade Commission Act, and the statements, representations, and failure to disclose material facts set forth in Paragraphs Seven and Eight were, and are, unfair, false, misleading and deceptive.

PAR. 10. The use by respondents of the unfair, false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, and the dissemination of the aforesaid "false advertisements" has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of milk. [8]

PAR. 11. The aforesaid acts and practices of respondents including the dissemination of "false advertisements," as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

## INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW JUDGE

JULY 31, 1979

## I

## STATEMENT OF THE CASE

### Allegations of Complaint

The complaint charged the California Milk Producers Advisory Board, an unincorporated association formed pursuant to the California Marketing Act of 1937, as amended, and a Marketing Order issued thereunder by the Director of Food and Agriculture of the State of California on October 9, 1969, and its advertising agency, Cunningham & Walsh, Inc., with the dissemination of misleading representations and false advertisements in the promotion of milk. More specifically, the complaint charged the Milk Advisory Board and Cunningham & Walsh with having disseminated advertisements over television, radio, in print media, by billboard, and otherwise, which represented that:

A. The consumption of milk is essential, necessary and needed by all individuals irrespective of the state of their health.

B. The consumption of milk is beneficial for all individuals.

C. The consumption of milk is beneficial in large or unlimited quantities.

D. The consumption of milk will prevent or lessen the probabilities of contracting colds or arthritis.

According to the complaint these alleged representations were misleading and false because "in truth and in fact":

A. The consumption of milk is not essential, necessary or needed by individuals with health problems such as certain allergies and symptomatic lactose intolerance.

B. The consumption of milk is detrimental to individuals with health problems such as certain allergies, and symptomatic lactose intolerance. [2]

C. The consumption of milk in large or unlimited quantities is detrimental to individuals with health problems such as certain allergies, and symptomatic lactose intolerance.

D. The consumption of milk will not prevent and will not lessen the probabilities of contracting colds or arthritis.

The complaint charged that the advertisements disseminated by the Milk Advisory Board and Cunningham & Walsh constituted "false advertisements" as defined in the Federal Trade Commission Act, and further that the use by the Board and Cunningham & Walsh of "unfair, false, misleading and deceptive statements" in the promotion of milk, and the "failure to disclose material facts," had the tendency and capacity "to mislead members of the consuming public into the purchase of substantial quantities of milk."

## Procedural History

### Injunction Against Commission

The complaint issued August 1, 1974, and was served on respondents August 14. A prehearing conference was scheduled to be held September 23 to discuss the issues, to determine the state of preparations of each side for trial, to organize the case generally, and to set a target date for hearings on the merits. On September 11, the State of California and its Director of Food and Agriculture, the California Milk Producers Advisory Board and Cunningham & Walsh, obtained a temporary restraining order from the U.S. District Court for the Northern District of California enjoining the Commission from further proceedings in this case. The prehearing conference scheduled by the law judge had to be cancelled. A preliminary injunction issued on September 23, CCH 1974-2 Trade Cases ¶ 75,328 (N.D. Cal. 1974), and nine months later on June 25, 1975, after briefing and argument, the District Court issued a permanent injunction against further Commission proceedings.

The decision of the District Court to issue a permanent injunction was grounded on the determination that the California Milk Producers Advisory Board was an agency of the State of California and that the Commission had no jurisdiction to proceed "with respect to the matters complained of by the FTC in Docket No. 8988." *State of California ex rel. Christensen* v. *Federal Trade Commission*, 9 S&D 1373 (N.D. Cal. 1975). [3]

The Commission appealed. After briefing and argument the Court of Appeals for the Ninth Circuit issued a decision on March 3, 1977, which vacated the injunction. Expressing no opinion on the merits of the jurisdictional question other than to note that the question was a "close one," the Court of Appeals concluded that the Commission "should have the opportunity to make the initial determination of its own jurisdiction" on the basis of a "full factual development" and a "solid factual record." *State of Cal. ex rel. Christensen* v. *F.T.C.*, 549 F.2d 1321 (9th Cir. 1977). The State of California, the Milk Board and Cunningham & Walsh petitioned for certiorari and the Court of Appeals stayed its mandate. The U.S. Supreme Court denied the petition for certiorari on October 3, 1977. On October 17, the mandate of the Court of Appeals was received by the District Court freeing the law judge and the Commission from the injunction.

Resumption of Commission Proceedings

On November 1, 1977, respondents were ordered to file their answers to the complaint and on November 4, 1977, an order was issued convening a pretrial conference November 30 to review the status of the case, and the ability of each side to go to trial in view of the three year interruption.

On November 17 the State of California by its Director of Food and Agriculture, represented by its Attorney General, filed a motion to intervene as a respondent in this proceeding. On November 25 the law judge denied intervention "as a respondent," but granted the State of California "permission to intervene for the limited purpose of raising, presenting, and arguing matters of fact or law on the issue of whether the California Milk Producers Advisory Board is subject to the jurisdiction of the Federal Trade Commission with respect to the advertising disseminated and challenged in the Commission's complaint."

A prehearing conference lasting most of the day was held on November 30. The possibility of eliminating by stipulation or otherwise all the issues with respect to respondents' advertising promoting the consumption of milk, except the question of jurisdiction, was explored in detail, but without success. The possibility of an agreement by both sides on the terms of an order which would issue by consent if, after trial, the jurisdictional question was resolved against respondents was raised by the law judge. [4] Notwithstanding subsequent discussion and negotiations, the parties advised the law judge on December 9, 1977, that they could not agree on the terms of such an order.

The parties being unable to agree on any basis for settlement or stipulation of the case in whole or in part, resolution of all issues on the merits by hearings became the only alternative. A timetable for pretrial procedures including discovery, and commencement of hearings was worked out by counsel for both sides and accepted by the law judge. It provided for commencement of trial on June 5, 1978.

Hearings on the Merits

The proceeding proved to be far more complex and lengthy than the law judge had anticipated. The case-in-chief required about eight weeks of hearings which, following three weeks in June, were completed in sessions in August, September and October. The case-in-defense began November 2 and proceeded with minor interruption to completion on November 29. Complaint counsel offered two and one-half days of rebuttal, completing this on December 4th. Neither the Milk Advisory Board nor Cunningham & Walsh desired to offer surrebuttal.

Inasmuch as thousands of exhibits, many of them medical studies, were offered over the course of the lengthy trial, in many instances being rejected initially but later being received after a proper foundation had been laid, and in many other instances being received only for a limited purpose, the law judge directed counsel for both sides to prepare a joint statement relating to all exhibits. The joint statement lists all exhibits offered in evidence, each page of the transcript where a ruling on the admissibility of an exhibit was made, and the nature of the ruling. In this manner the evidentiary status of every exhibit has been made clear at a glance to counsel, to the law judge and to the Commission for review. The joint statement was filed January 30 together with a statement of rejected exhibits and a stipulation of substantive corrections to the record. On February 8 the evidentiary phase of this proceeding was ruled by the law judge to have been completed.

Proposed findings and supporting material by both sides were directed to be filed by March 16 and reply memoranda, if any, were ordered filed by April 16. Permission was later granted both sides to file their proposed findings and supporting material by Friday, March 23. The date for submission of reply memoranda was extended to May 25 on application of respondents, the law judge having concluded that filing by [5] that date would not delay the Initial Decision which in the interim would be in the process of preparation. The State of California filed its brief as intervenor on the "jurisdictional" issue March 29 and its reply brief June 11.

It was clear at the time the foregoing extensions of time were granted to counsel that the size of the record and the complexity of the issues raised by this proceeding would necessitate more time than the 90 day rule permitted for the undersigned to write the

Initial Decision. The time for this was extended by the Commission to June 29, and later to July 31.

The hearings were attended throughout by a representative from the California Attorney General's office.

The following were among the issues raised by this proceeding and pursued in depth during the evidentiary hearings: the jurisdiction of the Commission to challenge the advertising of the Milk Advisory Board, involving a detailed inquiry into the nature and operations of the Board and its relation to the California Department of Food and Agriculture and to the State of California, the advertising disseminated by the Board and Cunningham & Walsh, the representations contained in the advertising disseminated by the Board and Cunningham & Walsh, the review of that advertising by the Department of Food and Agriculture, the need for milk in the diet, lactose intolerance and milk allergies, the medical and scientific knowledge concerning lactose intolerance and allergies, the development and the state of medical and scientific knowledge when the challenged advertising was being disseminated, the review of the claims in the advertising by scientific experts, the significance of lactose intolerance and milk allergy and the bearing thereof on milk consumption by persons with lactose intolerance or milk allergy, the dietary advice concerning milk consumption disseminated over the years by federal and state governments, and questions of relief. These were not the exclusive issues, but are stated only to give an indication of the scope of matters covered in the hearings.

The record numbers 12,919 transcript pages and 14 volumes of exhibits. Thirty-five witnesses testified, including fourteen experts from medical, scientific and other fields, many of whom were of national and international reputation.

The proceeding is now before the undersigned for decision based upon the allegations of the complaint, the answer, the evidence and the proposed findings of fact, conclusions and legal authority filed by the parties and the State of [6] California. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein, are rejected. The undersigned law judge, having considered the entire record, and all the contentions of respondents, complaint counsel and the State of California on the jurisdictional issue, makes the following findings and conclusions, and issues the order at the end hereof dismissing the complaint.

## II

## FINDINGS OF FACT

### Respondents

1. The California Milk Producers Advisory Board (hereinafter sometimes referred to as the "Milk Advisory Board," the "Milk Board" or the "Board") is an advisory board appointed by the Director of Food and Agriculture of the State of California. The Board, which consists of 24 dairy farmers and, more recently, one public member, was created pursuant to a "Marketing Order for Research, Education and Promotion of Market Milk and Dairy Products in California" promulgated by the state Director of Food and Agriculture on October 9, 1969, after an affirmative vote in favor thereof by California milk producers. This marketing order was issued pursuant to the California Marketing Act of 1937, as amended, (Cal. Agri. Code § 58,601, *et seq.*, CX 1135, 1146). The Advisory Board maintains an office in Modesto, California (Complaint, ¶¶ 1 and 2 and Answer, ¶¶ 1, 2 and 4).

2. Respondent Cunningham & Walsh, Inc., (hereinafter sometimes referred to as "Cunningham & Walsh," the "advertising agency," or the "agency"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 260 Madison Ave., New York, New York. Cunningham & Walsh maintains offices in a number of cities including San Francisco, California (Complaint, ¶ 3 and Answer, ¶ 3).

### Intervenor for a Limited Purpose

3. The State of California, by order of November 25, 1977, was permitted by the law judge to intervene in this action for the limited purpose stated earlier herein. [7]

### The Advertising of Respondents and the Representations Made

### Background

4. During the period from 1955 to the time the California Milk Producers Advisory Board was organized in 1969, there had been steady decline in the per capita consumption of milk, both nationally and in the State of California, although gross sales of milk in California increased due to population growth of the state. By the end of the 1960's, however, overall population growth in California no longer compensated for the per capita decline in milk consump-

tion. The dairymen of California became concerned. Under the leadership of a voluntary organization, the American Dairy Association of California, the dairymen sought the issuance of a marketing order for milk which would permit mandatory assessments on all dairy farmers to create a fund for the promotion of milk to stem, if possible, the sales decline. At a hearing held by the California Department of Food and Agriculture in connection with the proposed marketing order and advisory board, the state's milk producers indicated that they wanted a campaign of strong commercial advertising (CX 1119(b)). The marketing order was approved. Pursuant to it the California Milk Producers Advisory Board came into being to conduct the promotional activities authorized by the marketing order. Upon formation of the Board an assessment of 1/2 of one percent of sales was levied on each milk producer in California. In 1971 this assessment was increased to one percent of sales.

5. With the substantial promotional funds thus generated the Milk Board hired a leading advertising agency, Cunningham & Walsh, and an advertising and promotional campaign for milk using television, radio, newspapers, magazines, billboards, and point of sale materials, was begun. The Milk Board and Cunningham & Walsh spent the following amounts for the advertising of milk after formation of the Board. [8]

| *Period* | *Advertising Expenditure* |
|---|---|
| December 1969 to June 1970 (half-year) | $ 491,575. |
| July 1970 to June 1971 | 1,645,753. |
| July 1971 to December 1971 | 1,541,510. |
| January 1972 to December 1972 | 4,258,886. |
| January 1973 to December 1973 | 4,368,921. |
| January 1974 to December 1974 | 5,637,199. |

(CX 1380, CX 1386-90).

*"Essential, Necessary and Needed"*

6. The advertising of the Milk Advisory Board and Cunningham & Walsh, particularly the advertising which utilized the "Every Body Needs Milk" theme, had the capacity to convey, and conveyed the representation that milk was essential, necessary and needed by all individuals for a nutritionally adequate diet and good health. There was no representation that milk was essential for life or that one would become ill if one did not drink milk. The representation conveyed to the public, however, went far beyond the message that "Milk is good for you," "healthful" or "nutritious," or "that milk is a highly recommended and desirable product for good nutrition and that it is 'good for you' " (RPF 856, 870).

7. The message "Every Body Needs Milk" was conveyed to the California populace for almost three years by hundreds, if not thousands of advertisements using all channels of communication, television, radio, billboards, newspapers, magazines, and point of sale material (CX 2425-2441). This message was not communicated in isolation, but was almost invariably, except perhaps where it was printed on the sides of milk tank trucks, part of a larger advertisement which enhanced and reinforced the representation stated in the preceding finding, in both subtle and overt ways. [9]

Examples

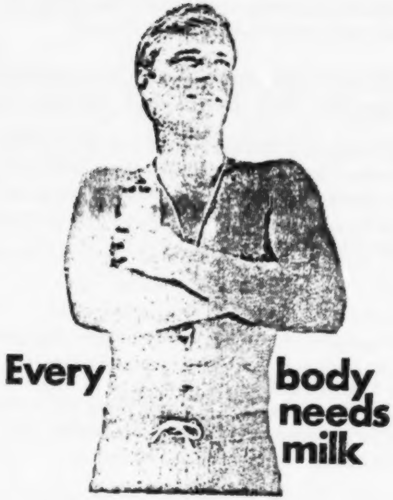
8. *"Beautiful People"* — CX 1 and 2.

These were among the first advertisements disseminated. Both CX 1 and 2 were newspaper and billboard ads (Tr. 151-52; CX 30, 2425(a), 2426(c)). They displayed "Every Body Needs Milk" in context with two handsome young models, a young man and a young woman, both in bathing attire. In each ad the model's body is emphasized, being placed intentionally between the words "Every" and "Body" (Manley, Tr. 11435; Crandall, Tr. 4919-20). The models are visible magnificent physical specimens radiating good health, quintessentially "beautiful people." The ads strongly convey, directly and by unstated suggestion, that milk is a dietary essential for the human body, including beautiful bodies. CX 1 is reproduced herein.

9. *"Every Body Needs Milk" 1970 Billboards* — CX 31, 33, 2426(a), 2427(d), 2428(a) and (b), 2429(a).

Following dissemination of CX 1 and 2, and the billboard versions (CX 30, 2426(c)), respondents created a series of billboards which were erected throughout California in 1970 at strategic high traffic locations (CX 2426(b) and (c), 2427(d), 2428(a) and (b), 2429(a)). Like CX 1 and 2, these featured "Every Body Needs Milk" with healthy young models participating in outdoor activities and sports (CX 31, 33, 2427(d)). Dates of dissemination and planned dissemination are shown in CX 852(a) and CX 2426(b); (Bier, Tr. 1618-21). There were "Bikini Girl" in April 1970, "Lifeguard" in May, "Karate Fighter" in June, "Bikini Girl with Kitten" in July, "Dune Buggy" in August, "Surfer" in September, "Football Player" in October, "Sky Diver" in November and "Girl on Exercise Rings" in December. Cunningham & Walsh described these in the following manner (CX 3000, p. 95; see also Bier, Tr. 1623): **[10]**

MILK ADVISORY BOARD



Ad No. SF-5500-A–150 lines B&W, 2 col. x 75 lines
California Newspapers–1970
CUNNINGHAM & WALSH • 500 SANSOME STREET
SAN FRANCISCO, 94111 (415) YUKON 1-7850
5-13-70–3

FEDERAL TRADE COMMISSION
Docket No 8788 COMMISSION Exhibit No. 1
In the Matter of: CMPAB
Date 6/6/78 Witness ______ Reporter

> [11] The outdoor billboards were directed towards a more general audience; young and old, male and female. They were meant to tell every body that they needed milk. The boards attempted to convey that milk provides health and vitality, that it makes people *look* great and *feel* great. These billboards were put up throughout the state of California beginning in April and a new design was used every month.

Concerning the exposure of the California public to these billboards the dairymen were told by the Milk Board (CX 2427(d), 2428(b)):

> Milk Advisory Board billboards, featuring a different model and activity each month, have attracted extremely high interest on the part of Californians. Following a survey on billboard effectiveness, Haug Associates, Inc., of Los Angeles, reported that the "Every Body Needs Milk" billboards, particularly the Bikini board, are among the top 10% of all boards they have measured.
>
> * * * * * * *
>
> The new November milk board is now up featuring the Sky Diver. For December, it will be the Girl on Rings, and for January, the Dune Buggy. All feature the theme "Every Body Needs Milk." The 30-sheet billboards, all located in high traffic areas, are now being rotated on a regular basis so as to reach increasing amounts of people. Nearly all markets in California are covered by the billboard postings, with hundreds of boards installed throughout the state.
>
> In addition to the regular 30-sheet billboards, spectacular or painted boards are featured in Los Angeles, San Diego and San Francisco-Oakland. Locations are changed each month, and all are on heavily travelled freeways or major streets in the cities. The painted boards alone, exclusive of the regular boards, reach an average of from 14 to 15 million viewers each month with the milk message.

[12] According to the Milk Advisory Board, the billboards were "seen," "understood," and the "Every Body Needs Milk" message was "believable and easy to absorb" (CX 2427(d)).

10. *"Cow Jokes"* — radio commercials, CX 78-83.

These were among the early commercials disseminated by the Milk Board and Cunningham & Walsh. They were broadcast on radio stations throughout California from March to July 1970 (Bier, Tr. 1672; Manley, Tr. 11439; RX 1843). These ads captured the attention of the listening audience with a "cow joke," and then conveyed the message through a female voice "Twinkle Star" singing at two or more points in the commercial "Every body needs milk." Just before the end of the commercial "Twinkle Star" states "And now the Milk Advisory Board who reminds you everybody needs milk * * *." The Milk Board's publication circulated to California milk producers described these commercials (CX 2426(b)):

> Humorous, catchy, ear-appealing. . .these are the radio spot announcements for milk, also carrying the "Every body Needs Milk" theme, now on 38 California radio stations. Using the Cow Joke approach, the milk announcements have been so successful radio

station operators report they are the most provocative commercials they have ever presented. Audience listenership is rated extremely high.

11. *"Milkmaid," "Milkmom," "Milkman,"* - TV ads CX 140–41, 143–45.

These were disseminated commencing in October 1970 and continued until February 1971 (RX 1843). In "Milkmaid" a disheveled teenage girl sips milk and is transformed in appearance into a sophisticated young lady as she tells the TV audience "everybody needs milk!" "to keep growing," "and feel good" "and looook good" . . . "Cause milk's got calcium and vitamins and many things I can't even remember—and who stops needing them." In "Milkmom" a care-worn "mom" holds a glass of milk in her hand and tells the TV audience "I mean, absolutely everybody needs milk." As she sips she also is transformed in appearance into a "high style" matron. In "Milkman" a crochety 70-year old sips milk and becomes a dapper, elderly gentleman with a walking stick as he advises that if milk can help "a body when its young" it can go right on helping "to keep it young," [13] and "at whatever your age — to feel good — and look good — everybody needs milk." At the end of all the commercials, the TV screen displayed "Every body needs milk" followed by "Milk Advisory Board." As many references as possible to "Every Body Needs Milk" were worked into the commercials, and at the end that slogan "Every Body Needs Milk" was kept on the screen longer than would have been the normal practice (Manley, Tr. 11449). These TV ads were estimated to reach 92% of Southern California households 13 times or more a month and 92% of Northern California households over 4 times monthly (CX 2427(b)). Underneath the nonsense there was a serious message conveying that milk was a dietary essential for all ages for good health.

12. *"Strobe" Billboards* — a slide RX 1837; CX 32, 2429(a), 2432(b), 2433(c) and 2434(c).

These were a second series of billboard advertisements created by Cunningham & Walsh and the Milk Board, and published January through December 1971, using "stroboscopic" photographs of activities such as bicycling, skating, drumming, fencing, a girl on a swing, man doing pushups, and track and field activities (Manley, Tr. 11445; Bier, Tr. 1733). Some of these ads were published as newspaper ads (Bier, Tr. 1623–24). Again, they all featured "Every Body Needs Milk" in dominating type, and the sales message conveyed was that everyone, no matter their activity, needed milk for adequate nutrition and good health.

13. *"Calcium Ads"* — newspapers CX 3, 4 and 5; magazines CX 20, 21 and 22.

These ads, published between October 1971 and April 1972 (RX 1843(c)), conveyed that calcium was an essential for the body to stop bleeding when cut, for the heart to beat, and for sight. The text stated "you need calcium throughout your life to keep your bones strong and healthy. Too little over a long period of time is one cause of *osteoporosis* — weak and brittle bones — which is all too common among the elderly" (CX 3 and 5). The ads then point out that the National Research Council recommended 800 milligrams of calcium a day "about as much as you get in a normal diet *if it includes two glasses of milk.*" The text then asks "Can you get enough calcium from other foods" and answers "Not easily" because "two glasses of milk give you as much calcium as each of the following" (CX 3):

> 20 eggs, 14 sweet potatoes,
> 20 cups of oatmeal, 1 1/2 pints
> of ice cream, 16 cups of cabbage,
> 2 1/2 cups of cottage cheese.

[14] The ad concludes "When it comes to calcium, there's no real substitute for milk. Every body needs calcium. Every body needs milk." The representation that milk was "essential, necessary and needed" for nutritionally adequate diet and good health was clear. The calcium ads, however, did not make the representation that milk drinking was essential for life in the sense that one had to drink milk to obtain the calcium necessary to continue living (CPF 74). The ads stated that *calcium* was essential to stop bleeding, for the heart to beat, and for sight, not *milk*. The ads did not convey in their overall "net impression" that if one did not drink milk one would not stop bleeding if cut, one's heart would stop beating, or one would go blind.

14. *1972 Billboards* — "Every Body Needs Milk," CX 175-79, 2436(b), 2437(a), 2438(a), 2439(b), 2440(b), and CX 2441(b).

All of these ads emphasized in strong print "Every Body needs Milk" in context with visibly healthy, handsome, young people of impressive physical appeal. The January and February 1972 "Every Body Needs Milk" billboards were posted in over 700 locations statewide in California (CX 2436(b)). As in the case of the "Beautiful People" ads, CX 1 and 2, the message was unmistakable that every "body" needed milk as a dietary essential for vigor, good health and beauty.

15. *"Celebrity" ads* — Using "Every Body Needs Milk," TV, CX 100 and 100(a), 101(a) and (b), 102, 103(a), 104(c) and (d), 105(a) and (b), 106(a) and (c), 192; radio, CX 51-63, 84-88 91-93, 95; newspaper, CX 9.

At a meeting of the Advertising Committee of the Milk Board and executives of Cunningham & Walsh held May 27, 1971, the results of the Board's advertising for milk and its "past and current program" were discussed (CX 860). A new program to involve the use of celebrities was described by Cunningham & Walsh's Senior Vice-President and Senior Creative Officer. According to the minutes of this meeting the following was to be the message and method (CX 860(b)): [15]

> Message? — with a quiet persuasive way, using high degree truth in advertising, give reasons why milk is needed by everybody. Break down the prejudice that milk can be dropped when a teenager.
>
> How? — use celebrities with honest, direct testimonials. Get respected, thoughtful people to say that they believe in milk. The creative staff presented a set of four simulated commercials for radio and TV using Pat Boone.

This was the genesis and theme of the so-called celebrity campaign, which aimed to present celebrities in an informal and sincere atmosphere, and have them in unrehearsed discussion state their reasons for drinking milk (Manley, Tr. 11453; Holm, Tr. 4683-85; Bier, Tr. 1745-46). Credibility was enhanced in the initial celebrity series by announcing at the conclusion of the commercial that the celebrity's fee, or a portion thereof, was being donated to charity (see CX 100(b), 101(b), and 104(b)).

16. Once the concept of the celebrity campaign was approved, Cunningham & Walsh proceeded to sign Pat Boone, Vikki Carr, columnist Abigail Van Buren ("Dear Abby"), and Vida Blue, baseball star, all well-known personalities, as the first four "celebrities" (Manley, Tr. 11455, 11475; CX 2435(c); RX 1843(b)). The celebrity ads were not limited to TV, but also were presented on radio, in newspapers and magazines, and on billboards, the commercials being edited to suit the medium. As indicated, the commercials did not employ a prepared script delivered by the celebrities as a "sales pitch," but instead the celebrity was filmed during an interview as someone off-camera carried on a dialogue, steering the conversation into areas desirable for milk advertising purposes (Manley, Tr. 11474). The interview was then edited by splicing together various statements of the celebrity and leaving out the off-

stage interviewer's part of the dialogue (Manley, Tr. 11457–58). This technique created the appearance of spontaneity (Manley, Tr. 11457). Quotations from the TV and radio celebrity ads were later used as headlines in newspaper and billboard advertisements (CX 4241(a)).

17. The celebrity campaign began over radio in July 1971 and was expanded to TV in September 1971 using the four nationally known personalities named earlier to promote milk. "The Milk Advisor" issue of September 1971 stated (CX 2434(a)): [16]

> Each star is a personal believer in and user of milk, and their candid statements for milk are the backbone of each commercial. Stars in the current "Every Body Needs Milk" campaign include pitching sensation, Vida Blue, singers Pat Boone and Vikki Carr and nationally known columnist Abigail Van Buren, of "Dear Abby" fame.

18. In her TV ad "Dear Abby" told the viewing audience that she could probably attribute the fact that she had good health, was seldom sick, and seldom had a cold to milk drinking all her life. As "Dear Abby" finished informing the audience of this the screen displayed "Every body needs milk" and the announcer repeated that statement (CX 100(a) and (b)). The TV screen then displayed the message "Dear Abby's services donated to Mt. Sinai Free Bed Fund." See CX 100 for video tape.

19. Radio commercials featuring "Dear Abby" were also broadcast as part of the celebrity campaign. One of these was known as "Young Girls" (CX 86 and 87), and another as "55 Million Readers" (CX 55). In "Young Girls" Abby recited how young girls with appearance problems wanted to become attractive and that she encouraged them "to eat good, nourishing food" and to drink milk. The commercial ended with the theme "Every Body Needs Milk . . . Even Dear Abby's." In "55 Million Readers," Abby basically repeated the message in her TV commercial that she had very good health, was very seldom sick, very seldom had a cold and "probably can attribute that to the fact that I have been a milk drinker all my life," as the commercial ends with a voice announcing "Every Body Needs Milk . . . Even Dear Abby's" (CX 55).

20. Vida Blue, the baseball pitching star, after telling the TV audience that he tried to teach kids "the difference between right and wrong," states that kids should drink milk, and adults, also. The viewing audience was then told in words on the screen and by voice that "Every body needs milk . . . Even Vida Blue's" (CX 101(a) and (b)). At the conclusion, similar to the "Dear Abby" ad, the message was displayed on the screen "A portion of Vida Blue's services

donated to The Sickle Cell Disease Research Foundation . . . Milk Advisory Board."

21. In a radio commercial entitled "Little League" Vida Blue reported drinking enormous amounts of milk (CX 56(a) and CX 57): [17]

> I've never told my Little League team that I drink two and a half gallons of milk, but I've just told them that I drink a lot of milk, and that it's good for you, and it's good for your body. And I'm just waiting for the day that I see one of my little kids become a great professional athlete.

In another radio commercial "Two and One Half Gallons" Vida Blue suggested that his milk drinking played a vital part in his baseball development (CX 58(a) and 59(a)):

> I couldn't tell you how much milk I used to drink. Uh, I'll take a rough estimate: maybe. . .uh gallon and a half a day. That's quite a bit, but I. . .I think I deserved to have that much in my body because, uh, even when I left school and I would go home, I would go back and play ball. And I think milk played a vital part in that also. 'N still have that love for milk, that love for milk. Maybe two and a half gallons per day now.

At the end of both commercials a "voice over" announced "Every body needs milk . . . Even Vida Blue's."

22. In "Advice for Kids," Vida Blue advised (CX 84 and 85):

> Only advice I can have for a kid who, uh, doesn't have a very good body is, uh, just get on the ball and drink a lot of milk and—I think it's important that you get the proper diet; you get your vegetables, your meats, your breads and, uh . . . I think last but not least you should get plenty of milk; as much as possible. And, uh, I think this will help to prepare you to become a good physical person.

> If someone approaches me, I mean, like I say, I can only give my honest opinion of what I think is right. And, uh, I think kids should drink milk. Uh, well, adults also. I mean, it's good for you, and it's good to you. So my advice now is, uh, yeah, sure, drink as much as you can.

[18] This commercial ended with "Every body needs milk . . . Even Vida Blue's" as Vida announced "Those are my personal feelings about it, and I would — could only advise them on doing what I thought was right."

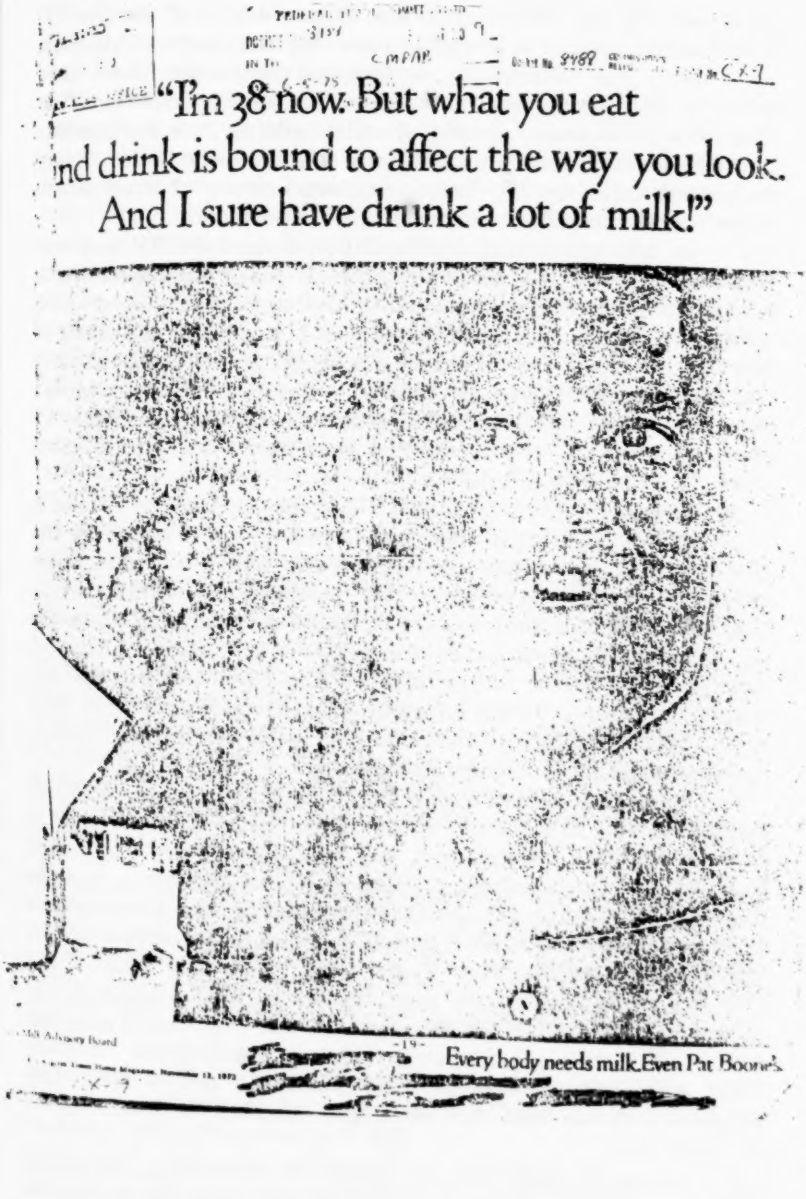
23. In a commercial known as "Teeth" (CX 104), Vikki Carr told the TV audience that milk was not only a great summer cooler, but "its good for you. You don't have to worry about your teeth being rotted away, you know." Again, print and voice admonished "Every body needs milk" as Ms. Carr told the audience that she didn't have a cavity in her mouth, and that "maybe loving milk had something to do with it" besides her "beans and tortillas." At the end of the ad

the TV screen carried the message "Miss Carr's services donated to the Vikki Carr Scholarship Fund. Milk Advisory Board."

24. Another of the celebrities featured by the Milk Board and Cunningham & Walsh was singer Pat Boone who told the radio audience in an "Every body needs milk" commercial entitled "Rosemary-the Cow" that when growing up he drank "a quart of milk per day per meal" (CX 52; Tr. 6202). This was broadcast in the latter part of 1971 (RX 1843(b)). In another "Every body needs milk" radio commercial "44.50 a week," Pat Boone told the audience that at the beginning of his career he did a TV show for a dairy and "I'd drink normally a quart of milk during the course of the program" (CX 51). In a print ad, reproduced herein, "I'm 38 now," again over the slogan "Every body needs milk," Mr. Boone suggested that milk drinking is "bound to affect the way you look" (CX 9).

25. Twenty-four "Every body needs milk" TV celebrity commercials and thirty-five "Every body needs milk" celebrity radio commercials featuring "Dear Abby," Vida Blue, Pat Boone and Vikki Carr were broadcast beginning in middle and late 1971 (RX 1843(b); Manley, Tr. 11459). All these commercials were broadcast on a rotating basis to avoid repetition and to achieve spontaniety (Manley, Tr. 11462-63). As already found, these commercials represented to the viewing and listening public that the drinking of milk was essential for all individuals for good health, good looks, and optimum physical vigor and energy.

26. In February 1972, two additional celebrities, Ray Bolger, a musical comedy star and dancer, and Phyllis Diller, comedienne, were added to the Milk Board's TV campaign (Manley, Tr. 11477; RX 1843(b) and (c)). In July 1972, Karen Valentine, a television actress, was added (CX 62(a), 63; RX 1843(b)), and in August 1972, Bill Graham, an entertainer, was included (CX 88, 91-93, 95; RX 1843(b)). [19]



C MPAB

Docket No. 8488

CX-9

6-5-75

"I'm 38 now. But what you eat
nd drink is bound to affect the way you look.
And I sure have drunk a lot of milk!"

Milk Advisory Board

November 12, 1973

CX-9

-19-

Every body needs milk. Even Pat Boone's.

[**20**] 27. In his commercial, Ray Bolger described for the TV audience the need of a dancer to have free movement of his body, particularly the extremities, noting that a dancer "can't have arthritic little joints." He then advised "it's terribly important that you have your proper intake of milk" adding "it's an absolute necessity for me." Both print and voice reinforced the theme "Every body needs milk" as Mr. Bolger concluded saying "I never saw a ballet dancer that didn't drink milk" (CX 103(a)).

28. In her commercial, Phyllis Diller advised the TV audience that she was having her teeth straightened, that if she hadn't drunk a lot of milk as a child and as an adult her "teeth would not be worth straightening," that her bones "would not be what they call young at [her] age, but they are," and that she attributed "all this elasticity and bone health to the use of milk; the consumption of large amounts of milk" (CX 102). The audience was then informed as in all these commercials, in print and by voice that "Every body needs milk . . . Even Phyllis Diller's."

29. Karen Valentine told the TV audience that dancers "tend to drink a lot of milk," that milk "builds you up, and it's good for the bones; it makes your legs strong," as the screen and announcer advised "Every body needs milk." Ms. Valentine concludes by saying "I've never had anything broken except for a fingernail . . . Really . . . I don't know if that has anything to do with drinking milk, but it sure saved a lot of doctor bills" (CX 106(c)). Again, the net impression created by the foregoing advertisements was that milk was indispensible for all individuals for good health, good bodies, good looks and optimum vigor and energy.

30. In August 1972 the Milk Board and Cunningham & Walsh decided to drop the theme "Every Body Needs Milk" in view of adverse publicity arising from the "Baltimore study" by Johns Hopkins medical personnel relating to lactase deficiency in some members of the public and the opening of the Commission's investigation in this matter (see RPF 335), and to replace it with "Milk Has Something for Every Body." All new commercials prepared after that month used the latter theme although the "Every Body Needs Milk" ads then in use continued to be run concurrently with ads featuring "Milk has something for every body" until around January 1973 when the last of them was supplanted by ads with the new slogan (Manley, Tr. 11527-28; see RPF 350). [**21**]

31. In and by itself, and as a theme for advertising, the slogan "Milk has something for every body" does not convey the representation that milk is "essential, necessary and needed by all individuals"

The slogan "Milk has something for every body" does convey the representation that milk contains substances nutritionally valuable for all individuals and is beneficial for all individuals.

32. The advertising of the Milk Board and Cunningham & Walsh using "Milk has something for every body," however, was disseminated concurrently during the closing months of 1972 with ads featuring "Every body needs milk," and followed over two and one-half years of intensive "Every body needs milk" advertising disseminated throughout California via billboards, TV, radio, print and point of sale material, even including use of "Every body needs milk" on the sides of milk tank trucks. Under these circumstances, and particularly in view of the intensity and the deep penetration achieved by respondents' "Every body needs milk" advertising (CX 3067(g)), the "Milk has something for every body" advertising had the capacity to evoke in the viewing, listening and reading public the message and representation that milk is "essential, necessary and needed by all individuals" (RX 1797; CX 3001; Dr. Aaker, Tr. 5297-5300). Additionally, some of the advertisements of the Milk Board and Cunningham & Walsh using "Milk Has Something for Every Body" in their net impression specifically did convey the representation that milk was "essential, necessary and needed by all individuals" for good health. Examples of such commercials were by Diahann Carroll, a TV singer and actress celebrity who was added to the Milk Board's celebrity group in January 1973 (CX 109, 110), two commercials by Mark Spitz (CX 7, 65), and a commercial featuring Karen Valentine which was first produced using "Every body needs milk" and later disseminated using the new theme "Milk has something for every body" (CX 106(a), and CX 106(b), (c)).

33. In "Skinny Girl" Diahann Carroll recounted to TV viewers (CX 109):

> Oh, I was a skinny little girl and I had to be nagged to do anything that had to do with eating or drinking anything but uh. . .the milk, was three times a day. It was insisted upon by my Mom. It seems she knew what she was talking about because when I went into a very strenuous uh, business, I found that I was a very strong, very healthy person and I think it had to [22] do with, what I call, a very well balanced, very well thought out diet, by my mother that included a glass setting right by that plate every time we sat down.

Print and voice announced "Milk Has Something For Every Body. . .Even Diahann Carroll's." In "My Teeth Are My Own" Ms. Carroll advised TV viewers (CX 110):

> My daughter's teeth are very good, so milk must have some calcium in it that is doing the trick 'cause we are. . .uh *always* complimented. . . uh. . .people usually think my teeth are not my own. Uh. . .they are all mine. I don't mean I pay for them, I

mean I was born with them. We can attribute it, I think, t'amounts of milk that I. . .drink.

Again the "voice over" ad screen stated "Milk has something for every body . . . Even Diahann Carroll's." Both ads had the tendency and capacity to convey the message that milk was essential to good health.

34. In a newspaper ad and a TV commercial using "Milk has something for every body" Mark Spitz conveyed the advice that milk was something your "body needs" (CX 7), that milk was something your "body really needs" (CX 65). In the overall context these ads, like the "Every body needs milk" ads, conveyed the impression that milk drinking was indispensable for good health.

35. In the "Milk has something for every body" version of "Ballerinas," Karen Valentine told the viewing audience, as she did in the "Every body needs milk" ad, that dancers "drink a lot of milk" that it was "good for the bones—it makes your legs strong, and concluded after the "Milk has something for every body . . . Even Karen Valentine's" announcement by the "voice over" and the screen, by stating (CX 106(c)):

*KAREN:* I've never had anything broken except for a fingernail. Really. I don't know if that has anything to do with drinking milk, but it sure saved a lot of doctor bills! [23]

### *"Beneficial For All Individuals"*

36. The advertising of the Milk Board and Cunningham & Walsh represented to the public that milk drinking was "essential, necessary and needed by all individuals" for good health. It follows that respondents' advertising represented that the consumption of milk is beneficial for all individuals. If the foregoing finding were disregarded, it nevertheless is obvious that the "Every body needs milk" and "Milk has something for every body" advertising conveyed to the public that milk drinking was beneficial for all individuals.

### *"Beneficial In Large Or Unlimited Quantities"*

37. The Milk Board and Cunningham & Walsh created and published a number of advertisements which portrayed celebrities consuming very large amounts of milk, or in which celebrities recounted the large amounts of milk they drank. These commercials conveyed the representation that the consumption of milk is beneficial in large or unlimited quantities (CX 6, 51(a), 52, 57(a), 58(a), 59(a), 63, 64, 105(a), (b), 111). Recounting by successful athletes and entertainers of the large quantities of milk they drank, and the

benefits they felt they gained therefrom, conveyed the implicit message that members of the public would receive similar benefits. All the testimonials were made in conjunction with the theme "Every Body Needs Milk" or "Milk Has Something For Every Body" reinforcing the message that consuming large or unlimited quantities was beneficial for bodily health.

### Allegation that Advertising Represented that Milk Consumption Would Prevent or Lessen the Probabilities of Contracting Colds or Arthritis

38. A TV commercial disseminated in the latter part of 1971, already described, featuring "Dear Abby" contained the following sequence (CX 100(a), (b)): [24]

| VIDEO | AUDIO |
|---|---|
| [illegible] ON CU DEAR ABBY. | ABBY: I've got my hand on the pulse of th public really. People tell me things they wouldn't tell anybody else. Kids tell me things they wouldn't tell their parents, husbands tell me things they wouldn't tell their wives, and vise versa, and I imagine it's a great outlet. I'm only in daily newspapers and I publish around the world, Ireland, Buenos-Aires -- 55 million dailies a lot of people read. I travel quite a bit in my work. I go on speaking engagements a when I do I have to keep my energy up. I have a lot of vitality, I always have, thank heavens. I have very good health, I'm seldom sick, I very seldom have a cold and I think I probably could attribute th to the fact that I have been a milk drink all my life, and I still am. |
| DISS TO TITLE: EVERY BODY NEEDS MILK. | ANNCR: Every body needs milk. |
| DISS TO TITLE: Even Dear Abby's. | CX 100(a)<br>Even Dear Abby's. |
| DISS TO CU OF ABBY. SUPER TITLE:<br>Dear Abby's services donated to Mt. Sinai Free Bed Fund, Minneapolis, Minnesota. Milk Advisory Board. | ABBY: That sounds like an ad for milk doesn't it? And you know something? It is!<br>CX 100(b) |

[25] A radio commercial broadcast at the same time contained the same continuity (CX 55).

39. A dancer, Ray Bolger, appeared in a TV commercial disseminated between February 1972 and July 1972 with the following sequence (CX 103(a)):

> RAY: The big important thing in our business — the movement of the body — is to keep your calcium balance. The extremities, for instance; the hands. We use our hands, in dancing, see? We must have a facility of having freedom of the hands. The hands are a beautiful thing when used properly. I mean when they're, ah . . . but they shouldn't look like you're playing Dracula, you know. And so therefore you want them kind of free and easy and you can't have arthritic little joints. So, one has to have sufficient calcium intake to have that calcium distributed properly . . . it's terribly important that you have your proper intake of milk. I suppose it would be obvious for me to say that I drink milk. But it's more than obvious; it's an absolute necessity for me.

The same continuity in substance was broadcast over radio (CX 61).

40. There was no representation in the "Dear Abby" commercial that milk would specifically prevent an individual from catching a cold or that milk had specific medicinal properties that would materially lessen the "probabilities" of catching a cold. Nor was there a representation in the Ray Bolger commercial that milk would specifically prevent arthritis or that it had specific medicinal properties which would materially lessen the "probabilities" of becoming arthritic. Milk has an image in the American culture of being the "perfect" food and exceptionally nutritious. And, in fact, milk is exceptionally nutritious. These commercials conveyed the message that a well-nourished body was less likely to "catch a cold" or suffer from arthritis, and that "Dear Abby" and Ray Bolger emphasized milk in their diets so their bodies would be well nourished, to provide their bodies with an abundance of necessary nutrients in which milk is unquestionably unusually rich. To read into these commercials the communications "If you drink milk you will not catch cold" or "If you drink milk you will not contract arthritis" is [26] unreasonable. But even if these communications were read into these commercials, they did not have the ability to mislead. Not even "the ignorant, the unthinking and the credulous" in today's world would believe that drinking milk will prevent colds or will prevent arthritis.

## Respondents' Market Research

In the preceding findings the undersigned concluded that the advertisements disseminated by the Milk Board and Cunningham & Walsh featuring "Every body needs milk," and some of those featuring "Milk has something for every body," made the representations alleged in the complaint, except those relating to the prevention of colds and arthritis. This conclusion was based upon an examination and viewing of the ads themselves, and is sufficient for the purposes of this decision. However, that conclusion is confirmed by market research conducted by respondents, or at their direction. Such market research disclosed, among other things studied, the messages and representations conveyed to the public. Contrary to respondent's contention (see, *e.g.*, RPF 831), the fact that the particular studies involved did not have the specific purpose of ascertaining the representations made by the advertising does not necessarily invalidate a showing of those representations when such emerged from the research.

41. On September 24, 1971, Cunningham & Walsh reported on an "on-air" test of three 60 second TV commercials (RX 1454), two of which, "Dear Abby" (CX 100(a) and (b)) and Vikki Carr's "Milk-a-holic" (CX 105(a) and (b)), have already been discussed. The audio portion of the Pat Boone commercial is set out in RX 1454(k). All three of these commercials were broadcast within a half hour period on August 10, 1971, in Fresno, San Diego and Bakersfield. The evening following the broadcast, telephone interviews were conducted with men and women (18 years and older) who had been watching the program on which the test commercials were aired (RX 1454(c)). Out of 9007 dialings, contacts were made with a total of 465 persons who were viewing when the commercials appeared over TV. These persons were asked questions designed to elicit the person's recall of the commercials, what was shown and said, and what the person interviewed thought "they were trying to tell you about milk" (RX 1454(z)90, 1454(c)). The responses of those interviewed were recorded in a series of "verbatims" (RX 1454(z)(4) through RX 1454(z)(84)).

42. The "verbatims" were coded in the report to group them in accordance with the ideas or portions of the ad recalled, and "played back" to the interviewer in response to questions. According to the report, the commericals communicated very well even though, in contrast to most commercials, they [27] depended almost entirely on the audio portion to convey their message (RX 1454(i)). The percentage of commercial recallers who played back each segment of the "Dear Abby" ad was set out in a tabulation (RX 1454(j)). Forty-seven percent of the male and twenty-one percent of the female recallers played back "Every body needs milk" or "everybody needs milk," two versions being stated here because by telephone it is clearly impossible to tell if a person intended to say "every" "body" or "everybody" (see RPF 834). Nineteen percent of males and

twenty-six percent of females played back "Every body needs milk" or "everybody needs milk" from the Pat Boone commercial (RX 1454(k)). For the Vikki Carr commercial, "Milk-a-holic," these percentages were thirty and twenty-six respectively (RX 1454(1)).

43. Inasmuch as "verbatims" are statements of the person interviewed which are written down by the interviewer, they are a clear indication of the messages and ideas communicated by the commercials. Respondents' arguments to the contrary are not persuasive and are rejected (see, RPF 816-50). There is no reason to believe that persons responding to telephone questions asking "What do you think they were trying to tell you about milk," and who replied "everybody needs milk" or "Every body needs milk," were using the word "needs" in a sense other than its ordinary meaning of "necessity," "necessary" or "required" (see RPF 857). This argument might have some cogency if there were only one or two such responses, but there were many. Nor is it valid to argue that the "verbatims" do not reveal the representations made by the ads because they elicited opinions already held about milk (RPF 857-70). Obviously, many people have positive ideas about milk, and many may even believe, apart from respondents' advertising, that milk is a dietary essential. The interviewer, however, did not ask what the person interviewed thought or believed about milk, or his opinions about milk, but what the ads *showed*, what the ads said and what the ads *were trying to tell you about milk* (RX 1454(z)(90)). Even though it is theoretically possible that a person interviewed might disregard the questions asked and respond with his preconceived opinions, the likelihood that that happened to any significant degree in this particular study is remote and provides no basis for disregarding the "verbatims" recorded.

44. The "verbatims" contained in the "on-air" test (RX 1454) reveal that the "Dear Abby," Pat Boone, and Vikki Carr commercials conveyed the representation that everybody needs milk as a dietary essential for good health. [28]

45. In July 1972 an "on-air" TV test was conducted of two Karen Valentine commercials, one using "Every body needs milk" and the other the then new slogan "Milk has something for every body" (CX 3000, p. 388; RX 1797). The purpose was to compare the effectiveness of the commercials in terms, among others, of "communication of main ideas." The commercial featuring "Every body needs milk" was tested in three cities, Bakersfield, Portland and Spokane. The commercial using "Milk has something for every body" was tested in Fresno, Eugene and Seattle. The evening following the "on-air" date, telephone interviews were conducted with men and women over 18

years of age who had seen the ads, and questions were asked "what was recalled about the commercials" and "what ideas about MILK were brought out in the commercials" (CX 3000, p. 391; RX 1797(d)). As in the case of the "Dear Abby," Pat Boone and Vikki Carr commercials, a large number of "verbatims" were recorded by interviewers (RX 1797(z)(5) through (z)(51)). In answer to the question "what ideas about milk were brought out in the commercial last night" (RX 1797(z)(93)), 24 out of 195 thought with respect to the "Every body needs milk" commercial that it conveyed the idea that milk was essential for everyone (RX 1797(z)(5) through (z)(55)). Some of those interviewed did more than simply play back "everyone needs milk" stating, for example, that the commercial brought out "everybody needs milk and its good for your teeth" (RX 1797(z)(7)), "that every body needs milk to keep healthy" (RX 1797(z)(8)), "that everybody needs milk and its good for you" (RX 1797(z)(23)), "Everybody needs milk no matter what your age is, adults and children . . . that's all I remember" (RX 1797(z)(34)), "That it is good for you and that everybody needs milk" (RX 1797(z)(41)), "It is good for you and things from milk can be gotten from no other source" (RX 1797(z)(43)), "Just her — and every body needs milk even Karen Valentine's body needs milk . . ." (RX 1797(z)(43)), "Basically, everyone needs milk, even a star personality . . . Every person needs to drink milk . . ." (RX 1797(z)(44)), "Every body needs milk. . . It's good for your body . . . More than soft drinks, but really can't remember if this was part of the commercial . . . That is so, I think" (RX 1797(z)(50)), "that people on the go need milk and it builds your body up" (RX 1797(z)(51)).

46. With respect to the version that used the slogan "Milk has something for every body," 26 out of 114 interviewed also thought the commercial communicated the idea that everyone needed milk (RX 1797(z)(56) through (z)(86)). Cunningham & Walsh reported that 26% of the "verbatim" responses fell into the category "*Every* body/*all* people/etc./ need milk" (RX 1797(k)) (emphasis in original). "Table 6" which Cunningham & Walsh [29] characterized as showing "what the new slogan means to people," and which was captioned "Interpretation of Slogan's Meaning," listed 26% as deriving the message "Everybody/all people/all human beings/young or old need/should have milk" (RX 1797(y)).

47. In August 1972 a Marketing Consulting and Research firm, Haug Associates, Inc., conducted an evaluation of a proposed billboard campaign for the Milk Board developed by Cunningham & Walsh using "Milk has something for every body" to compare that theme with "Every body needs milk" (CX 3001, pp. 11 through 70

(handwritten page numbers)). Part of this study involved showing a person a photograph of Phyllis Diller with the headline "Every body needs milk" at three exposure speeds, threshold of perception, one second and five seconds, with the question then asked "What are the main ideas the advertiser is trying to get across" (CX 3001, pp. 14–28). This evaluation showed that between 61 and 76 percent of those tested, depending on whether the exposure of the ad was "threshold," "one second" or "five seconds," thought the "main idea (net)" of the commercial featuring "Every body needs milk" was that "Every body/all ages need milk," and thought that the slogan "Every Body Needs Milk" itself meant that "Every body/all ages need milk" (CX 3001, pp. 40, 42).

48. Between 31% at threshold exposure and 73% at five seconds thought the "Main Idea (net)" of the Phyllis Diller ad with the slogan "Milk has something for every body" was that "Every body/all ages need milk" (CX 3001(z)(24)), and 73% thought "Milk has something for every body" means "Everybody/all ages need milk" (CX 3001(z)(26)).

49. As stated earlier, respondents' "Milk has something for every body" advertising commencing in late 1972 followed two and one-half years of intensive advertising over all media throughout California featuring "Every body needs milk." Under these circumstances the advertising using "Milk has something for every body" had the capacity to evoke the message and representation in the minds of members of the viewing, listening and reading public contained in the "Every body needs milk" advertising that milk was "essential, necessary and needed by all individuals." The results of the market research reviewed in the foregoing findings 45 through 48 demonstrate this.

50. Although the results of respondents' market research and the "verbatims" obtained are not projectable to any specific portion of the population, that fact does not destroy their value as evidence demonstrating that the advertisements had the [30] capacity to represent, and represented that milk was "essential, necessary and needed by all individuals" for an adequate diet and good health.

51. Dr. David Aaker was called by complaint counsel as an expert witness in the field of advertising and marketing research. Dr. Aaker is a Professor of Marketing at the University of California, Berkeley. He has done extensive research and writing in the area of marketing research. This has included developing questionnaires, overseeing master's theses, supervising the research of students, and designing research projects, some of which involved advertising or consumer perception of advertising. He is familiar with the pretesting and

post-testing of advertisements. He has also done research involving evaluating advertising copy. He has developed media models as predictors for marketing. He has published approximately 30 articles in the field of marketing. He has also published books entitled, *Multivariate Analysis in Marketing, Advertising Management, Advertising Management, Practical Perspectives,* and co-authored *Consumerism: Search for the Consumer Interest* and *Modern Marketing,* as well as a new book on marketing research not yet in print when this proceeding was completed. At the University of California, his ten years of teaching have included courses in marketing, advertising, consumer behavior, marketing research, marketing management, and statistics. He has been on the editorial board of *Management Science, The Journal of Marketing, The Journal of Marketing Research,* and *The Journal of Business Research.* In a University of Wisconsin poll, he was ranked among the 30 "thought leaders" in marketing. According to a Georgia State University poll, he was the 20th most quoted marketing writer in the United States. He has also been employed as a marketing consultant, working on a variety of aspects of advertising problems (Dr. Aaker, Tr. 5192–5201; CX 4000).

52. Dr. Aaker was asked to state his expert opinion whether consumers perceived advertising which carried the slogan "Every body needs milk" to mean that milk consumption is necessary for all persons (Tr. 5225). Dr. Aaker testified that in his opinion "a substantial majority of people would interpret such advertisements to mean that milk is necessary for all people" (Tr. 5226, 5233, 5290, 6392). Dr. Aaker based this opinion upon his expertise and upon marketing studies obtained from respondents and from other sources. In Dr. Aaker's opinion, respondents' advertising carrying the "Everybody needs milk" slogan basically reminded people of existing attitudes and beliefs they held about milk (Tr. 5528–29). In Dr. Aaker's opinion, pre-existing beliefs and attitudes about a product, [31] and behavior habits toward a product, will affect consumer perceptions of representations made in advertisements (Tr. 5229, 5235–44). In Dr. Aaker's opinion, pre-existing beliefs, attitudes and behavior relating to milk were well-developed, and were that milk is a nutritious food, and a healthy food, and in Dr. Aaker's opinion, a good majority believed that "adults need milk" (Tr. 5230, 5234). The fact that respondents' advertising using the theme "Every body needs milk" might strike a responsive chord in many persons exposed to that message, evoking pre-existing beliefs and attitudes about milk, does not lessen the significance of the message conveyed by respondents' advertising. Dr. Aaker's opinion

that a substantial majority of people would interpret advertising which used "Every body needs milk" to mean that milk is necessary for all people, in the sense that it is a dietary essential for good health, is credible, is supported by the market research of the Milk Board and Cunningham & Walsh or research conducted at their direction, by other market researchers in the record, and is consistent with the content of the advertisements themselves.

Milk as a Dietary Essential

53. Literally speaking not everyone needs milk in the sense that it is a dietary essential for every individual's good health. The human body needs the nutrients in milk for good health, but these can be obtained from other sources. The evidence in the record establishes, however, that this is not an easy matter for any given individual, particularly with respect to the body's calcium needs and certain other nutrients. Milk is one of the most nutritious foods in the nation's diet, and from the standpoint of the population as a whole, or even significant population groups, is literally "essential, necessary and needed." The withdrawal of milk from any major population group would amount to a nutritional disaster.

54. Nutrition texts are virtually unanimous in characterizing milk and dairy products dietary essentials for the body to obtain required nutrients. Krause and Hunscher, *Food, Nutrition and Diet Therapy* (5th Ed. 1972), states (RX 419(b)):

> The value of milk in the [diet] for all age levels has been repeatedly emphasized throughout this text. It furnishes about a hundred nutrients but is outstanding in importance for calcium, riboflavin and protein. Three-fourths of the calcium, [32] nearly one-half of the riboflavin, and one-fourth of the protein in the country's food supply come from milk. If milk is omitted or sparingly used in the diet, it is difficult to meet the requirement for calcium and riboflavin.

Another text, Dickie, *Diet in Health and Disease, Rationale and Practice,* (1974) states (RX 416(h)):

> Without milk, the diet will not meet the recommended dietary allowance for calcium and will probably be low in riboflavin and tryptophan.

Fleck, *Introduction to Nutrition,* (3rd Ed. 1976) states (RX 417(1)):

> Most authorities agree that milk is the single most important food in the diet. The greatest contribution of milk from the nutritive standpoint is calcium, which is very poorly distributed among other foods. It is therefore imperative that some kind of milk product be included in the diet every day to be assured of meeting the calcium requirement.

Robinson, *Normal and Therapeutic Nutrition,* (14th Ed. 1972) states (RX 435(k)):

> * * *There is no adequate substitute for milk. No food has a wider acceptability or offers a greater variety of uses. Adults of all ages should include about 2 cups of fluid milk daily, or its equivalent as evaporated milk, dry milk, or hard cheese. This allowance should be raised to 3 cups or more for school children and pregnant women and to 4 cups or more during the adolescent years and for the nursing mother.

Mitchell, et al., *Nutrition in Health and Disease,* (16th Ed. 1976) states (RX 422(k)): [33]

> * * * milk and milk products are the most important sources of calcium in readily available form. A few of the green, leafy vegetables used commonly in the Southern states are good sources of calcium, but others such as spinach, chard, beet greens, and rhubarb contain sufficient oxalic acid to form insoluble calcium oxalate, thus rendering the calcium unavailable. In most sections of the country greens are not used regularly enough or in sufficient quantity to be relied upon to replace milk, but they are important when milk is scarce or unobtainable.

Bogert, Briggs and Calloway, *Nutrition and Physical Fitness* (9th Ed. (1973) states (RX 415(m)):

> The inclusion of at least a pint of milk daily in the diet of adults is urged as the chief means for obtaining the calcium quota, as well as for the high quality proteins and vitamins that milk provides. For those who do not drink milk it should be incorporated in cooked foods wherever possible, and the more common use of cheese would also be advantageous.

55. Expert testimony from nutritional experts in this proceeding likewise established milk to be a dietary essential. Dr. Louise Page, Group Leader, Food and Diet Appraisal Research Group, Consumer and Food Economics Institute, United States Department of Agriculture testified (Tr. 8900):

> * * * Individuals can pick and choose among the other foods and come up with diets to get calcium but they will have a hard time getting recommended amounts of calcium* * *. You would have to rely heavily and constantly upon dark green vegetables, salmon, sardines, which is a very limited diet * * * if we ruled out milk as a source of calcium, there is not enough calcium provided by the other foods to meet the recommended amounts of calcium for all the population.

[34] Dr. George Briggs, Professor of Nutrition and Assistant Dean, College of Natural Resources, University of California at Berkeley, known nationally and internationally as an expert in human nutrition, and an author of textbooks and treatises on nutrition, testified (Tr. 7715):

> If suddenly milk ran out in California * * * and we all had to get calcium from other sources we would, we could do it but it would take some scientists working

together and some very strange foods coming into our supply and probably we would have to use calcium carbonate or calcium phosphate as a mineral, as fed to cows. That is where they get their calcium. We could do it if we had to do it but we prefer to do it because we are a country of choices by taking milk or milk products * * *.

Dr. Michael C. Latham, an international authority, Professor of International Nutrition and Cornell University, testified (Tr. 9710):

> Within the context of the U.S. dietary patterns of habit it is really quite difficult for individuals to get adequate amounts of such nutrients, particularly calcium and riboflavin without the consumption of milk. I am not saying it is impossible but it is quite difficult. . . .

56. As indicated, milk is by far the major source of calcium in the American diet. Since the 1940's, milk has supplied about 75% of the calcium (Dr. Briggs, Tr. 7840, 8149; Dr. Page, Tr. 8846, 8848, 8853; *National Food Situation,* RX 323(d), RX 1614(d)). The most recent United States Department of Agriculture statistics on the calcium contribution of milk is contained in the November 1976 *National Food Situation.* These figures show that fluid milk provides almost 50% of the calcium in the United States diet, 30.8% from whole milk and 14.8% from low-fat milk (RX 323(f)). *National Food Situation,* recently renamed *National Food Review,* is the authoritative and the only source for figures on the amounts of foods available in the United States food supply and the nutrients supplied therefrom (Dr. Briggs, Tr. 8143-52). [35]

57. Milk and milk products supply major amounts of various other essential nutrients to the American diet based upon the available food supply (Dr. Briggs, Tr. 8055-56). The most significant are (*National Food Situation,* January 1978, RX 1614(d); Dr. Briggs, Tr. 7840-41):

22% of the protein;
35% of the phosphorus;
21% of the magnesium;
39% of the riboflavin;
20% of the vitamin B-12

This is true even though milk and milk products provide only 11% of the food calories (RX 1614(d), see *Ten-State Survey,* CX 638 at III-13).

58. Notwithstanding the relative affluence of the United States, food consumption studies by the Department of Agriculture in the 1950's showed that calcium and vitamin A were often below the Recommended Dietary Allowance (RDA) levels (Dr. Page, Tr. 8831, 8904-05). The Household Food Consumption Survey done in 1965-1966 by the Department of Agriculture, furthermore, showed that

dietary intakes of some essential nutrients were decreasing rather than increasing. Diets nationwide frequently failed to provide even two-thirds of the RDA for calcium and vitamin A. Calcium shortages were attributed in part to low consumption of milk products (RX 403(b-d); CX 567(c); Dr. Briggs, Tr. 8137, 8165; Dr. Paige, Tr. 1047-49).

59. In 1969 a White House Conference on Food, Nutrition and Health was held (RX 401). One of the panels, considering the provision of food as it affects the consumer, expressed concern that decline in consumption of milk, especially among low-income families, was contributing to nutrient deficiencies (Dr. Paige, Tr. 1044-47; CX 640(y-z)).

60. In the late 1960's, in response to express direction from Congress, the Department of Health, Education, and Welfare began the first comprehensive survey ever developed to assess the nutritional status of a large segment of the United States population (CX 638(i-l). The Ten-State Survey, as it became known (Dr. Briggs, Tr. 8362), was specifically designed to evaluate the relationship between intake and utilization of food and total health status. The study sought to identify not only overt signs and symptoms of malnutrition but also to detect early "risk" signals (CX 638(i)-(3)). The Ten-State study involved clinical assessment, biochemical measurement, [36] dental examinations and dietary evaluation (CX 638(i-3) through CX (i-5)). California was one of the ten states surveyed (Dr. Briggs, Tr. 8168; CX 638(i-5)).

61. The Ten-State Survey showed evidence of malnutrition, most commonly in blacks, somewhat less frequently in Spanish Americans, and least frequently in whites (RX 324(i); CX 638(iv-289)). Vitamin A, riboflavin and calcium obtained from milk, were low (Dr. Briggs, Tr. 8169-70, 8353). Poor riboflavin status, measured biochemically, was a moderate nutritional problem among young people of all ethnic groups and low-income blacks of all ages (CX 638(iv-217); RX 324(e)).

62. An 8 ounce glass of milk provides 25% of the U.S. recommended dietary allowance for riboflavin for adults (CX 567(j)). Regarding calcium, the Ten-State Survey used no biochemical or clinical measurements, only dietary intake data, which were collected for certain age groups. The dietary standards of adequacy for calcium intake were considerably lower than the optimum amounts set by the RDA (Dr. Briggs, Tr. 8344, 8356, 8359, 8360; CX 638(v-2), (v-3) *compared with* RX 1721 at 102). Notwithstanding, large percentages of adolescents and pregnant and nursing women had deficient dietary intakes of calcium according to this measure (CX

638(v-81, v-233)). Eight ounces of milk provides 36% of the U.S. recommended dietary allowance of calcium for adults (CX 567(k)).

63. In young children, according to the Ten-State Survey, the prevalence of below-standard intakes of calcium increased with age due to decreasing milk consumption and replacement of milk by foods with a lower calcium density (CX 638(v-8)). In adolescents, the lowest calcium intakes occurred in blacks and Spanish Americans (CX 638(v-82)).

64. Another major study by the Department of Health, Education, and Welfare, known as the Health and Nutrition Examination Survey (HANES), was designed to measure the nutritional status of the United States population, using a representative probability sample of more than 10,000 persons aged 1 to 74 years (RX 1533(h)). Like the Ten-State Survey, this study was designed to detect early subclinical malnutrition as well as overt conditions (RX 1533(j)). The study showed that there is a significant portion of the United States population at risk of calcium deficiency, and the risk is greater in blacks than in whites generally (RX 1533(z 39-40), (z-43)).

65. The 1965 Department of Agriculture study (RX 403), the Ten-State Survey (CX 638; RX 324), and the Health and Nutrition Examination Survey (RX 1533), show that significant [37] numbers of the population are deficient in calcium, riboflavin or vitamin A. These nutrients, as stated, particularly the first two, are provided in major amounts in the United States diet by milk and dairy products (RX 1614; RX 323).

66. The Food and Nutrition Board, National Academy of Sciences, National Research Council, has established the amounts of calcium recommended each day for the United States population (RX 404 at 82-87, 129). Recommended Dietary Allowances (RDA) for calcium for various age and sex groups are (RX 404 at 129):

| | |
|---|---|
| Children 1 to 10 years | 800 mg |
| Teenagers 11 to 18 years | 1200 mg |
| Adults 19 to 51+ years | 800 mg |
| Pregnant and nursing women | 1200 mg |

The RDA is not a minimum requirement, but a standard designed to serve as a goal for good nutrition and to meet the known nutritional needs of practically all healthy persons (RX 404 at 2, 13; Dr. Briggs, Tr. 8097-98). RDAs are formulated by an expert committee of nutritional scientists and medical nutritionists. They are arrived at on the basis of developments in nutritional science and are revised approximately every five years. RDAs are approved by the drafting committee, the Food and Nutrition Board, and the executive committee of the National Academy of Sciences before they are published (Dr. Briggs, Tr. 8095, 8101, 8104). RDAs are developed specifically for use with the United States population, taking into account peculiarities of the food supply, eating patterns, climate and other factors. They are different from allowances used in other countries or by international agencies (Dr. Briggs, Tr. 8100). The National Academy of Sciences is the highest accepted authority on amounts of nutrients recommended for the United States population (Dr. Briggs, Tr. 8101; Dr. Page, Tr. 8888).

67. The "Basic Four" nutrition guide published by the U.S. Department of Agriculture lists milk and dairy products as a separate food group based on the fact, according to Dr. Louise Page (Tr. 8846–48), that "74% of the calcium available in the food supply comes from dairy products . . . So, if you do not have dairy products in your diet, it becomes quite difficult to get the recommended amount of calcium" (see also RX 1505(f), *Essentials of an Adequate Diet).*

68. From a nutritional standpoint it would be misleading to suggest that any significant population groups in the United States could obtain the necessary calcium in their diets from sources other than milk and dairy products. As [38] already stated, and as Dr. Page testified, "if we ruled out milk as a source of calcium, there is not enough calcium provided by the other foods to meet the recommended amounts of calcium for all the population" (Dr. Page, Tr. 8855, 8900).

69. Very few foods other than milk exist which are feasible alternatives for calcium (Dr. Briggs, Tr. 5777–78; CX 640(z–29), (z-32), (z–34); see USDA's food composition tables, RX 1478 and 1479). This is true for a number of reasons. Many foods high in calcium are not frequently consumed by all individuals, have limited availability due to seasons, or require consumption in excessive quantities to obtain sufficient calcium (Dr. Briggs, 5778–81, 7843–75, 7927–42, 7954–56; CX 657(d) and (e)). A number of foods high in calcium are relatively expensive, at least in relation to fluid milk, and others contain calcium not readily absorbed by the body due to the presence in the foods of oxyalate, fiber or phytic acid compounds (Dr. Briggs, Tr. 7809–18, 7842–49, 7872–74, 7933–38; CX 657(d) and (e), CX 640(z-28)–(z–29)). Further, other foods or sources of dietary calcium may have undesirable characteristics at the consumption levels for adequate calcium intake, may not lend themselves to easy or

convenient preparation, may not be practicable as a regular part of the daily diet, or may not be palatable (Dr. Briggs, Tr. 7843–45, 7865–69, 7928–35, 7955–56). Finally, dietary supplements such as calcium pills are not a practicable source of dietary calcium for large segments of the population. Dr. Briggs, who had experience for five years as a member of a panel of experts convened by the Food and Drug Administration to study over-the-counter mineral and vitamin products, testified that calcium pills for general use posed a risk of over-dosage and bodily imbalance which could be harmful or even dangerous (Dr. Briggs, Tr. 7143, 7822–25).

70. Foods which may supply a major part of the calcium in the diets of the populations of other countries in the world are not part of the United States food pattern. For example, tortillas made with lime-soaked corn (Dr. Briggs, Tr. 7827–28; CX 640(z)(29)). There is evidence that nutrition problems due to calcium deficiency exist in countries where milk is not widely available. Osteomalacia, a condition reflecting low intake of calcium and vitamin D in adults, is prevalent in the Orient where diets are low in calcium (CX 640(z)(29–30); Dr. Briggs, Tr. 7828, 7830–34). It cannot be assumed that calcium intake is adequate in countries where people do not drink milk or consume dairy products. Nor can it be assumed that low calcium intake in those countries is associated with normal health and growth, and has no adverse effect on the populations of such countries. [39]

## Primary Lactase Deficiency

Insofar as the general population is concerned, those not subject to "symptomatic lactose intolerance" or allergic to milk, there is no issue in this proceeding respecting the truth of the advertising of the Milk Board and Cunningham & Walsh. The complaint challenged respondents' advertising only as directed to "individuals with health problems such as certain allergies, and symptomatic lactose intolerance." The issue, therefore, is whether respondents' advertising was false, misleading, deceptive, or unfair in view of the presence in the population of persons who are "symptomatic lactose intolerant" and of persons who are allergic to milk.

## Nature and Cause

71. Although not in general use in the medical and scientific iterature on the subject, the term "symptomatic lactose intoler-nce" describes a condition in which individuals are intolerant to actose when ingested and develop symptoms from such ingestion.

72. Lactose is the sugar found in milk, and is sometimes called "milk sugar." Lactose is produced only by the cells found in a lactating mammary gland (Dr. Kretchmer, Tr. 392; CX 244, p. 3). The constituents of cow's milk are water, lactose (about 5%), fat (about 4%), vitamins, minerals, and proteins (Dr. Briggs, Tr. 5845, 5847; RX 295). Milk is the only natural source of lactose, it does not occur naturally in other animal or vegetable foods. Lactose is also present in significant quantities in certain dairy products made from milk, in whole or in part, such as ice cream and cottage cheese (CX 245, Table 2). A number of other products manufactured from milk, such as hard cheese and true yogurt, contain little lactose because it is fermented out during the manufacturing process (Dr. Herman, Tr. 12253-59). Some yogurt in the U.S. is not completely fermented, and thus contains a somewhat greater amount of lactose than true yogurt (Dr. Kretchmer, Tr. 392, 431-32). Lactose in small amounts is present in some manufactured foods made with milk as an ingredient, and is added in some instances to other foods during their manufacture (Dr. Kretchmer, Tr. 392; Dr. Briggs, Tr. 5847-58, 7764-65, 7730, 8501; RX 251(c); CX 531).

73. Lactose is a disaccharide or double sugar composed of two monosaccharides, glucose and galactose. Lactose, as such, cannot be absorbed through the intestinal wall, but for absorption must be broken down into the foregoing two monosaccharides (CX 244, pp. 3-4; Dr. Briggs, Tr. 5901). [40]

74. Lactose is metabolized or broken down in the intestinal track, through the agency of an enzyme known as lactose, into glucose and galactose which are absorbable. Lactase is present in the walls of the small intestine (CX 244, pp. 4-5, Dr. Briggs, Tr. 5879, 5889, 8464-65, 8501; Dr. Kretchmer, Tr. 393), and is the only enzyme which metabolizes lactose (Dr. Paige, Tr. 889-91; Dr. Kretchmer, Tr. 393; CX 244, p. 5). If the quantity of lactose entering the small intestine exceeds the lactase activity available, the excess lactose will not be metabolized (Dr. Paige, Tr. 889-91; Dr. Kretchmer, Tr. 393, 653-57, 667; see also CX 244(f), 500(g)).

75. Lactase sufficient to digest the lactose in milk is normally present in the small intestine in all persons until the age of weaning (Dr. Kretchmer, Tr. 404; CX 498(e)-(g); CX 244(h)). Thereafter, in much of the world's population particularly non-caucasians, the level of lactase present in the intestinal tract declines from infancy in a normal progression to a point which may be described as low lactase activity or lactase deficiency (Dr. Paige, Tr. 894; Dr. Kretchmer, Tr. 397; Dr. Briggs Tr. 8590; Dr. Latham, Tr. 9166-67; CX

244, 498). This type of low lactase activity is often referred to as "primary lactase deficiency" (Dr. Paige, Tr. 894).[1] This term will be used herein for convenience although the word "deficiency" is arguably inappropriate when probably a majority of the world's population has low lactase activity after early childhood (see CX 244, p. 3).

76. The continuation of high levels of lactase activity after early childhood and throughout adulthood in persons of European and particularly northern European origin is an inherited trait (Dr. Kretchmer, Tr. 397; Dr. Paige, Tr. 894; Dr. Latham, Tr. 9181) which appears to be associated with many generations of milk drinking and dairy product consumption (CX 246, 589, 595).

77. Where lactase activity is deficient, lactose present in milk, depending on the amounts ingested in relation to the lactase activity present, may not be digested. [41] that is, broken down into glucose and galactose. Reduced absorption of lactose as a consequence of low lactase activity is referred to as lactose malabsorption (CX 636; Dr. Kretchmer, Tr. 398). Lactose not digested in the small intestine as a result of lactase deficiency passes into the large intestine where it is subject to bacterial action and ferments or decays. The result may be the emergence of symptoms in the individual, generally mild, such as "gas," "bloating," "cramps," or "loose stool" (Dr. Kretchmer, Tr. 401-02; Dr. Scrimshaw, Tr. 9853; CX 244(g); CX 500(d)). The term lactose intolerance or "symptomatic lactose intolerance," used in the complaint, would apply to this condition (Dr. Paige, Tr. 850, 897; Dr. Latham, Tr. 9157, 9170; see also CX 458, 464, 484, 485, 517).

78. As indicated, the presence of symptoms and their degree in those lactase deficient is related to the quantity of lactose ingested in relation to the available lactase activity (Dr. Briggs, Tr. 8536-37; Dr. Kretchmer, Tr. 653-57, 667; Dr. Scrimshaw, Tr. 9848-53, 9856), and to some extent possibly to the circumstances of ingestion, for example whether in milk or with other food (Dr. Briggs, Tr. 8200-08; Dr. Paige, Tr. 1285-89; CX 507). The greater the quantity of lactose ingested, the more probable is the occurence of symptoms mentioned in the preceding finding, and the greater the probable degree of those symptoms (Dr. Kretchmer, Tr. 650, 653-57, 667; Dr. Scrimshaw, Tr. 9848, 9853, 9856; Dr. Herman, Tr. 12117, 12381; Dr. Paige, Tr. 948).

79. Medical science has not found any means for preventing or

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[1] There are two other forms of lactase deficiency, not principally involved in this proceeding, "congenital" and "secondary." The former refers to lactase activity low or absent at birth, sometimes called "alactasia" (Dr. Kretchmer, Tr. 394-95; Dr. Paige, Tr. 892; CX 484(a)). This results from a genetic disorder and is very rare. "Secondary" lactase deficiency results from disease, surgery, or other secondary causes which eliminate or reduce lactase activity in the intestinal tract (Dr. Paige, Tr. 892-93; Dr. Kretchmer, Tr. 396; CX 407(b); RX 308(k)(1)).

arresting the genetically programmed decline in lactase activity after infancy among those subject to primary lactase deficiency (Dr. Paige, Tr. 895; CX 589). Nor has medical science found any means for inducing increased lactase activity after it has normally declined under such circumstances (Dr. Kretchmer, Tr. 398, Dr. Paige, Tr. 895; Dr. Herman, Tr. 12086-88).

80. Lactose malabsorption, as indicated, is a term used to describe reduced absorption of lactose among those lactase deficient, as determined by a lactose tolerance test (CX 636; Dr. Kretchmer, Tr. 398, 893). Lactose malabsorption obviously implies lactase deficiency since one is directly dependent on the other (Dr. Kretchmer, Tr. 893). An individual found to be lactase deficient therefore is often referred to as a lactose malabsorber (Dr. Paige, Tr. 893; Dr. Kretchmer, Tr. 399; see also CX 405, 449-84, 683). If an individual [42] who is lactase deficient, as determined by any of three test methods,[2] experiences symptoms following the ingestion of the test dose of lactose, the individual is considered "lactose intolerant."

Prevalence of Primary Lactase Deficiency

81. The record contains reliable evidence, within fairly broad ranges, of the incidence in various population groups of lactase deficiency of the primary type where the lactase enzyme level is high at birth but falls to a deficiency level after weaning through mid-childhood in persons without disease as a normal course of events due to genetic factors. In considering such incidence, however, it cannot be assumed that all individuals with lactase deficiency necessarily cannot drink milk without having symptoms or discomfort. Many persons with low lactase levels, if not most, drink one, two or three glasses of milk per day without any symptoms whatsoever (CX 244, p. 7).

82. Lactase deficiency is common throughout the world and in the United States. In fact, as stated, the bulk of the world's non-caucasian population is probably lactase deficient. In contrast, high levels of lactase activity are present throughout life among many

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[2] The most widely used method for determining whether an individual is lactase deficient is the lactose tolerance test. This method involves having a subject ingest, usually in around 8 ounces of water, at one sitting, after fasting, a relatively large quantity of lactose, generally 50 grams. This is the lactose content of slightly over one quart of milk. A determination is then made of lactose absorption by either (1) obtaining blood samples from the individual at intervals after the lactose ingestion to determine whether the level of the sugar in the individual's blood has risen significantly or (2) measuring breath hydrogen (see Dr. Paige, Tr. 891; Dr. Kretchmer, Tr. 399; Dr. Herman Tr. 12025, 12245-50). The most accurate, but less frequent, method for determining lactase deficiency is a jejunal biopsy which involves removal of a sample of intestinal mucosa and assaying the sample (Dr. Kretchmer, Tr. 394-95; Dr. Paige, Tr. 391; Dr. Latham, Tr. 9168; CX 244, p. 9-10). The biopsy will show the precise level of lactase activity, and if there is a deficiency, whether it is primary or secondary (Dr. Herman, Tr. 12026, 12148, 12644-45, 12705).

Europeans, particularly northern Europeans, and among those with that ancestral background. [43]

83. Dr. David M. Paige, Assistant Professor of Pediatrics and Associate Professor of Maternal and Child Health, Johns Hopkins University, provided the following estimate of the prevalence of primary lactase deficiency among various population groups (Tr. 889-900, 934): northern European ancestry, 3%-4%, European ancestry but not northern European, 60%-65%, Blacks, 75%, Asians, 70%-100%, Mexican-Americans (Spanish surname), 53%, Caucasians overall, 15%-20%. Dr. Kretchmer estimated the white population of the United States to be 12% lactase deficient, and the country as a whole to be 15% to 20%. According to Dr. Kretchmer, persons of Asian origin were 70% to 100% lactase deficient, blacks about 70%, and persons of Hispanic background about 60% (Tr. 412-15, 428). Dr. Herman believed 10% of the population of the United States of northern European origin were lactase deficient and 50% of the population of other origins (Tr. 12045-47). In Dr. Herman's estimate 60% of the U.S. population had a northern European background and 40% other than northern European. See also CX 498 and 595.

84. Dr. Nevin S. Scrimshaw and Dr. Michael C. Latham are both internationally known and distinguished medical experts and authorities in the field of international nutrition and many other related scientific fields. Dr. Scrimshaw is currently Professor of Human Nutrition at M.I.T. Dr. Latham is Professor of International Nutrition at Cornell, as stated earlier. George C. Briggs, Ph.D., also earlier mentioned, is a nationally and internationally known nutritionist and Professor of Nutrition at the University of California at Berkeley. In research studies Dr. Scrimshaw reported the prevalence of lactase deficiency shown among non-Caucasians was 60% to 90%, and among Caucasians overall 5% to 15% (RX 305(c)); see also 306(c). In a paper for the Protein Advisory Group and other documents, Dr. Latham reported that 70% to 100% of non-Caucasians were shown by studies to be lactase deficient, and 10% to 20% of Caucasian adults (RX 308(t); CX 599(d), 600(a), 635(p)). Dr. Briggs believed 60% to 80% of non-Caucasians were lactase deficient and 5% to 10% of Caucasians.

85. An article in the record, *A Review of Dietary Lactose And Its Varied Utilization by Man* published in 1978 by Dr. Norton S. Rosensweig, Associate Professor of Medicine at Cornell University Medical College, contains a table with references to research studies showing the incidence of lactase deficiency or "hypolactasia" in various population groups (CX 244, Table 2). According to Dr.

Rosensweig's Table, lactase deficiency is present to the following degree in the following population groups: whites, 6% to 21%, Asians, 100%, blacks, 70% to 77%, and Mexican-Americans, 54%. [44]

86. Under any of the estimates, it is evident that a large number of people in California are lactase deficient. In 1970 California had a population of almost 20 million people (CX 694, Characteristics of the Population of California, U.S. Bureau of Census). Among these were 212,121 Japanese, 170,374 Chinese, 135,641 of Philippine origin, and 16,634 Koreans (CX 694(l) and (m)). The total of these persons of Asian origin amounts to 534,770, and there were Asians in smaller numbers from other countries such as Vietnam. There are in California, according to the 1970 census, approximately 1,397,138 blacks (CX 694(f)). Overall the non-white population of California in 1970 amounted to a total of 2,101,258 persons of all ages, approximately 1,890,635 being 5 years old or older. There were, moreover, in California 2,369,292 persons of Spanish origin or descent (CX 694(f)), the bulk of these coming from Mexico or whose parents came from that country. Additionally, large numbers of the remaining approximately 14,755,000 persons in California in 1970 clearly had non-northern European ancestry.

87. Application to these population figures of the percentages of various population groups which are lactase deficient as set out in the preceding findings readily establishes that at least several million people in California are lactase deficient.

### Primary Lactase Deficiency, Milk Intolerance, and Milk Drinking

88. This proceeding is concerned with "symptoms" occurring in persons with primary lactase deficiency from the drinking of milk. It is not primarily concerned with reports in the scientific and medical literature of symptoms in lactase deficient persons resulting from the administration of the standard lactose tolerance test. Reports in the literature of the occurrence of "gas," "bloating," "cramps," "loose stools," or "diarrhea," following administration of the standard lactose tolerance test do not necessarily mean that such symptoms will occur in those who are lactose intolerant from the drinking of usual and moderate amounts of milk, that is, an 8 ounce glass or so at a time. The standard lactose tolerance test, used in many medical and scientific studies of lactose deficient subjects, is an abnormal situation (Dr. Briggs, Tr. 7246). In the standard lactose tolerance test, "very high doses of lactose are given, much larger than are normally present in the amounts of milk that people drink commonly at one sitting" (Dr. Latham, Tr. 9157). The standard

lactose tolerance test involves, as previously described, the administration of 50 grams of lactose to an adult, equivalent to that contained in more than a quart of milk (Dr. Paige, Tr. 1003–04; Dr. Kretchmer, Tr. 566; Dr. Briggs, Tr. 7348). In contrast, an 8 ounce glass of milk [45] contains about 12 grams of lactose and the lactose is mixed with proteins and fat, and other substances. Where symptoms do occur in lactase deficient persons from the ingestion of lactose, there is evidence that they tend to be fewer and milder where milk is consumed than where an equivalent amount of lactose present in the milk is ingested in water (see CX 507, "Comparison of whole milk and skim milk with aqueous lactose solution in lactose tolerance testing, "published in *The American Journal of Clinical Nutrition,* April 1973; Dr. Briggs, Tr. 8200–08; Dr. Paige, Tr. 1285–89). In the standard lactose tolerance test, moreover, the lactose is fed dissolved in water on an empty stomach after a fast (Dr. Kretchmer, Tr. 567). Experiencing symptoms during a lactose tolerance test, therefore, is not necessarily a diagnosis of milk intolerance, at least to milk in moderate amounts (Dr. Paige, Tr. 1053; Dr. Briggs, Tr. 6005, 6030, 7303, 8222; Dr. Kretchmer, Tr. 661–62; CX 595(b)).

89. Consistent with the preceding finding, a group of eminent scientists who make up the Protein Advisory Group and advise the World Health Organization, the Food and Agriculture Organization, UNICEF, the World Bank, UNESCO, and other United Nations agencies (Dr. Scrimshaw, Tr. 9830; Dr. Latham, Tr. 9148–49) in an official statement, *PAG Statement on how Lactase Activity and Milk Intolerance,* issued in 1972 said (CX 636(d)):

> An intolerance to lactose in the large amounts commonly used in load tests (50 g of lactose or more per m2 of body surface) which correspond in an adult to the consumption at one time of 1.0–1.5 liters of milk, gives no information on the existence of milk intolerance when the milk is consumed in moderate quantities.

This pronouncement was repeated in the official "UN Statement on Milk" issued in February 1972 (CX 636(f)).

## Proportion of Lactase Deficient Person Having Symptoms from Drinking Milk and the Significance of Such Symptoms

### Expert Opinion

Five experts gave their opinions of the proportion of lactase deficient persons experiencing symptoms from drinking milk in moderate amounts at a sitting, and their estimates of the significance of such symptoms. The opinions of these experts are given below in the order in which they appeared in this proceeding. [46]

Dr. Norman Kretchmer

Dr. Kretchmer's curriculum vitae is in the record as CX 4004. Dr. Kretchmer was called by complaint counsel. He graduated from Cornell University in 1944 with a B.S. in animal Physiology. He continued his studies and obtained an M.S. in physiological chemistry from the University of Minnesota in 1945, a Ph.D., also in physiological chemistry, from Minnesota in 1947, and an M.D. from New York State College of Medicine in 1952.

From 1953 to 1959, Dr. Kretchmer was Assistant Professor, later Associate Professor of Pediatrics at Cornell University. He then became Professor of Pediatrics at Stanford University, a position which he held from 1959 to 1969. In this capacity he was in charge of the teaching program for medical students and pediatric services at Stanford Medical Center (Dr. Kretchmer, Tr. 362; CX 4004). In 1969 Dr. Kretchmer became Chief of the Division of Developmental Biology and Chairman of the Program in Human Biology at Stanford, acting in that capacity until 1972. Dr. Kretchmer continued as Professor of Pediatrics until 1974. Meanwhile, in 1970 Dr. Kretchmer accepted a post as Visiting Professor at the University of Lagos, Nigeria, where he performed research to determine the incidence of low lactase activity in tribal groups in relation to possible genetic mechanisms (Dr. Kretchmer, Tr. 415, 423; CX 499).

In 1974 Dr. Kretchmer moved to a position with the National Institutes of Health as Acting Director of the Institute on Aging. During Dr. Kretchmer's year as Acting Director of the Institute on Aging, he was also Director, National Institute of Child Health and Human Development, a position he currently holds.

Dr. Kretchmer holds memberships in a number of medical societies concerned with pediatrics, growth and development, biology and clinical nutrition. He is the current President of the American Pediatrics Society (Dr. Kretchmer, Tr. 357).

90. Dr. Kretchmer gave his estimate of the proportion of lactase deficient persons who would experience symptoms from drinking a glass of milk, making clear that his estimates were relatively "rough" (Tr. 417):

> The only opinion I have — my opinion is based on work that we did with the American Indians, as well as literature. I am trying to think of the name of the fellow that did it, but I can't remember. I think — and I can't remember the exact figure, but it [47] seems to me that one glass of milk, which would be the equivalent to, say, 10 to 14

grams of lactose, within that range, there would be about 20 to 25 per cent of the people that would react with intolerance.

The work Dr. Kretchmer referred to with American Indians is in the record as CX 492 "Lactose Malabsorption Among the Pima Indians of Arizona." This study did not use milk as a testing substance. At Tr. 419, Dr. Kretchmer stated that he did not give the 25 percent as a "hard and fast" figure. At Tr. 816 Dr. Kretchmer recalled his testimony the previous day as "I guess I estimated somewhere between 12% and 25% for milk" as a basis for producing "signs and symptoms" among lactose malabsorbers. With respect to the significance of "signs and symptoms," Dr. Kretchmer gave a range from mild gas to diarrhea, but did not provide percentage estimates for lactose malabsorbers experiencing milk "signs or symptoms" or for those experiencing more significant manifestations (Tr. 400-20).

### Dr. David M. Paige

Dr. Paige's curriculum vitae is in the record as CX 4005. Dr. Paige was called by complaint counsel. He is Assistant Professor of Pediatrics and Associate Professor of Maternal and Child Health, Johns Hopkins University. Dr. Paige obtained his B.S. in 1960 at Long Island University and his M.D. at New York Medical College in 1964. Following this, he did a pediatric internship and residency at the State University Downstate Medical Center of New York. During 1965-67, Dr. Paige served with the Public Health Service on a Navajo Indian reservation in Arizona, with clinical responsibilities for patients and for field medical problems such as tuberculosis control. He also had some responsibility for distribution of Department of Agriculture supplemental foods, including milk. As a result of his experience with the Public Health Service, Dr. Paige decided to obtain additional training in public health (Dr. Paige, Tr. 848).

Dr. Paige returned to school, attending Johns Hopkins University where he performed a second pediatric residency and obtained a Master's degree in Public Health in 1969 (Tr. 848; CX 4005). Since 1969 he has been a pediatrician at the Johns Hopkins Hospital. In 1972 Dr. Paige became Associate Professor of Maternal and Child Health and Assistant Professor of Pediatrics, positions which he currently holds (Dr. Paige, Tr. 842-43; CX 4005). At Johns Hopkins, Dr. Paige's current responsibilities are patient care, teaching and research. He has clinical responsibility for diagnosis, treatment and, when possible, preventive care of infant and child patients (Dr. Paige, Tr. 843-45). [48]

A number of medical researchers at Johns Hopkins have been working for a considerable period in the lactase deficient, lactose intolerance area (see, for example, CX 405). These researchers have become known among those concerned with this subject as the "Johns Hopkins group." Dr. Paige became affiliated with this group and most of his research activities have been connected with lactose intolerance questions (Dr. Paige, Tr. 853-54; CX 4005(d)-(g)).

Dr. Paige holds memberships in a number of medical and nutritional associations (CX 4005). He also has acted as a consultant to the National Institutes of Health, the United States Department of Agriculture and the Congressional Office of Technology Assessment (Dr. Paige, Tr. 857-58, 1149-48; CX 4005).

91. In Dr. Paige's opinion "approximately 15 to 20 percent" of the U.S. population are lactase deficient, lactose malabsorbers (Tr. 934). Of these persons who are lactose malabsorbers, Dr. Paige estimated that virtually no children aged 1 to 5 would experience "signs or symptoms" from one glass of milk, that about 10% of 5 to 8 year olds, about 20% of 8 to 12 year olds, and about 33% to 40% of 12 to 18 year olds would have "signs or symptoms" from one glass of milk (Dr. Paige, Tr. 920). He estimated that 55% of all adult lactose malabsorbers would experience "signs or symptoms" from one glass of milk (Dr. Paige, Tr. 921). This testimony of Dr. Paige is substantially at variance with the results of the double-blind study, described later in this decision, conducted by him in 1975 and published in the *American Journal of Clinical Nutrition* in which he and his co-workers from Johns Hopkins Medical Institutions reported only about 13.5% of adult lactose malabsorbers to have symptoms with the consumption of 8 ounces of whole milk (CX 551(c)). The departure in his testimony from the results of this study lacked a convincing basis and was unpersuasive (Tr. 1171-72).

92. With respect to the foregoing percentage figures for "signs or symptoms" in various age groups, Dr. Paige was referring to "some gastric discomfort and gas maybe, at the most" (Tr. 1154), that is, "mild symptoms" (Tr. 1155). Dr. Paige did not attempt to quantify any proportion of lactose malabsorbers experiencing other than "mild symptoms."

## Dr. Michael C. Latham

Dr. Michael C. Latham was called by respondents. Dr. Latham has achieved international recognition in the field of nutrition. His curriculum vitae is in the record as RX 1522. [49] He received his bachelor's degree in 1949 and his medical degree, equivalent to the "M.D." in the U.S., in 1952 at Trinity College, University of Dublin, Ireland (Dr. Latham, Tr. 9117-18; RX 1522). Following graduation, Dr. Latham served a medical internship in England and performed his residency in internal medicine at the Methodist Hospital in Los Angeles. Dr. Latham also has a Diplomate in Tropical Medicine and Hygiene from the University of London and a Master's in Public Health from Harvard University (Dr. Latham, Tr. 9121–23; RX 1522(a)).

From 1954 to 1955 Dr. Latham was a senior physician at a major London hospital, and following this he became Medical Officer and later Medical Officer in Charge of the Nutrition Unit, Ministry of Health, Tanzania. There he was in charge of nutrition services for the entire country. He also taught at the medical school, engaged in nutrition research, advised the government and consulted with international agencies (Dr. Latham, Tr. 9120–21). While working in Tanzania, Dr. Latham administered relief measures during two major famines and helped to identify the country's major nutritional problems. At that time he was also involved in administering UNICEF's milk distribution program to malnourished children. For his work in Tanzania Dr. Latham received the Order of the British Empire from Queen Elizabeth II (Dr. Latham, Tr. 9123–26). His experience in Tanzania created Dr. Latham's later interest in milk research (Tr. 9143).

Following his experience in Tanzania, Dr. Latham was appointed a Research Fellow at Harvard University and later became Assistant Professor of Nutrition. While at Harvard, Dr. Latham directed a landmark study on diet and heart disease known as the "Boston-Ireland" study (Tr. 9122–23).

In 1968 Dr. Latham was appointed Professor of International Nutrition, Cornell University, Ithaca, New York, where he is also Director of the Program in International Nutrition. This program trains United States and foreign students in food and nutrition problems of low-income communities and countries. Cornell's program is the largest of its kind (Dr. Latham, Tr. 9127–30; RX 1735). At various times, Dr. Latham has advised international U.N. agencies, such as WHO (World Health Organization), FAO (Food and Agriculture Organization), UNICEF and, domestically, the Peace Corps on nutritional matters (Tr. 9138–39).

Dr. Latham was a leading participant in the committee of the United Nations Protein Advisory Group which developed a position paper on lactose intolerance in 1971–1972, described later in this decision. He wrote the major background paper considered by the group, which was an extensive [50] review of the literature on the subject (Dr. Latham, Tr. 9148, 9150, 9154–55; Dr. Scrimshaw, Tr. 9959; RX 308). Dr. Latham was also a participant in the National

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Academy of Sciences committee which developed a position paper on lactose intolerance in 1972 (Dr. Latham, Tr. 9234; Dr. Scrimshaw, Tr. 9959).

Dr. Latham has been an active researcher on the practical significance of lactose intolerance in the United States. Among his contributions to the field have been investigations of the prevalence and severity of symptoms upon milk consumption (Dr. Latham, Tr. 9273-90; CX 600), a comparison of milk consumption in black and white children (Dr. Latham, Tr. 9300-04; CX 599), and research into lactose-reduced milk (Dr. Latham, Tr. 9369, 9377-83; CX 494). He has also investigated the relationship between milk consumption and lactose intolerance in the Tanzanian Masai tribe (Dr. Latham, Tr. 9338-49; RX 1736).

Dr. Latham has published extensively on many topics in the field of human nutrition in both developing countries and the United States (RX 1523). One of his publications is *Human Nutrition in Tropical Africa* (1965), which is now in its sixth printing (Dr. Latham, Tr. 9127). Another of his publications, the *Scope Manual on Nutrition*, of which he is senior author, is made available by a pharmaceutical firm to every medical student in the United States. The book was prepared because of Dr. Latham's concern about the general lack of nutrition training of physicians (Dr. Latham, Tr. 9244-50; RX 281). Dr. Latham is currently serving on the Editorial Board of the *American Journal of Clinical Nutrition* (Tr. 9259, 9443), is an Associate Editor of *Nutrition Reviews*, and is a member of many medical and nutritional associations (RX 1522).

Dr. Latham has acted as an advisor to various governmental bodies on public policy issues relative to nutrition. He was Vice Chairman of the panel of the 1969 White House Conference on Food, Nutrition and Health which dealt with the nutritional problems of groups for whom the Federal government has special responsibility, *e.g.*, American Indians, migrant workers, Eskimos, and Puerto Ricans (Dr. Latham, Tr. 9139). He was among three expert witnesses to testify at the opening session of hearings of the U.S. Senate Select Committee on Nutrition and Human Needs. He also was an invited witness at the "cereal hearings" of the United States Senate Subcommittee on the Consumer in 1970 (RX 1522(d)). Dr. Latham is a member of the Council on Children, Media and Merchandising, a group concerned with the impact of television advertising on child nutrition (RX 1522(d)). He has testified in various FTC proceedings as [51] an expert called by complaint counsel (for example, in *ITT-Continental Baking Co., Inc.*, "Hostess Twinkies," Dkt. 8860; Dr. Latham, Tr. 9130-31). Dr. Latham also testified in the FTC hearings on the proposed trade regulation rule on food advertising in 1976, when he presented opinions on various nutritional advertising issues, including lactose intolerance (Dr. Latham, Tr. 9131-32; CX 649).

Dr. Latham has authored or co-authored over 85 articles and research papers, including four books. Dr. Latham is an outstanding scientist, an authority in the field of human nutrition, and an expert of unparalleled qualifications on the subject of lactose intolerance and milk drinking. His testimony is entitled to great weight.

93. According to Dr. Latham 2% or at most 4% of the total population of the United States would experience symptoms of some sort from drinking one glass of milk (Tr. 9255). The number who would regard such symptoms as a deterrent to milk drinking in Dr. Latham's opinion would be between 1/2% and 1% (Tr. 9257). Dr. Latham based his opinion on the literature, the reports of other people's studies, on the work he and his colleagues had done, and on his experience in programs and other activities in the field of nutrition and milk consumption (Tr. 9257-58). Dr. Latham has kept up-to-date on all literature on the subject of lactose intolerance and the development of symptoms from milk drinking through Cornell University's computerized data retrieval system (Tr. 9258). Dr. Latham keeps familiar with unpublished or to-be-published studies through attending professional meetings and discussions with colleagues. Also, as a member of the Editorial Board of the *American Journal of Clinical Nutrition* and for certain other journals, he reviews submitted papers (Tr. 9259).

### Dr. Nevin S. Scrimshaw

Dr. Scrimshaw, a member of the National Academy of Sciences and an authority of international standing in human nutrition, was called by respondents and has been described briefly earlier. His curriculum vitae is in the record as RX 1520. As in the case of Dr. Latham, Dr. Scrimshaw's qualifications are extraordinary. His opinions in the area of lactose intolerance and milk consumption are as authoritative as it is possible to obtain. They are entitled to great weight. Dr. Scrimshaw is a Phi Beta Kappa graduate in Zoology from Ohio Wesleyan University in 1937. He obtained a Masters degree in biology from Harvard in 1939, a Ph.D. [52] in physiology from Harvard in 1941, and an M.D. at the University of Rochester in 1945. He interned at Gorgas Hospital in the Panama Canal Zone, 1945-46. In 1959 he obtained a second Masters degree, this time in Public Health, specializing in epidemiology, also from Harvard (Dr. Scrimshaw, Tr. 9828-30; RX 1520). Dr. Scrimshaw has two honorary doctorate degrees — in Public Service from Ohio Wesleyan University in 1961 and a Doctor of Science from the University of Rochester in 1974 (RX 1520).

During the 1950's Dr. Scrimshaw worked on questions relating to nutritional problems and issues applicable to Central America. He headed the Institute of Nutrition of Central America and served as a consultant in nutrition to the World Health Organization (Dr. Scrimshaw, Tr. 9829; RX 1520).

In 1961 Dr. Scrimshaw was appointed Professor of Human Nutrition at M.I.T. where he established a multidisciplinary department concerned with all major aspects of human nutrition (Dr. Scrimshaw, Tr. 9830, 9831; RX 1520). In 1976 he set up the M.I.T. International Nutrition Planning Program, a cooperative venture with the Departments of Political Science, Economics and Urban Studies and the anthropology group of the Humanities Department. About 200 graduate students are enrolled currently in the international program which is operated in close collaboration with the Center for International Health at Harvard. Dr. Scrimshaw is Director of the M.I.T. International Program and Co-Director of the joint MIT/Harvard program (Dr. Scrimshaw, Tr. 9831-32). He is also Director of the M.I.T. Clinical Research Center, which does inpatient and outpatient metabolic studies in nutrition (Dr. Scrimshaw, Tr. 9831-32; RX 1520).

Dr. Scrimshaw, as stated, is a member of the National Academy of Sciences. His distinguished career has included service on so many high-level policy making groups and advisory boards, both national and international, they cannot be cataloged in this decision. He has been particularly active in United Nations and World Health Organization work, especially in the fields of international nutrition and protein requirements in developing nations. See RX 1522. The Protein Advisory Group of the United Nations was established by Dr. Scrimshaw. The PAG originally advised WHO, but later became advisory also to UNICEF, UNESCO, the World Bank and other United Nations agencies (Dr. Scrimshaw, Tr. 9830). Under Dr. Scrimshaw's chairmanship (1970-73), the PAG formed a working group to evaluate the evidence on lactose intolerance in 1971 (Dr. Scrimshaw, Tr. 9830, 9846-58). The PAG issued a formal position paper on the subject in early 1972, already mentioned [53] (CX 636). Dr. Scrimshaw has worked extensively with the Food and Nutrition Board, the highest level advising group to the U.S. Government on questions of nutrition (Tr. 9833-34; RX 1520).

In 1972 during Dr. Scrimshaw's term as Chairman of the National Academy of Sciences' Committee on International Nutrition Programs, he appointed a Subcommittee to develop a position paper on lactose intolerance as it applies to the United States, particularly as it relates to milk promotion by government agencies (Dr. Scrimshaw, Tr. 9860-61). The National Academy's position paper was issued in May 1972 (CX 643), and is discussed later in this decision.

Dr. Scrimshaw has authored or co-authored 461 scientific and medical articles in the fields of nutrition and allied areas, public policy relative to nutritional questions, food planning, nutrition in relation to disease, and many other similar topics (see RX 1521). Dr. Scrimshaw has investigated the effect of milk consumption on lactose intolerant persons by means of "double-blind" studies which isolate symptoms truly due to milk drinking from psychosomatic or other responses (Dr. Scrimshaw, Tr. 9880-86, 9921-44; CX 463; RX 305-06, RX 1725).

94. Dr. Scrimshaw testified on the issue of the prevalence of milk intolerance and the statement of the United Nations Protein Advisory Group, as follows (Tr. 9852):

> * * * modest amounts of milk generally taken to be a glass, no more than a glass at a time, nor more than 240 cc's, would be unlikely to be a problem for most individuals. It was recognized that in the Oriental population with a loss of lactase activity [that] is sharper and more complete, that there would be some Oriental adults that, even with a glass of milk would experience symptoms but that they would speedily learn this, and avoid it as they learned, as we all learn to avoid foods that cause us problems.

Asked whether he would recommend that people found to be intolerant to 240 or 480 ml of milk, cease drinking milk, Dr. Scrimshaw testified (Tr. 9931): [54]

> On the contrary, I would continue to recommend milk as an integral part of a balanced diet and of a nutrition education program in the schools, recognizing that there would be an occasional individual who might experience discomfort with milk consumption.

In Dr. Scrimshaw's experience symptoms from milk drinking are of "low frequencies" and "very mild" (Tr. 9940). Dr. Scrimshaw based his opinion on his own studies at M.I.T., Dr. Latham's studies at Cornell University, and experience with milk feeding programs all over the world (Tr. 9946-47). In Dr. Scrimshaw's view, milk intolerance was "absolutely not" a public health problem (Tr. 9949).

### Dr. George M. Briggs

Dr. Briggs has been mentioned earlier in this decision. His curriculum vitae is in the record as CX 4008. Although called by complaint counsel, Dr. Briggs, since early in its formation, acted as a consultant to the Milk Advisory Board with respect to nutritional or other claims for milk contained in the Board's advertising. Dr. Briggs was on the witness stand for 11 days and he was questioned on virtually all issues in this proceeding.

Dr. Briggs, Ph.D., is Professor of Nutrition, Department of Nutritional Sciences and Associate Dean, College of Natural Resources, University of California, Berkeley. He is a nationally and internationally known nutritional scientist and educator. Dr. Briggs graduated from the University of Wisconsin in 1940 and continued his studies there receiving an M.S. in Biochemistry in 1941, and a doctorate in that field in 1944 (Tr. 5764). From Dr. Briggs' work came the discovery of Vitamin B-10, folic acid, which is indispensable in the human diet, and Vitamin B-11 (Tr. 7083-85; CX 4008). In 1945 he joined the University of Maryland where his work and those of his colleagues led to the discovery of Vitamin B-12, essential for building hemoglobin in the blood (Tr. 7086-87).

Between 1951 and 1958, Dr. Briggs was Chief of the Nutrition Unit, National Institute of Arthritis and Metabolic Diseases, National Institutes of Health (Tr. 7093). From 1958 to 1960, Dr. Briggs was Executive Secretary of the Biochemistry Training Committee and Pharmacology Training Committee in the Division of General Medical Sciences of the [55] National Institutes of Health (CX 4008). In this capacity, he was responsible for administering Federal grants for supporting research in biochemistry, pharmacology, anesthesiology, toxicology and nutrition (Dr. Briggs, Tr. 7096).

In 1960 Dr. Briggs was appointed Chairman of the Department of Nutritional Sciences of the University of California, Berkeley, a position he held from 1960 until 1970 (Dr. Briggs, Tr. 7079, 7081) when he completed his term in the rotating chairmanship of the Department. Through the 1960's to date Dr. Briggs has been Professor of Nutrition (Tr. 7081; CX 4008) and has been engaged in the training of graduate students in that subject. In addition, he has been, and is presently, a biochemist in the Agricultural Experiment Station (Tr. 7978). One of his current research projects is the study of the interrelationships among calcium, vitamin D and lactose (Dr. Briggs, Tr. 7142).

Dr. Briggs has published more than 128 original articles in numerous scientific journals (CX 4009), and is the co-author of the most widely used textbook on nutrition in this country, *Nutrition and Physical Fitness*, now in its ninth edition (Dr. Briggs, Tr. 7131-32, 8115, 8117; CX 233, 4008; RX 415).

Dr. Briggs has served or presently serves on numerous high-level professional and governmental committees concerned with nutrition policy. He serves as an appointed member of the Food and Nutrition

Board Committee on Recommended Dietary Allowances (RDAs) of the National Academy of Sciences (Dr. Briggs, Tr. 7119, 8095; CX 4008).

Dr. Briggs has also held many positions on editorial boards of scientific journals, including *Nutrition Reviews,* 1954-58; *Journal of the American Dietetic Association,* 1963-66; *Journal of Nutrition,* 1962-67; and the *American Journal Clinical Nutrition,* 1975-77 (Dr. Briggs, Tr. 7138-39; CX 4008). He was also founder of the *Journal of Nutrition Education* and was its Executive Editor from 1968 to 1976 (Dr. Briggs, Tr. 7132). In these positions, Dr. Briggs has participated extensively in the peer review of scientific papers submitted to the journal (Tr. 7133-40). Dr. Briggs is also a member of numerous scientific organizations. In addition, Dr. Briggs has undertaken many public service assignments. These include lectures and talks at meetings and seminars for professionals and the public, consulting with both federal and state government agencies, testifying before Congressional hearings, writing consumer articles on nutrition for newspapers and magazines and appearing on radio and television (Dr. Briggs, Tr. 7090, 7139-42, 7494-95; RX 1513-14). **[56]**

Dr. Briggs was Chairman of the Panel on Nutrition Education of the 1969 White House Conference on Food, Nutrition and Health (Tr. 7495). He has testified on behalf of FTC attorneys as an expert witness in a number of proceedings (Coca-Cola Co., "Hi-C", Dkt. 8839 ITT-Continental, "Hostess-Twinkies," Dkt. 8860 and the TRR proceeding on Protein Supplements, Tr. 7160-63, see acknowledgement for Dr. Briggs help in *Protein Supplement Health Hazards and Marketing Deceptions: A Staff Report to the Federal Trade Commission,* August 8, 1975, at p. 3). Dr. Briggs was the first witness to be called by the FTC staff in the 1976 hearings on the proposed TRR proceeding on Food Advertising (RX 1819, 1862), and has been consulted by the staff in connection with the proposed TRR proceeding on Children's Advertising (Dr. Briggs, Tr. 7157-60).

Dr. Briggs is an outstanding scientist, a leading expert in the area of human nutrition, and a dedicated public servant. Although a consultant to the Milk Board, during 11 days on the witness stand, during which he was questioned from time to time by the law judge, Dr. Briggs displayed integrity and objectivity. Dr. Briggs has studied virtually everything in the medical and scientific literature on the subject of lactose intolerance and milk consumption. His knowledge of the subject is encyclopedic. His expert opinions are persuasive, credible, and carry great weight.

95. In Dr. Briggs' opinion only a small portion of the population cannot handle milk, amounting to "less than one percent" (Tr. 8239).

Dr. Briggs was unaware of "any significant numbers of people that have any problem with the lactose in an 8 ounce glass of milk" (Tr. 7303). In answer to a question whether he was aware of anyone having diarrhea from an 8 ounce glass of milk, Dr. Briggs stated "* * * Very, very few individuals, but so few that I would ignore them entirely in terms of the general population" (Tr. 7302).

### Dr. Robert H. Herman

Dr. Herman was called by complaint counsel as a rebuttal witness. His curriculum vitae is in the record as CX 4010. Dr. Herman obtained his B.S. in biology at the Illinois Institute of Technology, Chicago, in 1949, and his M.D. in 1953 at the University of Illinois Medical School, Chicago. He interned at the Walter Reed General Hospital in Washington, D.C., from 1953 to 1954. From 1955 to 1959 Dr. Herman was [57] Chief of Medicine and Commanding Officer of the 43d Surgical Hospital in Korea. Following his tour of duty in Korea, he attended the Military Medicine and Allied Sciences Course in Washington, D.C., 1959–1960, and then worked in the Department of Metabolism at Walter Reed Army Medical Center for one and a half years (Dr. Herman, Tr. 12005).

In 1965 Dr. Herman became Chief of the Metabolic Division of the United States Army Medical Research and Nutrition Laboratory in Denver. This entire laboratory moved to the Letterman Army Institute of Research, San Francisco, in 1974, and currently Dr. Herman holds the position of Chief of the Department of Medicine. Dr. Herman's military rank is Colonel.

Dr. Herman is one of the consultants of the Surgeon General of the United States on metabolic disorders (CX 4010). Lactose intolerance and osteoporosis in Dr. Herman's view are metabolic disorders (Tr. 12002). Dr. Herman has been involved in research and discussions regarding the implications of lactase deficiency (Tr. 12433-46). Much of his research work has been directed toward the attempts to renew lactase activity once it has declined. Dr. Herman has had extensive clinical experience in diagnosing and treating numerous individuals, mainly adults, suffering from metabolic disorders.

In 1974 he attended the National Dairy Conference on lactose intolerance of which Dr. Scrimshaw was Chairman (CX 644(b)). Dr. Herman has been editor-in-chief of the *American Journal of Clinical Nutrition* from 1974 to the present. In this capacity, he has been involved in reviewing and approving for publication a number of articles on the subject of lactase deficiency.

96. In Dr. Herman's opinion approximately 50% of lactose malabsorbers would react with "signs or symptoms" upon the

ingestion of one glass of milk (Tr. 12046, 12053–54). He based this opinion on two review articles (CX 244, 246), his own personal experience as a milk-intolerant individual, and his experience with patients (Tr. 12047, 12052, 12054 and 12490). CX 244, "A Review of Dietary Lactose and Varied Utilization by Man," however, does not support Dr. Herman's opinion. Nowhere does this article provide any evidence that 50% of lactose malabsorbers will experience symptoms from 240 ml of milk. CX 246, "Lactase Deficiency: An Example of Dietary Evolution," published in *Current Anthropology* also fails to provide any percentage estimate of lactose malabsorbers who would react to an 8 ounce glass of milk. Dr. Herman's [58] personal experience with being lactose intolerant, and that of the patients he has seen, may not be representative of the total lactose malabsorbing population (see Tr. 12243–44). Study of his testimony fails to reveal an adequate scientific foundation for the percentage estimates Dr. Herman provided. From the study and observation of the law judge, the percentage estimates given by Dr. Herman while on the stand were essentially simply assertions based on personal views, rather than expert scientific opinion based on literature and scientific investigations.

## Medical and Scientific Literature

The record contains much literature reporting on the incidence of symptoms among lactase deficient persons from drinking milk in varying amounts. Many of these articles, reports and studies were received in evidence for all purposes. Others were offered without an expert who could explain them or lay an adequate foundation for them, and were objected to by one side or the other. Many of these were admitted in evidence for a limited purpose, not for the truth of what was reported in them. The limited purpose of admission generally was on the issue of notice to respondents of medical questions relative to milk drinking by lactase deficient population groups when respondents were disseminating the challenged advertising. Where the transcript records an exhibit as being "received as information published in an authoritative and reliable medical journal on the date indicated and available to a researcher," or received as coming "to the attention of Dr. Briggs about the time it was published. . .and is part of the sum total of information which Dr. Briggs had in his possession during the time he reviewed the advertising of the Milk Board," the exhibit was received on the "notice issue" but *not* as evidence of the truth of statements or reports therein (see, *e.g.*, Tr. 6966, Tr. 5998; see also "Joint Statement of Exhibits Received in Evidence and Reference to All Rulings Regarding Each Such Subject" filed January 29, 1979).

97. In connection with articles and studies reporting symptoms from milk consumption, it must be emphasized that the existence of symptoms is largely a subjective matter. In one of Dr. Latham's studies published in the *American Journal of Clinical Nutrition*, he and his co-researchers reported that there was a difficulty dealing with such subjective responses (CX 494(c)). Since some of the test subjects in this study reported that flatulence was a normal, everyday occurrence, it was difficult for Dr. Latham and his co-researchers to know in the test they were conducting whether that condition was in truth due to milk ingestion. Dr. Latham and his co-workers commented (CX 494(f)): [59]

> * * * it was found that slightly over half of all subjects developed some symptoms, usually mild, from the consumption of a placebo. This must lead to certain doubts about the results of certain other studies where the subjects were aware of the possibility of symptoms resulting from lactose consumption but where placebos were not used.

Further, as Dr. Scrimshaw established, probing by researchers about the presence of symptoms undoubtedly has the capacity to cause test subjects to "come-up" with symptoms (RX 305, 306).

98. To be certain of the true existence of symptoms, particularly milder symptoms, blind or double-blind studies or other techniques to conceal the identity of the substance being given to test subjects, are imperative (Dr. Scrimshaw, Tr. 9910-12, 9917; Dr. Briggs, Tr. 8267; see also Dr. Kretchmer, Tr. 638-39; RX 305, 306, RX 1725). The work of Dr. Scrimshaw and his colleagues at M.I.T. established the unreliability of reports of symptoms when test subjects are able to identify what they are ingesting, and when they know or can devine that researchers are looking for the presence of symptoms. Dr. Scrimshaw testified on this subject with complete validity, in the opinion of the undersigned, as follows (Tr. 9911):

> * * * if individuals have any reason to suspect that the material which they are testing will cause adverse symptoms of some kind, the chances of symptoms which we all have every day being interpreted as due to that material are quite great. We all have times when we feel bloating, we have gas, we may have some intestinal pain from gas, we may have days with loose stools. If you follow any group of subjects for a period of 30 days just on their normal diet and you really quiz them carefully on symptoms, you will get lots of symptoms. So the danger is that when you do a feeding study these irrelevant symptoms get attributed to the material. Only if the individual realizes that there is no way of knowing whether he is getting the material or not getting the material do you approach something that is a more proper trial. [60]

99. Two reliable and persuasive double-blind studies have recent-

ly been performed by Dr. Scrimshaw and colleagues at the Massachusetts Institute of Technology on the "Comparative Tolerance of Adolescents of Differing Ethnic Backgrounds of Lactose-Containing and Lactose-Free Milk" (RX 305, 306). The first was "Initial Experience with a Double-Blind Procedure" (RX 305) and the second was "Improvement of a Double-Blind Test" (RX 306). Both have been reviewed and accepted for publication in the *American Journal of Clinical Nutrition* (Dr. Scrimshaw, Tr. 9883–84, 10038, with minor revisions for publication RX 1739 and 1740 are the same as RX 305 and 306; see Tr. 10040–48). Both studies were performed on healthy adolescent subjects, 14 to 19 years old, of varying racial backgrounds (Dr. Scrimshaw, Tr. 9901–93; RX 305(e), 306(d)).

Chocolate flavored milk was used for test purposes to ensure a double-blind study in which lactose was the only variable (RX 305(f)). Some flavoring must be added to disguise the difference in taste between lactose-free and lactose-containing milk (Dr. Scrimshaw, Tr. 9887). All subjects were studied for tolerance to one glass and to two glasses of lactose-containing and lactose-free chocolate milk test beverages, given double-blind fashion in random order on four consecutive days (Dr. Scrimshaw, Tr. 9901–03; RX 305(f), 306(f)).

In the first study (RX 305(e)) among the 110 test subjects "58 were black, 44 were white and 8 were of Latin-American descent." The subjects reported symptoms, if any, on questionnaries. The first study emphasized the possibility of symptoms and urged complete reporting (Dr. Scrimshaw, Tr. 9882, 9902; RX 305(f)). In the second study (RX 306) the questioning about symptoms was handled more casually on the premise that "an overly aggressive approach will give rise to a great number of false positive responses," *i.e.*, test subjects "coming up" with symptoms when none were really present (Dr. Scrimshaw, Tr. 9882; RX 306(i)).

Out of the 110 subjects in the first study (RX 305), 67 were lactase deficient (RX 305(n)). Thirty of these lactase deficient subjects reported no symptoms at all after any milk. Four reported symptoms after lactose-free milk, ten reported symptoms after both lactose free and lactose containing milk, and seven reported symptoms after 240 ml, but not after 480 ml of lactose-containing milk. Because such paradoxical responses raised questions as to the actual existence of "symptoms" or, if symptoms were actually experienced, the cause thereof, the researchers turned to the remaining 16 test subjects who were considered "potential examples of milk intolerance due to lactose malabsorption" (RX 305(g)). Of these "only three reported symptoms on days on which 240 or 480 ml of lactose containing milk was given. The study concluded (RX 305(h)): **[61]**

> * * * the apparent prevalence of milk intolerance secondary to lactose malabsorption would be 5% (3/67) after 240 ml and 24% (16/67) after 480 ml of LC milk.

The study further concluded that "it must be assumed that some individuals reported symptoms due to factors other than lactose; these might be of psychosomatic origin." According to Dr. Scrimshaw since a number of the lactose malabsorbers reported symptoms after consuming both lactose-free and lactose-containing milk, the symptoms were probably reported only because the subjects were stimulated by the researcher to "come up" with symptoms (Dr. Scrimshaw, Tr. 9930-34). The study reported (RX 305(i)):

> The true prevalence of milk intolerance secondary to lactose malabsorption cannot be determined in any way except through randomized 'double-blind' studies.

See also Dr. Kretchmer, Tr. 638-40. This study has been accepted for publication, as stated, in the *American Journal of Clinical Nutrition*. The fact that it had not been published at the time offered in evidence has no bearing on the reliability of the results. Chocolate milk was used because without disguising the difference between lactose-free and lactose containing milk, a double-blind study is impossible (RX 1739(j)); Dr. Scrimshaw, Tr. 9887; see also Dr. Latham, Tr. 9459). The use of chocolate milk theoretically could have affected the results of this study (RX 1739(j)), but there is no credible evidence that this was the case. Dr. Paige's suggestion to this effect was not persuasive, being essentially a conjecture (Tr. 1087). Chocolate flavored milk, in fact, could have increased the incidence of symptoms (see RX 1725(l)).

100. In the second M.I.T. study (RX 306), there were 45 lactose malabsorbers (RX 306(f) and (o)). Twenty-nine, about 64% reported no symptoms throughout the test with either the lactose-free or the lactose containing milks, in contrast to 45% in the first study (RX 305(g)). The substantially lower frequency of symptoms was attributed by Dr. Scrimshaw to the more casual way in which the existence of alleged symptoms was elicited (Tr. 9933-34). No statistically significant differences were found in the incidence of symptoms reported by malabsorbers and absorbers after drinking 240 ml of either lactose-free or lactose-containing milk (RX 306(b)). According to the study it did not appear that any of the 45 lactase deficient test subjects had symptoms due to the lactose in 240 ml of milk although 16% of them apparently reacted to the [62] lactose in 480 ml of milk (RX 306(b)). The symptoms in both of the foregoing studies at M.I.T. were mild, there were no severe symptoms (Dr. Scrimshaw, Tr. 9931). The report concluded that lactose-malabsorbing individuals between the ages of 14 and 19 can tolerate moderate amounts of milk without

experiencing any discomfort that can be identified as resulting from lactose malabsorption. The study further concluded (RX 306(h)):

> * * * we find that even after 480 ml milk, the nature and severity of symptoms reported by lactose malabsorbers rarely warranted serious consideration.

101. In another "double-blind" study conducted at M.I.T. under Dr. Scrimshaw's supervision in 1978, three of 24 lactase deficient test subjects had symptoms with 480 ml of milk and two presumably had symptoms, about 21% (RX 1737). Only three out of 24 of the lactase deficient had symptoms with the lactose of one glass of milk, about 12.5% (Dr. Scrimshaw, Tr. 9938, 9982-83; RX 1737(w), RX 1738(f)). According to Dr. Scrimshaw the symptoms were very mild (Tr. 9909, 9940-41, 9884-86).

102. A recent study for publication in a scientific journal dealing with geriatrics has been completed by Dr. Scrimshaw and another researcher at M.I.T. (RX 1725). The test subjects were 87 elderly with a mean age of 77 years, 23 of whom were lactase deficient. A chocolate-flavored dairy drink either containing lactose or being lactose free was served under double-blind conditions with a light lactose free meal (RX 1725(f)). On the following morning the test subjects were interviewed as to the occurrence of any symptoms. The researchers concluded that the amount of lactose in a single glass of milk was insufficient to cause an "identifiable" gastrointestinal response in a controlled double-blind study with these test subjects (RX 1725(k)). The study concluded with the statement (RX 1725(n)):

> Our results suggest that, under normal circumstances, the 11-12gm of lactose in a single glass of white milk would not lead to serious symptoms in a large majority of elderly lactose malabsorbers.

103. In a comprehensive and reliable study using placebos, entitled "Lactose Intolerance and Milk Intolerance in Healthy Adults and Children: Practical Implications and Methodological Approaches," prepared at Cornell University in 1973 under the direction of Dr. Latham, the practical [63] implications of lactose deficiency for milk drinking were examined (RX 1723; Dr. Latham, Tr. 9360-61). Thirty-five adults were studied, 19 tolerant and 16 intolerant to lactose (RX 1723(z)(38)). Subjects ingested varying amounts of lactose in water, lactose as milk, and placebos, once a week for 10 weeks. Subjects recorded any symptoms experienced for eight hours following ingestion of the lactose or milk and rated each symptom as mild, moderate or severe. Subjects were also asked whether, if discomfort was experienced, such would prevent them from drinking milk in the future if they found that drinking normal

amounts of milk caused the same symptoms (RX 1723 (z-17), (z-18)). According to Dr. Latham (Tr. 9363):

> The conclusion in a nutshell from that study was the people that are malabsorbers, in our study all of them could drink useful quantities of milk. All of them could drink at least one cup of milk, fasting on one occasion *with no symptoms or with mild symptoms*. (Emphasis added).

The Study reported (RX 1723 (z-160)):

> * * * it appears from our sample that most intolerant adults can consume at least 15-30 g lactose, both in water and as milk, without experiencing severe symptoms. In this study, 9 of the 16 intolerant adults consumed either 15 or 30 g lactose in water, and 13 of the [16] consumed either 15 or 30 g lactose as milk while fasting with either 0 or only 1-2 mild symptoms occurring. Although the severity of symptoms depended on each individual's subjective rating, 14 of the 16 intolerant subjects reported they would not stop regular milk drinking due to the severity of symptoms . . .

The report further stated (RX 1723 (z-163)):

> * * * The majority of our intolerant subjects could consume 2 1/2 cups of milk containing 30 g of lactose, and suffer no symptoms whatsoever. [64]

104. Based upon the preceding study an article was published in March 1974 in *The American Journal of Clinical Nutrition* "Lactose intolerance and milk consumption: the relation of tolerance to symptoms." The article reported (CX 600(c)):

> When intolerant subjects were given milk, 13 of 15 subjects (86%) ingested either 15 g lactose (1.25 cups milk) or 30 g lactose (2.5 cups milk) with two or fewer mild symptoms. * * * Twenty-seven percent of 15 intolerant subjects reported no symptoms at all, 28% reported mild gas only, and 20% reported mild gas and mild bloating. Eighty-six percent reported they would not stop drinking milk regularly with an equivalent degree of discomfort.

The paper concluded with the following (CX 600(g)):

> * * * it was found that lactose-intolerant subjects can consume nutritionally useful quantities of milk without undue symptoms developing.

105. In an article in the *American Journal of Clinical Nutrition* in August 1975 on "Lactose Hydrolyzed Milk" researchers from Johns Hopkins Medical Institutions, including Dr. Paige who testified in this proceeding, using "double-blind" techniques, found that only 3 of 22 healthy black teenagers, about 13%, experienced symptoms of any kind from ingestion of 8 ounces of "untreated whole milk" (CX 551). The significance of the symptoms reported by the study was not stated; failure to comment on this aspect suggests that the symptoms were probably mild (See Dr. Latham, Tr. 9373). Symptoms were also reported by 3 of the lactase deficient teenagers

on drinking the 90% hydrolyzed milk which contained only 1.2 g of lactose (CX 551(c), indicating the problem with subjective assessment of symptoms and un-blind tests. According to this study the following "double-blind" methodology was used (CX 551(b)):

> The subjects were given the 8 ounces of test milk, coded and unidentified. The technician and interviewer as well as the subjects were unaware of which milk was being tested. At the conclusion of the study, the code was revealed, tolerant and intolerant subjects identified and all data on each subject collated. [65]

106. An article was published in 1978 "Intestinal Lactase Deficiency and Milk Drinking Capacity in the Adult" by researchers of the Instituto Nacional de la Nutricion, Mexico (CX 685). This appeared in the *American Journal of Nutrition*. In this study, different amounts of milk were given to a group of normal adults to determine their milk tolerance and to correlate it with their intestinal lactase activity as judged by a lactose tolerance test (CX 685(a)). Each subject, after overnight fasting, was given on 4 consecutive days the following amounts of milk: 250 ml (day 1), 500 ml (day 2), 750 ml (day 3), and 1000 ml (day 4). Out of 121 lactase deficient test subjects, 14.5% had symptoms of some sort following ingestion of 250 ml of milk (CX 685(d), 685(b), Table 1; Dr. Latham, Tr. 9446). The study indicated that 85% to 86% of lactase deficient persons could drink an 8 ounce glass of milk without any symptoms and 72% could drink two 8 ounce glasses of milk with at most symptoms classified by subjects as mild (CX 685(b)). The author contrasted the results of this study showing only 14.5% of lactase deficient persons having symptoms from 240 ml of milk with the higher percentages produced by some of the studies of the so-called Johns Hopkins group, noting that the differences were hard to explain but perhaps not too surprising "when dealing with subjective responses to a given agent in different populations" (CX 685(d); see CX 417, mentioned later). The results of this study are very similar to the results obtained by Dr. Paige of Johns Hopkins, described in the preceding finding, where only 3 of 22 lactose malabsorbers were reported to have had symptoms of any kind from ingestion of 240 ml of milk (about 14%).

107. There are other apparently reliable studies in the literature which report higher figures for the incidence of symptoms from milk consumption. Results of a recent study in Mexico were reported in an issue of *Gastroenterology* published in 1978 (CX 668). The study was designed as "double-blind", although there is some question whether this was true in reality (Dr. Latham, Tr. 9441–42). The purpose was to determine whether lactase deficient persons were also milk

intolerant and, if so, the amount of milk they must ingest to produce symptoms. Each of 150 adult test subjects, 97 of whom were lactase deficient, received 250 ml of a different type of milk on 3 consecutive days. Milk A contained no lactose, Milk B had 12.5 gm, and Milk C contained 37.5 gm of lactose. In the 97 lactase deficient test subjects, ingestion of 250 ml of the reconstituted powdered whole milk containing 12.5 g of lactose, produced no symptoms in 61 but did produce symptoms of some kind in the balance of 36, about [66] 37% (Dr. Latham, Tr. 9435-36; CX 668(b), Table 1). Twenty of the 36 had mild symptoms and 16 had what were classified as severe symptoms (CX 668(b), Table 1). Ninety-seven percent of those with mild symptoms and 10% of those with "severe" symptoms, did not feel such symptoms would prevent continued milk drinking. The study noted the difference in results from an earlier study by the authors, described in the preceding finding, where only 14.5% of lactase deficient persons were determined to have symptoms from consumption of 240 ml of milk. The study commented that the conclusions relative to symptoms might not apply to "populations with different ages or socioeconomic levels in Mexico or elsewhere in the world," noting the "variability of symptoms in [lactase] deficient subjects" and the need to study "each individual population" (CX 668(b)). A significant number of these test subjects may not have been accustomed to milk drinking (Dr. Scrimshaw, Tr. 10014-17), hence this study is of questionable validity for estimating the prevalance of symptoms in a U.S. population.

108. In an article in the *American Journal of Clinical Nutrition* in June 1976 "Symptom Response to lactose-reduced milk in lactose-intolerant adults," researchers including Dr. Latham stated that 5 out of 16, about 30% lactase deficient test subjects reported symptoms from ingesting 2.5 cups of lactose-reduced milk which contained 7.5 gm lactose (CX 494, Table 3). The symptoms reported were rated by the test subjects with a composite score of about 2 on a scale of 12 indicating that the symptoms were very mild (Table 3). Twelve out of the 16 reported symptoms from 2.5 cups of lactose-reduced milk which contained 15 gm lactose (CX 494, Table 3). The symptoms, again, were very mild. The symptoms were obtained "from the subjects own rating of the presence and severity of four symptoms" "bloating, gas, abdominal cramps, and diarrhea" (CX 494(b), Part 1), all of which were to be treated the same for rating purposes. Out of 17 lactase deficient subjects, especially sensitive to lactose (Dr. Latham, Tr. 9385), 15 reported mild to moderate symptoms from 500 ml whole milk (Dr. Latham, Tr. 9378-87; CX 494, Table 4). These quantities of milk were used in this research project

by Dr. Latham because he and his co-researchers could not "get adequate symptoms" with smaller quantities of milk and the study needed symptoms to compare with the lactose reduced milk (Dr. Latham, Tr. 9387). With respect to conclusions respecting symptoms from reports of test subjects, the study stated (CX 494(c)):

> Symptomatic response usually has to be based on a subjective evaluation, and therefore there must be reservations concerning the interpretation and quantification of these data.

[67] In the "Discussion" section, as already described, the study noted in connection with symptom recording that there was "difficulty dealing with subjective responses" (CX 494(e)), observing further that there were several test subjects "who reported that flatulence was a normal, everyday occurrence," *i.e.*, regardless of milk consumption, making it difficult to judge "whether mild gas was actually a response to lactose in milk." Dr. Latham did not believe that the results of this study could be projected to the population as a whole (Tr. 9389).

109. The following articles and studies, in the opinion of the undersigned, have little or no probative value on the incidence and significance of symptoms from the consumption of milk.

CX 458 - This was one of the earliest articles reporting symptoms from milk ingestion. It appeared in 1965 in *Gastroenterology*, a technical medical journal. With the title "Intestinal Lactase Deficit in Adults," the study reported on tests conducted on 12 lactase deficient patients obtained "from the Gastroenterology Section at the Hines VA Hospital" (CX 458(a)). All of the subjects were hospitalized for serious illnesses, such as irritable colon, alcoholism, osteoporosis, duodenal ulcer, cirrhosis, diabetes, and obesity. Reports of symptoms were not based on tests but upon anecdotal accounts of patients, a method well known to be scientifically unreliable. The possibility of "secondary lactose intolerance" resulting from disease also was not ruled out in this study. In view of the serious diseases present over an apparently long period of time in these test subjects, furthermore, a question arises whether the symptoms they reported were really due to milk. As a result of these factors, this study is considered to have little reliability for purposes of this case (see Dr. Scrimshaw, Tr. 9956-57; see also, Dr. Speckman, Tr. 10956-57).

CX 405 - This was a widely circulated article published in 1966 in the *Journal of the American Medical Associaton* "A Racial Difference in the Incidence of Lastase Deficiency." Researchers affiliated with Johns Hopkins University School of Medicine reported on a study of 40 male prisoners who were volunteers from the Maryland

State House of Correction, "20 consecutive whites and 20 consecutive negroes." Eighteen of the 20 Negro test subjects were reported to have experienced symptoms from a lactose tolerance test in which 50 gm of lactose per square meter of body surface was administered at one time, the average dose being 91 gm "the [68] amount of lactose contained in approximately 1 3/4 quarts of milk" (CX 405(a)). This study is not reliable for purposes of this case because no tests were done with milk. The existence of symptoms from milk drinking and their significance stated in this article were anecdotal only, being based upon what the authors gathered the test subjects experienced from milk drinking. According to the article, the majority of the subjects reporting symptoms from milk drinking stated that they liked milk and had learned to limit their intake to around a glass at a meal (CX 405(b)). Symptoms from milk drinking were reported not "clinically significant" (CX 405(e)).

CX 683 - This was an article in the *New England Journal of Medicine* in 1967 "Osteoporosis, Intestinal Lactase Deficiency and Low Dietary Calcium Intake." The authors reported that in 5 elderly lactase deficient patients with osteoporosis, 15 gm of lactose, administered in a program to determine if lactase activity could be increased, had to be reduced to 7.5 gm because of severe symptoms. No additional data on this aspect or on the nature of the symptoms were supplied. The report, in a somewhat paradoxical additional statement, referred to another study for the assertion that "Negro lactase-deficient subjects tolerated up to 150 gm of lactose daily [the amount in 3 quarts of milk] within two or three weeks of the start of feedings" (CX 683(c)). The numbers in this study were extremely small and details are absent. The study has little value on the issue of the prevalence and significance of symptoms from milk drinking.

CX 489 - This article "Milk and Lactose Intolerance in Healthy Orientals" appeared in *Science* in February 1968. In this article the author of CX 405 and another researcher from Johns Hopkins reported on a study of twenty healthy Oriental adults living in the United States. Out of the 20, 19 were reported to have "had abdominal bloating, flatulence and diarrhea" after ingesting on an empty stomach a 50 gm dose of lactose in water. No tests were performed with milk. The symptoms and their significance reported to arise from milk drinking, as in CX 405, were purely anecdotal, being simply reports of what the authors gleaned from talking to the subjects.

CX 480 - This was an article in the *Scandinavian Journal of Gastroenterology* in 1969 "Specific Small-Intestinal Lactase Deficiency in Adults." According to this article, 11 of 18 lactase-deficient persons hospitalized with a variety of serious gastro-intestinal disorders reported to the authors that they had symptoms on consuming one glass or less of milk (CX 480(e), Table II). As stated previously, where test subjects are [69] afflicted with severe gastrointestinal disorders or other diseases, the direct correlation of milk consumption with symptoms is questionable. Again, anecdotal reports of this kind are not considered to be scientifically reliable.

CX 417 - This was as study published in the *New England Journal of Medicine* in May 1975 "Lactose and Milk Intolerance: Clinical Implications." A number of investigators from Johns Hopkins, including Dr. Paige who testified in this proceeding, sought to examine the clinical importance of tolerance-test-determined "lactose intolerance." Subjects were male patients at the Veterans Administration Hospital at Perry Point, Maryland. The study reported that 240 ml of low-fat milk (about 8 oz.) caused mild symptoms "mild discomfort, cramping, gas, flatulence or some distention" in 26 of 44 lactose intolerant subjects (CX 417(c); see also Dr. Latham, Tr. 9449–56; Dr. Briggs, Tr. 8314–16; Tr. 9464, 9725). This study, however, was not "double-blind," nor were placebos used and to this extent it is unreliable. In a study published by Dr. Paige only three months later which did use "double-blind" techniques, he found that only 3 of 22 lactase deficient test subjects experienced symptoms from 8 ounces of whole milk, about 14% (CX 551, previously described). In CX 417, the test subjects were given either an unidentified test sugar or low-fat milk. It seems obvious that they were able to recognize the low-fat milk when it was administered as the test substance. The study, therefore, leaves doubt of the credence to be accorded the reports of symptoms due to milk. As in many of the studies, furthermore, the symptoms were assessed and reported by the test subjects themselves and to this extent constituted a subjective evaluation. "Diarrhea" was not defined. Subjects may have reported looser-than-normal bowel movements as "diarrhea." Finally, the test subjects were hospitalized for various illnesses with possible bearing upon the test results (see Dr. Latham, Tr. 9453–56).

CX 521 - This is another study by the "Johns Hopkins" group, including Dr. Paige. It was published in the November 1975 issue of *Pediatrics* and reported on "Intolerance of Eight Ounces of Milk in Healthy Lactose-Intolerant Teen-Agers" (CX 521). The objective of this study was "to determine if subjects who are intolerant of a standard lactose tolerance test (50 gm of lactose) are aware of any symptoms with 8 ounces of milk and with physiologic amounts of lactose, such as 12 gm, which would be equivalent to the lactose found in 8 ounces of milk" (CX 521(a)). Thirty-three black adolescents from the lowest socioeconomic decile of Baltimore were the study subjects. Of these, 13 were lactose intolerant (Dr. Paige, Tr. 1160-66; CX 521(c)). Subjects received 8 oz. of milk or [70] an unidentified test sugar on separate occasions and were questioned thereafter by an observer. As noted in the case of the preceding study, a solution of "test sugar" is readily distinguishable from milk (Dr. Latham, Tr. 9459). The test subjects obviously knew when they were being given milk and when the test sugar. Symptoms were stated to have been reported by 7 of 13 lactase deficient subjects. The symptoms reported, "bloating," "cramps" and "loose stools," were wholly subjective, being dependent on what the teenager reported to the observer. Again, this study is in strong contrast to Dr. Paige's results when he used a double-blind methodology, only 3 of 22 reporting symptoms. It may be noted that all teenagers except one intended to continue drinking milk notwithstanding the "symptoms."

CX 463 - This was a study conducted on children 9 years old or younger. It is considered of little probative value for this proceeding because in children that young the lactase level may not have yet declined fully in those destined to be lactase deficient. As a consequence, failure to experience symptoms is not a true indication of the proportion experiencing symptoms from milk consumption.

CX 525 - This was an article in *Gastroenterology* published in 1966. Four of 7 lactase deficient adults were reported to be symptomatic when "challenged with 1 to 3 glasses of milk" (CX 525(e)). How many of the 4 were challenged with 3 glasses of milk is not stated. The number of test subjects, furthermore, is too small to be accorded any significance in this proceeding.

110. There is no question on this record that there are numbers of lactase deficient persons who experience symptoms from drinking milk in moderate amounts at a time. The question is the proportion having symptoms, and the question thereafter is the significance of the symptoms. The preponderance of the evidence establishes that the bulk of lactase deficient persons can consume an 8 ounce glass of milk at one sitting without symptoms. Although the evidence is in conflict and a scientific concensus must await further work, the undersigned has concluded after weighing all of the studies and the testimony of the expert witnesses, that the preponderance of the evidence establishes that the incidence of symptoms of any kind following the consumption of an 8 ounce glass of milk is probably in the range of 5% to 15% of lactase deficient, lactose malabsorbers.

111. The preponderance of the evidence further establishes that in the great majority of lactase deficient persons who experience

symptoms from the ingestion of 240 ml of milk, the [71] symptoms are mild to totally insignificant. The proportion of those experiencing other than mild or insignificant symptoms from 240 ml of milk is probably only 15% of those experiencing symptoms of any kind, and even in these the symptoms are not medically of consequence. They have no effect whatever on health. Of course, the more milk that is consumed at a sitting, the more significant symptoms are likely to be in those experiencing them. But at the 8 ounce level of consumption, few healthy adults in the United States who are lactase deficient will have symptoms of any degree of significance or troublesomeness. The symptoms experienced can validly be likened to those experienced by many persons when certain foods containing complex carbohydrates such as beans are consumed (Dr. Paige, Tr. 1122-23; Dr. Briggs, Tr. 7930).

## Milk Allergy

Paragraph Nine of the complaint alleges that the advertising of respondents was false because the consumption of milk is detrimental to persons suffering from milk allergy. In support of this allegation, complaint counsel called Dr. Oscar Lionel Frick and Dr. Herbert S. Kaufman, and elicited testimony on this subject from Drs. Kretchmer and Paige whose qualifications have been stated. Respondents called Dr. Charles D. May and Dr. Abba I. Terr for expert testimony on the allergy question.

### Dr. Herbert S. Kaufman

Dr. Kaufman is a medical doctor specializing in the field of allergy and immunology and engaged in private practice in San Francisco since approximately 1966 (Dr. Kaufman, Tr. 3243). His curriculum vitae is in the record as CX 4003. Dr. Kaufman obtained his degree from Baylor Medical School in 1961 and completed a joint residency at Washington University in St. Louis, Missouri, and at Baylor Medical School in Houston, Texas (Dr. Kaufman, Tr. 3248; CX 4003). Dr. Kaufman's practice is that of a consultant in allergy and immunology (Dr. Kaufman, Tr. 3249). He sees patients referred by other physicians who have made a tenative diagnosis of allergy. Approximately 90% of Dr. Kaufman's patients are referred to him in this manner (Dr. Kaufman, Tr. 3324-25). Dr. Kaufman is a member of the American Academy of Allergy, the American College of Allergy, the American Academy of Pediatrics and is a diplomate of the American Board of Allergy and Immunology (CX 4003). Dr. Kaufman has been director of the Allergy and Immunology clinic at

Childrens Hospital in San Francisco, Chief of the Pediatric Allergy Clinic at Presbyterian Medical Center in San Francisco, [72] and is presently a lecturer in Allergy and Immunology at Mt. Zion Hospital in San Francisco (CX 4003).

Dr. Oscar L. Frick

Dr. Frick is a medical doctor and possesses a Ph.D. in microbiology. His curriculum vitae is in the record as CX 4002. He obtained his medical degree from Cornell Medical School in 1946 and completed his residency at the Children's Hospital in Buffalo, New York. After several years of private practice in pediatrics, Dr. Frick became interested in allergies and pursued further training in that specialty, receiving a Ph.D. in medical microbiology from Stanford University in 1964 (Dr. Frick, Tr. 4582). He then joined the staff of the University of California Medical Center at San Francisco where he is currently Professor of Pediatrics and Director of the allergy and immunology training program. Dr. Frick is a member of many professional societies and has written a number of technical articles in the field of allergy (CX 4002). He has been co-chairman of the American Board of Allergy and Immunology and was one of the founding members of the Board. Dr. Frick was President of the American Academy of Allergy in 1971 (CX 4002(b)). He has served on the Editorial Board of the *Journal of Allergy* (Tr. 4585). Dr. Frick's clinical experience in the diagnosis and treatment of allergy extends from his practice as a pediatrician commencing in 1951 to date. He continues to see patients as a member of the University of California hospital staff, and privately (Tr. 4583). He has conducted research in the field (Tr. 4583) which has been published (CX 4002), and Dr. Frick has authored chapters in various medical textbooks dealing with allergy.

Dr. Charles D. May

Dr. Charles D. May is Professor of Pediatrics at the University of Colorado Medical School, Senior Physician in the Division of Pediatric Allergy and Clinical Director of Inpatient Services at the National Jewish Hospital and Research Center in Denver, Colorado (Dr. May, Tr. 10063; RX 1525). His curriculum vitae is in the record as RX 1525. Dr. May obtained his degree from Harvard Medical School in 1935, completed his residency at Children's Hospital in Boston in 1937 and then served as a Commonwealth Fund Fellow in the Department of Organic Chemistry at Harvard. In 1941 he joined the Harvard Medical School as an instructor in pediatrics. With the outbreak of war, Dr. May joined the Army and served as Chief

Medical Service, 5th General Hospital, [73] spending four years overseas. In 1946 he returned to Harvard as an assistant professor. In 1947 he went to the University of Minnesota Medical School as an associate professor of pediatrics and in 1952 joined the State University of Iowa College of Medicine as Professor and Chairman of the Department of Pediatrics. From 1957 to 1961 Dr. May was Clinical Professor of Pediatrics at Columbia University. Throughout this phase of his career, Dr. May's clinical and research work focused on infant nutrition and nutritional diseases of children (Dr. May, Tr. 10064, 10068–71). In 1961 Dr. May joined the faculty at New York University School of Medicine, and in 1970 Dr. May joined the staff at the National Jewish Hospital, where he operates a special care facility of eight hospital beds, special staff and 24-hour direct observation of patients. This facility is unique in the research and treatment of allergic disease (Dr. May, Tr. 10073–74). In its operation, Dr. May and his colleagues have developed a "double-blind" method which eliminates all uncertainty in the diagnosis of food allergies (RX 1750, 1756).

Dr. May's contributions to medical knowledge in the fields of infant nutrition, pediatrics and allergy have been recognized by his profession. He has received both the Mead Johnson Award (1949) and the Borden Award (1958) which are granted by the American Academy of Pediatrics in recognition of outstanding research contribution in the fields of pediatrics and nutrition during the preceding year (Dr. May, Tr. 10080–81; RX 1525). Dr. May was Vice-President of the American Academy of Allergy for the year 1977–78, an honorary position awarded in recognition of significant contributions to the field of allergy (Dr. May, Tr. 10078–79). Dr. May is also Chairman of the Academy's Committee on Food Allergy and a member of the NIH Task Force on Pediatric Allergy. He is a fellow or member of many professional societies (RX 1525) and has written many scholarly reports and articles on his research work (RX 1525(b) through (f)).

### Dr. Abba I. Terr

Dr. Abba I. Terr is a medical doctor specializing in allergy and clinical immunology (Dr. Terr, Tr. 10193). His curriculum vitae is in the record as RX 1524. He obtained his degree from Western Reserve University School of Medicine in 1956 and completed his residency in internal medicine at the University of Michigan Medical Center in 1960. He then completed a two-year fellowship in allergy and immunology leading to a Master of Science degree at the University of Michigan, and joined the faculty as an instructor. Thereafter, [74] he became assistant professor of internal medicine in the section of allergy, and simultaneously served as a clinical investigator at the Veterans Administration Hospital in Ann Arbor where his research was funded by a United States Public Health Service research career development award. In 1966 he joined the faculty of Case Western Reserve University School of Medicine as an assistant professor and Director of the medical school's Allergy Clinic (Dr. Terr, Tr. 10194-96). Dr. Terr relocated in San Francisco, California, in late 1970 and has devoted approximately 70% of his time since then to a private consulting practice in the field of adult allergy and clinical immunology. The balance of his time is divided between Stanford University School of Medicine, where Dr. Terr is Director of Adult Allergy Clinic and Clinical Associate Professor of Medicine, and the San Francisco Childrens Hospital where he is Director of the Allergy Clinic. He is also a civilian consultant to the Allergy Clinic at Letterman Hospital operated by the United States Army. Dr. Terr is chairman of the scientific advisory panel on allergy of the California Medical Association, a member and fellow of many professional societies and has written articles on his research and clinical work (Dr. Terr, Tr. 10196-99; RX 1524).

113. Allergy is the field of medicine concerned with adverse immunologic reactions to the introduction of foreign substances, normally proteins, into the human body (Dr. Kretchmer, Tr. 380-91, 780; Dr. Frick, Tr. 4595; Dr. Kaufman, Tr. 3250-51; Dr. May, Tr. 10092-96; Dr. Terr, Tr. 10210-11). These foreign substances may gain access through the nose or mouth or by contact with or injection through the skin (Dr. Frick, Tr. 4587; Dr. Kaufman, Tr. 3251; Dr. May, Tr. 10094). The allergic response is a result of the recognition by the body's immune system that the protein which has penetrated the body is foreign. This foreign substance, known as an antigen or allergen, triggers the production of antibodies which circulate throughout the body. A given allergen will provoke a heterogenous response, an array of antibodies, immunoglobulins, which combine with the allergen and which may, through that combination, cause a variety of physical manifestations or symptoms (Dr. May, Tr. 10092-96).

114. Food allergy, and in particular milk allergy, can cause a variety of symptoms ranging from runny nose or rhinitis, skin rash or exzema to allergic dermatitis, cramps, diarrhea, asthma and even anaphylactic shock (Dr. May, Tr. 10107-09; Dr. Kaufman, Tr. 3261; Dr. Paige, Tr. 879-80; 1232-35; Dr. Terr, Tr. 10211). [75]

115. The common symptoms of milk allergy, however, are not of major medical significance except in rare instances (Dr. Paige, Tr.

1233-34; Dr. Terr, 10203-07; Dr. May, 10209; Dr. Kaufman, Tr. 3356; Dr. Kretchmer, Tr. 380). Not only are the symptoms caused by milk allergy generally not serious, all experts agreed that to the extent milk allergy exists, it is a condition which is most prevalent during infancy, declining rapidly after that age (Dr. Paige, Tr. 885, 1230, 1250, 1234-35, 1238-39; Dr. Kretchmer, Tr. 786, 788; Dr. Frick, Tr. 4608-10; Dr. Kaufman, Tr. 3362; Dr. May, Tr. 10114-15; Dr. Terr, Tr. 10213).

116. The more frequent reports of milk allergy among infants may be due to mis-diagnosis (Dr. May, 10109; Dr. Terr, Tr. 10214-15). Dr. Paige testified (Tr. 1234-35):

> I think there is over-diagnosis in this area by working pediatricians because there is a tendency to overrespond to problems such as colic and loose bowel movements in the young victim by what I would call a wastebasket diagnosis of allergy.
>
> * * * I am focusing now on the infant. It is not an uncommon complaint for a mother to bring in a child suggesting that he has colic, a syndrome for which we have no rational explanation, or that the child is having some loose stools or he doesn't seem to be taking his milk and with very little application to the problem many pediatricians will lump those findings into a diagnosis of milk allergy.

Double blind studies have been conducted by Dr. May and his colleagues at the National Jewish Hospital in Denver, Colorado, which show that only one-half of infants diagnosed by conventional methods as being allergic to *any* food actually are allergic to such food. Only one-third of diagnosed food allergies in persons over the age of three are confirmed by double-blind food challenges (Dr. May, Tr. 10113; RX 1750(f), 1756(i)).

117. The overwhelming majority of infants, in the neighborhood of 90%, will have recovered from milk "allergy" within several weeks to perhaps a year after initial diagnosis [76] (Dr. Paige, Tr. 1239-40, 1250). Dr. May testified that 80% of infants exhibiting symptomatic sensitivity to milk will lose that reactivity within their first year of life and that approximately 98% will be asymptomatic by the time they are sixteen (Dr. May, Tr. 10114-15). The disappearance of milk allergy apparently results from maturation of both the gastrointestinal tract and of the immunity system, so that fewer milk allergens penetrate the intestinal mucosa and fewer harmful antibodies are precipitated by the milk allergens which do penetrate (Dr. May, Tr. 10116-17).

118. There are no reliable surveys or studies upon which any opinion of the prevalence of milk allergy in the population as a

whole can be based (Dr. Frick, Tr. 4608; Dr. May, Tr. 10169-70; Dr. Terr, Tr. 10232). In a chapter for a text *Allergy Principles and Practice* published in 1978 headed "Adverse Reactions To Food Due to Hypersensitivity," Dr. May and Dr. S. Allan Bock wrote (RX 421(b))[3]:

> Unequivocal clinical manifestations of hypersensitivity readily ascribed to ingestion of food are probably not common; perhaps less than 1% of infants exhibit symptomatic hypersensitivity to cow's milk, and this may be one of the most frequent examples.

119. Dr. Charles D. May in recent studies of food sensitivity established that reliable determinations of food allergies can only be made by a double-blind procedure "which eliminates the bias of the observers and the prejudice of the patient" (RX 1750(c); RX 1756(v)). As already stated, Dr. May established that only one-half of children under three years of age diagnosed by conventional methods as being allergic to any food actually are, and that only one-third of diagnosed food allergies in children over the age of three are confirmed by double-blind procedures (RX 1750(f); RX 1756(i)). Dr. May stated in his written lecture on "Food Sensitivity" (RX 1750(f)): [77]

> In the next Slide (*5*) are seen the results we obtained in double-blind food challenges in 81 children over 3 years of age with histories of reactions to foods. Symptoms were provoked in only 27 of the 81 children, or 33%. Symptoms were provoked in only 36 of 164 tests with different foods, or 22%. *Thus, more than two thirds of the histories of reactions to foods could not be confirmed and were psychologic or imaginary.* Of the 36 reactions, most were due to peanut and other nuts and a relatively few to egg, milk, and soy. These four food items accounted for all the reactions we observed even though some reactions were claimed to be due to other foods listed in the previous slide. Puncture skin tests with the corresponding food extracts were positive in all the cases of confirmed reactions, and this will be discussed in greater detail later. The onset of symptoms in these children was within minutes to 2 hours and therefore characteristic of reaginic reactions. The reactions were caused by 20 to 8,000 mg of the dried food. (Emphasis added).

120. In an article "A Modern Clinical Approach To Food Hypersensitivity" prepared for *Allergy* Dr. May and his associate Dr. Allan Bock stated (RX 1756(i)):

> In recent studies administration of foods so that neither the subject nor the observer knew what was being consumed - a double-blind procedure - revealed that only about a third of histories of adverse reactions to food could be confirmed objectively.

With respect to the diagnosis of milk allergy, Dr. May testified (Tr. 10113):

> * * * of those persons who are reported or believed to have milk reactions without

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[3] This exhibit was received in evidence for all purposes (Tr. 3387) although the undersigned apparently did not specifically so state on the record.

using double blind studies, that only half of those in infancy will be confirmed and in older people, only a third of them will be confirmed by double blind studies. In other words, there is a large amount of error in what is assumed to have been an association between some symptoms and the ingestion of milk. [78]

121. The most scientifically reliable evidence in the record on the prevalence of true milk allergy was provided by Dr. May. Dr. May testified that true milk allergy was "extremely uncommon among adults" (Tr. 10170). In Dr. May's expert opinion, among infants two years old or younger there would be approximately 5 instances of true milk allergy per 1000 (Tr. 10113-14). Between the ages of 2 or 3 and 16, the incidence of milk allergy would be about 1/50th of the figure for infants 2 years old or younger, in other words 1/50th of 5 per 1000, or about 1 in 10,000 (Dr. May, Tr. 10115). Dr. May testified to his experience at the University of Colorado Medical School and National Jewish Hospital, Denver (Tr. 10115-16):

> * * * we seldom have a person come to us who is 16 years of age and who is still exhibiting clinical symptomatic sensitivity to milk and we virtually never have an adult who comes to us with that complaint.

Over the age of 16 the incidence of milk allergy is even lower although Dr. May had no specific figure, testifying only that it was "exceedingly rare" (Tr. 10175).

122. Dr. Abba Terr testified that in eight years of medical practice as a consulting allergist he had treated only two confirmed cases of milk allergy during which period he treated between 4000 and 5000 patients suspected of experiencing an allergic response to some substance (Dr. Terr, Tr. 10202-03).

123. Dr. Oscar L. Frick testified on cross-examination that one-half of one percent of the population would experience allergic reactions to milk at some time in their lives, but at any given time only one-twentieth of one percent of the population would be subject to symptoms from milk allergy, as follows (Tr. 4625-26):

> Q. Do you recall stating your opinion in the course of that meeting that approximately less than one-twentieth of one percent of the general population would be experiencing signs or symptums [*sic*] resulting from milk allergy at any given time?
>
> A. That's right, on any one day, I think, is the way we put it. [79]
>
> Q. At any given time?
>
> A. Yes.
>
> Q. One-twentieth of one per cent?
>
> A. Yes.

Q. And that if you were to project that number to the general population who would experience signs or symptoms as a result of milk allergy at any time during their life, I believe you indicated you would multiply that one-twentieth of one per cent by ten?

A. I believe that was the figures that we used, yes.

Q. Which would give you one-half of one per cent for the general population at sometime during their life?

A. Yes.

One-half of 1% "for the general population at sometime during their life" is equivalent to 5 instances per 1000 people. One-twentieth of 1% amounts to one person in 2,000 people.

124. On direct examination Dr. Frick testified that "around seven percent or seven and a half per cent" of children "zero to three years" of age would be allergic to milk. (Tr. 4606–07). This figure must be discounted in view of Dr. May's studies that only one-half of such diagnoses by the usual methods in medical practice are confirmed objectively by double-blind studies. Furthermore, as Dr. Kretchmer testified "There is a tendency for a child to grow out of it" (Tr. 380). Among the "pediatric age group," aged 3 through 15, Dr. Frick "would put the figure at about 5 per cent" for the prevalence of milk allergy, although the study Dr. Frick referenced involving 400 infants in 1957, the incidence was only 1% (Tr. 4608). For the population as a whole Dr. Frick could not provide a percentage figure because "one doesn't really know because there really are no figures on that" (Tr. 4608).

125. Dr. David Paige believed that 7 percent of children (Tr. 883, 1250) and "7 per cent or 10 per cent of the general population were allergic to milk" (Tr. 885–86). The latter testimony for the general population included infants and children. Since Dr. Paige had already testified that 7 per cent [80] of children were allergic to milk, his testimony that "7 per cent or 10 per cent" of the general population is allergic to milk is difficult to accept in view of his testimony at Tr. 1239 that the overwhelming majority of children, "in the range of 90 percent," recover from that condition. If the latter statement is true then the incidence for the general population cannot be the same or greater than the incidence for children. The basis of Dr. Paige's estimate is also somewhat vague "General pediatric literature" "experience" and "conversation" (Tr. 886). Again, as Dr. May's studies established, diagnosis for milk allergy using conventional methods are highly unreliable.

126. According to Dr. Kaufman "5 to 15 percent" of adults, 15 percent of adolescents aged 12 to 18, and about 15 to 20 percent of

children aged 1 to 12, are allergic to cow's milk (Tr. 3286–87). Dr. Kaufman recognized that his estimates of milk allergy prevalence were considerably higher than those contained in the medical and scientific literature on the subject (Tr. 3287–99, Tr. 3413–15, 3419–27). Dr. Kaufman testified that his estimates of the prevalence of milk allergy were based on his clinical experience as a practicing allergist. However, 90% of his patients were referred to him by other physicians who had already determined that the patient was probably suffering from an allergic reaction (Tr. 3325, 3426–27; Tr. 3438–39). The clinical experience of Dr. Kaufman thus was with a patient group clearly not representative of the general population. Moreover, Dr. Kaufman's diagnosis of milk allergy in his practice was subject to the infirmity documented by Dr. May. Unless double-blind techniques are employed, unreliable figures for prevalence are obtained. Dr. Kaufman did not use double-blind diagnostic techniques (Tr. 3375, 3392–94). Dr. Kaufman's opinion as to prevalence of milk allergy was also based on a study he performed in 1964–66 involving 92 infants, one or both of whose parents were allergic and who had a confirmed history of allergy symptoms (Tr. 3395). The problem with such a study as a basis for an opinion of prevalence lies in the fact that if one or both parents of an infant are allergic, the likelihood that the infant will be allergic is much greater than would otherwise be the case (Tr. 3396–97). The 92 infants studied by Dr. Kaufman, therefore, were not representative of the general population. Any estimates of prevalence of milk allergy based on such a group are invalid. Dr. Kaufman believed that milk is not a desirable food and that "you're going to find that, just as tobacco has been found to be an undesirable product, you're going to find that cow's milk is as well" (Tr. 3418). In 1972 he wrote a letter relative to the Milk Board's "Every body needs milk" advertising in which he stated "careful studies have demonstrated that 45% of the negro children in the Baltimore area became sick when [81] given cow's milk" (CX 206). On cross-examination of Dr. Kaufman it became clear that no studies by the Johns Hopkins group or any other groups on Negro children in Baltimore established that 45 percent of Negro children in the Baltimore area became sick when given cow's milk (Tr. 3430–38). Dr. Kaufman did not provide references to any medical or scientific articles which reflected figures for the prevalence of milk allergy comparable to his estimates.

127. The preponderence of the evidence established beyond serious question that true allergic reactions to milk are so rare in the general population, at least beyond infancy, as to be of no consequence.

## Respondents' Advertising Considered in view of the Evidence Relating to Milk Allergy and Lactose Intolerance

It has been found that respondents' advertising conveyed the representations (1) that milk was "essential, necessary and needed by all individuals" for proper nutrition and good health, (2) that consumption of milk was "beneficial for all individuals" and (3) that the consumption of milk was "beneficial in large or unlimited quantities."

128. As indicated earlier, milk is not a dietary requirement for any one individual to obtain essential nutrients and to maintain good health. Every nutrient which milk supplies to the human body can be obtained from other foods by any individual, although in the case of calcium particularly, this would not be easy but would require careful dietary planning and selection of foods. From a nutritional standpoint and from the standpoint of the population of California and the United States as a whole, however, milk is essential. Were milk to be withdrawn from the California food supply, or that of the U.S. as a whole, a nutritional crisis would be created and probably there would be no readily available way to supply the resulting nutrient deficit.

129. True milk allergy is so rare in the population after infancy that this condition must be disregarded in examining respondents' advertising, whether utilizing the theme "Every body needs milk" or "Milk has something for every body." There are some individuals in the population allergic to almost any food including milk, but it is unreasonable to condemn the advertising of the Milk Advisory Board and Cunningham & Walsh because of this tiny fraction of the population. [82]

130. The percentage of various population groups which are lactase deficient has been set out in a prior section. The percentage of lactase deficient persons among various population groups is approximately as follows: Caucasians about 10%, Japanese, 100%, Chinese, 100%, American Indians, 60%, Filipinos, 100%, Koreans, 100%, Mexican Americans, 50%, and Blacks, about 70%.

131. Primary lactase deficiency, as described in prior findings, is a condition where the lactase enzyme level is high at birth and falls after weaning through mid-childhood, as a normal course of events in persons without disease (Dr. Kretchmer, Tr. 397-98; Dr. Latham, Tr. 9160). Children under ten who are destined to be lactase deficient, may not have reached a fully lactase deficient state when under that age. Applying the percentages set out in the previous finding to the various population groups in California 10 years of age

or older who are probably lactase deficient, results in a total of 4 to 5 million lactase deficient persons, in round figures about 20% to 25% of the California population (CX 694, Characteristics of the Population - California (1970), Bureau of the Census, U.S. Department of Commerce). Following the Hispanic population, the California Caucasian population contains the largest number of lactase deficient persons in the state. This is the case because the number of persons in that population group is greater by far than in any other group, although their percentage of lactase deficient persons is low.

132. Of the 20% to 25% of the California population which is lactase deficient, probably at most only 15%, as previously found, would experience symptoms of any kind from 240 ml of milk consumed at a sitting, and these would generally be mild and inconsequential. Of those experiencing symptoms of some kind, the evidence establishes that in only 15% would the symptoms be of sufficient social or psychological concern or cause sufficient physical discomfort, for the symptoms to be considered significant. Lactase deficient persons with symptoms of any significance from drinking 8 ounces of milk, in other words, constitute in all likelihood considerably less than 1%, in fact, about .7%, of the California population of 16,391,161 persons ten years of age or older in 1970. In terms of population groups with high percentages of lactase deficient persons, the number who would experience symptoms of any significance from an 8 ounce glass of milk is still extremely small, probably amounting to less than 2%. And such symptoms as are experienced are not "health problems." They have no bearing at all on individual health, *e.g.*, being mild gas or a "soft stool," or the like. Diarrhea is non-existent or extremely rare from 240 ml of milk (Dr. Paige, Tr. 1377-78; Dr. Briggs, Tr. 8325-26). [83] The foregoing percentages, of course, are essentially estimates, although based on the most reliable and persusasive studies and expert testimony in the record. Statistically valid projections are impossible on this record. This is true because there are no surveys based upon representative samples which would permit statistically valid and accurate projections to the total California population, or to particular population groups.

133. As stated earlier, the complaint does not challenge respondents' advertising from the standpoint of the California population generally. The complaint only challenges respondents' advertising to the extent it had impact on persons with "health problems" such as "certain allergies" and "symptomatic lactose intolerance." With respect to "symptomatic lactose *intolerance*," the advertising was challenged on the ground that milk is not "essential, necessary or needed" by those with that condition, on the ground that milk is

"detrimental" to such individuals, and on the ground that milk is detrimental to such individuals "in large or unlimited quantities."

134. The population of California experiencing significant symptoms due to "symptomatic lactose intolerance" from drinking normal and usual amounts of milk at a meal or at a time is so small in relation to the total population of the state that it is unreasonable to consider this condition in examining respondents' advertising. It is unreasonable to judge the advertising of the Milk Board and Cunningham & Walsh from the standpoint of this small, less than 1% segment of the population.

135. The record establishes, furthermore, that persons who do have significant symptoms from drinking milk are well aware of this and limit their milk intake to a level which does not produce symptoms they find undesirable. Those who have not associated their "symptoms" with milk consumption have in all probability not done so because the symptoms have been so mild they have not paid a great deal of attention to them. If there are lactase deficient persons who are really troubled by symptoms from milk drinking but who continue to drink milk, not having associated the symptoms with the milk consumption, their number is unknown. The record does not prove there is any significant number of such persons. Conclusions in a matter of this importance cannot be made on the basis of argument or speculation. [84]

136. If respondents' advertising is judged from the standpoint of the less than 1% of the population with symptoms of any significance, the advertising was nevertheless not "unfair, false, misleading and deceptive." The fact that milk is not literally needed by any one individual with "symptomatic lactose intolerance" does not compel the conclusion that respondents' advertising was "unfair, false, misleading and deceptive." The record proves that although any particular individual can obtain the nutrients in milk, particularly the calcium and riboflavin, from other sources, that is not practical for most individuals. The Food and Nutrition Board of the National Academy of Sciences has established the RDA for calcium to be 800 mg. Any one individual can obtain 800 mg of calcium from sources other than milk, although with difficulty. Most individuals cannot or will not do this. If they do not, they will suffer nutritional deficiencies. Looking beyond a single individual, or a few individuals, substantial evidence establishes that milk is "essential, necessary and needed" by the people of California and all significant population groups in that state, including the bulk of those with "symptomatic lactose intolerance."

137. Although it has been found that the portion of the California

population experiencing symptoms of any significance from 8 ounces of milk is so small that the Milk Board and Cunningham & Walsh did not have to tailor their advertising to fit this small segment of the population, the fact is that drinking normal and usual amounts of milk, around an 8 ounce glass at a meal or at a time, is not detrimental to "symptomatic lactose intolerant" persons. Such amounts of milk consumption, on the contrary, are beneficial to such persons. They obtain all the nutrients contained in milk, except possibly the calories present in the lactose (see CX 432, 644; Dr. Scrimshaw, Tr. 9857, 9947–48, 9960–61; Dr. Latham, Tr. 9262–66; see also, CX 224; Dr. Scrimshaw, Tr. 9837–43; RX 1471). Without milk drinking as suggested in the preceding findings, the "symptomatic lactose intolerant" person undergoes a substantial risk of suffering from a long term calcium deficiency with probable serious adverse effects on health, and possible other nutritional deficiencies. Individuals who do not have the training, knowledge and ability to learn the composition of foods, the will or funds to be guided by the composition of foods in preparing their diets so that they obtain all nutrients, particularly calcium, their bodies require, do need milk. [85]

138. The representations conveyed by respondent's advertising, furthermore, were essentially the same as the dietary advice given to the public by the Federal government for many years prior to WW II and continuing to the present. Countless U.S. Department of Agriculture pamphlets and other communications have told the public that everyone *needs* milk, that everyone should drink some milk every day, that teenagers should drink 4 or more 8 ounce cups daily, and adults 2 or more 8 ounce cups daily. No qualifications have been made in this Federal government dietary advice for lactase deficient persons. See RX 343, 345, 347–48, 350, 356(a) through (y), 369, 395.

139. Respondents addressed representations in their advertising to the 20% to 25% of the California population which is lactase deficient that milk drinking in large or unlimited quantities was beneficial, and that such persons should drink milk in such quantities. As milk consumption by lactase deficient persons increases beyond the 8 ounce-at-a-time level, the number of lactase deficient persons who will experience symptoms increases and the significance of such symptoms increases. Symptoms and the significance of the symptoms, in other words, are "dose-related" (Dr. Scrimshaw, Tr. 9856; Dr. Latham, Tr. 9645; Dr. Paige, Tr. 948; CX 407(c); RX 297(d); CX 571(c); RX 400(z)(10); CX 593(a)–(b), CX 500(j), 419(b), (c) and (d); CX 463(b), 494(c) and (d), CX 668(b), 685(b)).

Ingestion of unusually large or unlimited quantities of milk at on time can produce diarrhea, rather than simply "soft-stools," an other significant symptoms among lactase deficient persons. Th number of lactase deficient persons in California, as described, i substantial. Respondents' advertising encouraging and suggestin that this population group consume large or unlimited quantities o milk at a time was unfair and misleading.

## The Milk Advisory Board and its Relation to the State o California

### Background

### Advisory Boards and Marketing Orders under California Law

140. The California Marketing Act of 1937, as the date suggests was depression oriented legislation. The purpose was to aid th state's agricultural community which then faced unprecedente problems in selling its products. As a basis for the Act, the Californi legislature found that the inability of agricultural producers t maintain [86] markets or to develop new or larger markets for thei products had resulted in unreasonable and unnecessary economi waste of the agricultural wealth of California, that this jeopardize continued production of adequate supplies of farm products an prevented producers from obtaining a fair return, and that unles such problems were alleviated agricultural producers would b prevented from maintaining a proper standard of living an contributing their fair share to the costs of government. Th California legislature declared that it was the policy of the State o California to aid producers of agricultural commodities in solving their marketing problems, and that the marketing of agricultura commodities was affected with a public interest (Cal. Agri. Code, §§ 58651-58, 653, in the record as CX 1110 (z-81), *et. seq.*).

141. Among the purposes of the Marketing Act of 1937 were the following (Cal. Agri. Code, § 58654):

(1) to provide methods and means for the maintenance of present markets, or for the development of new or larger markets, for commodities which are grown within this state and,

(2) to restore and maintain adequate purchasing power for the producers of the state.

142. In achieving these objectives the Marketing Act of 1937 authorized a variety of activities including surplus control and stabilization funding; limitation of quantity; allotment of quantity or

quality for purchase; allotment of quantity or quality for processing or distribution; regulation of period for processing; surplus, stabilization or byproduct pools; grading standards, uniform inspection and grading; advertising and sale promotion; prohibition of unfair trade practices; production adjustment benefits; research studies; quality improvement; educational programs; official board brands, trade names or labels; and prevention and control of insects, predators and diseases (Cal. Agri. Code, §§ 58882-95). As listed, advertising and sale promotion were specifically authorized activities which producers of a commodity might obtain a marketing order to conduct, but those activities were not necessarily required under the Act. The Marketing Act of 1937 thus authorized the promulgation of marketing orders for specific products and purposes, and the creation of advisory boards to formulate and carry out marketing plans (Cal. Agri. Code, § 58741, *et seq.*). [87] With respect to advertising and promotion the Act provided (Cal. Agri. Code, § 58889):

> A marketing order may contain provisions for the establishment of plans for advertising and sales promotion to maintain present markets or to create new or larger markets for any commodity which is grown in this state.

Under the Act generic advertising only is permitted without reference to private brands or trade names, and false or unwarranted claims, including disparagement of other commodities, are specifically prohibited (Cal. Agri. Code, § 58889).

143. Before a marketing order may be issued, the Director of the California Department of Food and Agriculture must find reason to believe that a proposed marketing order will tend to effectuate the policies of the Marketing Act. Thereafter, the Director, upon notice to the industry and the public, must conduct a public hearing and, based thereon, make findings that the proposed marketing order will effectuate the policies of the Marketing Act. Following that, the proposed marketing order must be submitted to a vote of the producers of the commodity involved. If approved, a marketing order may be promulgated (Cal. Agri. Code, §§ 58741, 58771, 58772-75, 58777, 58782-88, 58811-14). Approval must be by a majority according to one or the other of the following percentages of producers (Cal. Agri. Code, § 58993):

(a) 65% of the producers representing at least 51% of production, or

(b) 51% of producers representing 65% of production.

144. All marketing order activities must be paid for by the

producers who band together to carry out the activities provided for in the order. An assessment is levied on each producer after the marketing order has been approved with a maximum being specified. The maximum assessment cannot be increased except by another vote pursuant to the foregoing voting formula (Cal. Agri. Code, §§ 58921-22, 59034).

145. Under the Marketing Act monies obtained by assessment on the producers of a commodity covered by a marketing order may be used for the generic advertising and promotion of the commodity, if that is an activity or objective authorized by the particular marketing order involved, and for the payment of all expenses incurred in carrying out [88] the authorized marketing plan. Among the expenses which must be paid by producers are the expenses incurred by the state Department of Food and Agriculture in formulating, issuing, administering and enforcing the Marketing Order, including the time of the Director and Department personnel (Cal. Agri. Code, §§ 58921, 58941, 58961). Funds collected by assessment on producers must be deposited in a bank or other depository, and segregated for the account of the particular marketing order under which the funds were collected. No monies may be expended without the approval of the Director of Food and Agriculture, and assessment funds may be spent only for marketing order expenses (Cal. Agri. Code, § 58937).

146. Assessment funds collected are not part of the general revenues of the State of California but are in the nature of trust fund monies which can only be used, as stated, for expenses incurred in implementing the marketing order. Income on assessment funds is allocated to the particular marketing order account involved. If monies are not expended for marketing order purposes in a particular fiscal year, they are carried over to defray marketing order expenses for the following fiscal year. In the event that a marketing order terminates, the Marketing Act of 1937 requires that unexpended assessment funds, if any, be refunded pro rata to the producers from whom the funds were collected. If the unexpended funds are so small that a pro rata refund to producers is impractical, the funds may be held to defray expenses of a subsequent marketing order (Cal. Agri. Code, §§ 58938-39).

147. Although the Marketing Act of 1937 lodges responsibility for administering marketing orders in the Director of Food and Agriculture, the Act requires that each marketing order provide for an advisory board to assist the Director in carrying out this responsibility. The advisory board must consist entirely of producers of the commodity covered by the marketing order except for one member from the Department of Food and Agriculture or a public member.

The Director has authority to monitor all activities conducted under a marketing order for compliance with the Act and with the provisions of the marketing order; no actions may be taken without his approval, directly or through staff of the Department of Food and Agriculture (Cal. Agri. Code, §§ 58711-12, 58846(a), 59141-42, 59161-63). The California Director of Food and Agriculture appoints all members of advisory boards although marketing orders contain provisions for the nomination of producers for the Director's consideration (Cal. Agri. Code, §§ 58841-43). [89]

148. The California Director of Food and Agriculture may delegate to an advisory board responsibilities for administering marketing orders including authority to enter into contracts or agreements, authority to employ personnel, and authority to incur expenses, all subject, however, to the approval of the Director (Cal. Agri. Code, § 58845).

149. Advisory boards formed under the California Marketing Act of 1937 may be terminated at any time following, in general, the procedures governing the establishment and promulgation of marketing orders, and a vote of the producers of the commodity according to the formula set out earlier.

### Formation of the California Milk Producers Advisory Board and Promulgation of the Marketing Order under Which It Was Organized

150. During the 1950's and 1960's a number of milk producers in the State of California maintained a state affiliate of the American Dairy Association. This affiliate was known as the American Dairy Association of California (hereinafter sometimes referred to as ADA of California). It was formed for the purpose, among others, of advertising and promoting milk consumption (CX 2210(d)(47); Shields, Tr. 1866-71; Reuhl, Tr. 2079-80).

151. The ADA of California was a purely voluntary association, funded only by dues and contributions from those milk producers who chose to join. It could not require dairymen either to join or to contribute (CX 1110(y)-(z); Shields, Tr. 1872; Larson, Tr. 11581, 11584). By the year 1968, 70 percent of dairy farmers were contributing members, but this group represented only about 50% of the total volume of market milk produced in California. Larger dairies often did not join or contribute to the Association's budget to advertise and promote milk consumption. Nevertheless, the large dairies reaped the benefits (Larson, Tr. 11584-85; Reuhl, Tr. 2085-86), and this situation discouraged many dairymen who supported the organization, making it difficult to hold them as members. Mr.

Larson, a director of the ADA of California and later a Chairman of the California Milk Producers Advisory Board testified (Tr. 11585-86):

> Q. Did there come a time when you, personally, and/or the ADA of California decided that some steps would have to be taken to remedy this situation that you just described with respect to the amount of membership in the state? [90]
>
> A. Yes, I think it was probably about 1966 that we began thinking that it was hard to hold the membership in the organization. We could not get the big ones that should be in, so we began to realize that it was going to have to be a compulsory program, or I think ADA of California would have fallen apart, so that is when we started thinking about some total program.

152. Between 1958 and 1969, reflecting a national trend, per capita consumption of milk in California declined from approximately 146 quarts to approximately 127 quarts, a decline of 13 percent in one decade (CX 2210(E-01), p. 2; CX 2430(a), 2431(b); Shields, Tr. 1872). By 1969 this downward trend had become a matter of serious concern to California milk producers. Before that time population increases had prevented the per capita decrease in milk consumption from reducing total gallonage sold. In the later 1960's, however, the population growth of California began to level off rendering the per capita decrease in milk consumption particularly significant to dairy farmers (Larson, Tr. 11591; Reuhl, Tr. 2281-82, 2285; Krade, Tr. 9737; Shahbazian, Tr. 4399-4400; RX 1464, 1467; CX 1110(z-206)). The ADA of California and many dairy farmers concluded that milk was competing with heavily advertised junk food and soft drinks, and that the advertising of milk had not been extensive or aggressive enough to permit milk to hold its own or to halt the continuing decline in per capita consumption (CX 1110(z)-(z1) (z4-z5), (z31-z32), (z-65); CX 1119(b), 2210(E-01), p. 2).

153. As a result of the problems faced by the ADA of California in obtaining sufficient funds for a promotional program for milk of the desired magnitude, efforts were directed toward creation of a mandatory program by which all California milk producers could be required to contribute to a promotional fund. Initially the management of the ADA of California sought to obtain the status of an agricultural marketing commission which had greater freedom to act and less control by the Director of Food and Agriculture than an advisory board (Reuhl, Tr. 2092; Larson, Tr. 11586). This proposal was opposed by the Department of Food and Agriculture and was dropped in favor of an amendment to the Marketing Act to permit the promulgation of a milk marketing order and the creation of an advisory board under the Marketing Act of 1937 (Reuhl, Tr. 2092).

For a marketing order and an advisory board to promote the sale of milk under the Marketing Act of 1937, however, an amendment to the Marketing Act was necessary since under the California code market milk was not [91] within the definition of a "commodity" which could be the subject of a marketing order (Reuhl, Tr. 2091; Krade, Tr. 9736; Larson, Tr. 11586-87; Shahbazian, Tr. 2388).

154. The proposal to amend the Marketing Act of 1937 to permit issuance of a marketing order for milk and the creation of a Milk Advisory Board was supported by the then Director of Food and Agriculture and the Chief of the Bureau of Marketing (Krade, Tr. 9738; Shahbazian, Tr. 2408). The Chief of the Bureau of Marketing testified (Krade, Tr. 9739):

> We felt at that time that there was a good, rational argument that promotion and advertising might very well help the dairy industry in its time of difficulty.

155. In 1959, pursuant to the efforts of the ADA of California and the state's dairy farmers, an amendment to the Marketing Act of 1937 authorizing a marketing order and the formation of an advisory board for market milk was enacted (Larson, Tr. 11589; Krade, Tr. 9742). The amendment became effective in June 1969 (Shahbazian, Tr. 4169).

156. After notice to the industry and the public, and the required hearings, the Director of the California Department of Food and Agriculture, through department staff, made the findings needed under the Marketing Act and approved a proposed marketing order for milk which was then submitted to the milk producers of the state for their approval (CX 1110, 1119, 1130(a)-(b), 1135; Krade, Tr. 9746-47, 9756-57, 9763-64, 9768, 9781; Shahbazian, Tr. 2388).

157. The marketing order was ratified by over 80 percent of producers (Larson, Tr. 11590; Krade, Tr. 9781). Meetings of milk producers were thereafter held in the various districts to nominate producers from among whom the Director could select the Advisory Board members (Shahbazian, Tr. 2401-02). Following the approval of the requisite percentage of milk producers, the marketing order was made effective by the Director of Food and Agriculture and the California Milk Producers Advisory Board came into existence in December 1969 (CX 1146(a)-(zl).

158. The ADA of California played a leadership role at all stages in the creation of the Advisory Board (Reuhl, Tr. 2096-2101, 2116-17, 2311-12; Larson, Tr. 11581, 11585-90, 11618-19; Shahbazian, Tr. 2412-12(b); Krade, Tr. 9746-47, 9753-55; CX 1110(x)(z)-71, CX 1130). The ADA of California was dissolved in late 1969 or early 1970 after

the formation of the Advisory Board (Reuhl, Tr. 2102; Larson, Tr. 11588–89). [92]

159. The staff of the ADA of California, in general, became the staff of the California Milk Producers Advisory Board (CX 2403(d)-(e); Reuhl, Tr. 2103–06; Larson, Tr. 11600–01). The manager of the ADA of California, Mr. Reuhl, became the manager of the Advisory Board (CX 2210(d)–47; Reuhl, Tr. 2103). The assistant manager and public relations director of the ADA of California, Mr. Shields, became the Advisory Board's assistant manager and public relations director (Shields, Tr. 1865–66). Mr. Larson, a member of the Board of Directors of the ADA of California became Chairman of the Advisory Board (Larson, Tr. 11581, 11589, 11600). Most of the members of the Board of Directors of the ADA of California became members of the Advisory Board (Reuhl, Tr. 2108–09; Calcagno, Tr. 11668). The offices of the ADA of California in Modesto, California, became the Advisory Board's offices and the association's office supplies, furniture and equipment became the Advisory Board's office supplies, furniture and equipment (Reuhl, Tr. 2102–03; Larson, Tr. 11588–89).

### California Milk Producers Advisory Board

### Authority, Purpose and Objectives

160. The primary mission of the California Milk Producers Advisory Board is to promote the consumption of milk in the state of California using the funds obtained by the mandatory assessment authorized by the Marketing Order and approved by the state's milk producers. To this end, the Advisory Board has authority, subject to the approval of the Director of Food and Agriculture, to formulate and carry out promotional and advertising programs, to employ a staff, to hire agents and consultants, and to expend the assessed funds (Cal. Agri. Code, §§ 58845–46; CX 1110(z–89), 1146).

161. The specific objectives of the "Marketing Order for Research, Education and Promotion of Market Milk and Dairy Products in California" as stated by the findings of the Department of Food and Agriculture preliminary to its adoption, were the following (CX 1119(a)):

1. To more effectively correlate the marketing of California market milk and dairy products with the demand therefor;
2. To establish and maintain orderly marketing of market milk;
3. To provide methods and means for the maintenance of present markets and for the development of new and larger markets for California milk and dairy products; and [93]

4. To eliminate or reduce economic waste in the marketing of milk and dairy products.

162. The purpose of the Milk Advisory Board was expressed in more everyday language from time to time by Board members and staff, by officials and staff of the Department of Food and Agriculture, and by leaders of California dairymen. These statements reflect the understanding of the California dairy industry of the purpose of the Board and its activities and objectives. Mr. Norman Larson, Chairman of the Milk Advisory Board from its formation through 1973 and a Board member since that time, testified in this proceeding to the Board's objective (Tr. 11591):

> Well, I don't think its any different from the American Dairy Association. The goal was always to sell milk. We realized what was happening. I think that is the thing that spurred this on, the fact that per capita consumption was continually going down. This has been the sole purpose of our organization, to sell our product.

Mr. Oren Christensen representing the ADA of California testified at the 1969 hearing conducted by the Department of Food and Agriculture on the proposed Marketing Order for milk (CX 1110(z)(z1)):

> Experts in the field of promotion tell us beyond a shadow of doubt that unless we conduct expanded programs of dairy food promotion in all categories and on all levels we can expect a continuation of our decline in our per capita consumption of milk. Any businessman engaged in the sale of a product or service will tell you the same thing whether he is selling tractors or clothing, cigarettes or automobiles.

Mr Hugh Good, a Board member of the ADA of California and subsequently a member of the Milk Advisory Board, and a member of the Dairy Council of California, testified at the same hearing (CX 110, (z11)-(z12)):

> The plan under consideration today, financed and operated by the dairy farmers of California subject to the approval of the Director of Agriculture, fills the need for commercial promotion on a non-brand basis covering the entire state. [94]

Mr. Good also expressed the distinction between the proposed Milk Advisory Board and the Dairy Council of California (CX 1110 (z-12)):

> This plan would not infringe on or duplicate the excellent work being done by the Dairy Council of California in the field of education with the schools and professional people. The Dairy Council has the confidence and is accepted as an authority on

> nutrition by the Educational System. I would feel that a strong commercial advertising approach by the Dairy Council would jeopardize the favorable position enjoyed by Dairy Council with the schools of California.
>
> To be most effective, our milk marketing program must remain separate as a commercial sales approach to the consumer, and our educational program must also be continued as a separate entity. I believe the intent and aim of this plan is to do just this.

Other California dairymen testified to the same effect, that advertising and promotion of milk were needed for the economic good of the dairy farmers of California (CX 1110).

163. Mr. Vernon L. Shahbazian, a senior agricultural Economist in the Bureau of Marketing of the Department of Food and Agriculture, summarized the testimony at the hearing on the prospective Marketing Order for milk (CX 1119(b)):

> According to the testimony received, there was a desire to carry out strong commercial advertising to consumers. This would complement the information and education approach used by the Dairy Council of California, which includes a strong program of education in the schools. [95]

164. The "1974 Marketing Plan" presented to the Advisory Board by Cunningham & Walsh, after stating that in March 1970 the Board had launched "one of the most effective advertising campaigns ever implemented for any product," restated the "overall objectives" of the Board and the "basic reason for being formed" (CX 3116, p. 4):

> To Build Milk Sales For The
> Benefit of Dairy Farmers
>
> -and-
>
> At All Times, Milk Must Be
> Portrayed In A Dignified,
> Wholesome, Truthful,
> and Sincere Manner.

The overall, long-term goal of the Board was given as "to return the per capita consumption of milk to its all-time high of 140 quarts achieved in 1947."

165. The objectives and basic purpose of the Milk Advisory Board to increase milk sales and thereby to enhance the economic well-being of California's dairy farmers were frequently stated to dairy farmers and others by the Milk Advisory Board in "The Milk Advisor," and in a publication called "The Dairyman" which allocated several pages to activities of the Milk Advisory Board (CX 2425-72; CX 3135-58).

166. During the trial of this proceeding, Mr. Louis Calcagno, current chairman of the Milk Advisory Board, testified to the purpose of the Board (Tr. 11649):

> A. I would believe we have the sole purpose of telling the public about our nutritional product, and of course, to increase the per capita consumption and the sale of Class 1 milk and other dairy products.
>
> Q. Does the program of the California Milk Producers Advisory Board, in your opinion, benefit all of the dairymen in the State of California? [96]
>
> A. It surely benefits all of them. I could not think of any particular part of the industry that hasn't benefited. New sales create new pool quota, new pool quotas are given to producers; and, of course, this enhances their income; makes it more economical and feasible for them to produce milk.

## Membership

167. The Milk Advisory Board consists of 24 producers of "market milk" and, since 1975, one public member (Shahbazian, Tr. 4175; CX 1146(w)-(x), (xx), Article I, Section A, Subsections 1, 6). Stated non-technically, "market milk" is milk produced and marketed for consumption as fluid milk and for the manufacture of fluid milk products (Agri. Code, §§ 32509-10, 35751-55, 38183, 38213, 38452, 38512, 38521). The public member, not a milk producer, is on the Board to represent the interests of the California general public (Schribner, Tr. 11194-95, see also, Calcagno, Tr. 11647-48; Shahbazian, Tr. 4337-38; Ikari, Tr. 2607-98, 2705-10).

168. The members of the Milk Advisory Board are appointed by the Director of Food and Agriculture from among the state's milk producers, except for the public member. Advisory Board members are generally selected from lists of nominees submitted after vote by assessment-paying dairy farmers (CX 1146(x), Article II, Section A, Subsection 3), although the Director is not required to appoint Board members who have been nominated by the milk producers (Rominger, Tr. 11253-54). The state of California is divided into districts so that the membership of the Milk Advisory Board is drawn from various geographic areas of the state which produce market milk (CX 1146(z) to (z-1), Article II, Section A, Subsection 5; CX 2304(l); Shahbazian, Tr. 4179-80, 4278). Milk producers within a district select their nominees to the Milk Advisory Board at nomination meetings at which only milk producing dairy farmers are eligible to vote (CX 1146, which is the Marketing Order with all amendments to date, Tr. 4200-04; CX 2304(l)-(m), CX 1126(b), CX 1227(b), Shahbazian, Tr. 4275-80; Rominger, Tr. 11242-43).

169. Over the years, the Director of Food and Agriculture has

usually appointed the dairymen to the Milk Advisory Board who have received the most votes of milk producers in their districts (Portello, Tr. 2761; Shahbazian, Tr. 4177, 4277-79; Rominger, Tr. 11241-42, 11253-54). The public member is selected by the Director from among those whose names have been submitted by various groups including the Milk Board (Calcagno, Tr. 11648; Ikari, Tr. 2607-98). [97]

Funding

170. Milk Advisory Board activities are funded entirely by assessments on dairy farmers producing market milk. No tax or other monies are received from the state of California, and the state is paid by the Milk Advisory Board for all expenses incurred as a result of administering the Marketing Order or arising from the operations of the Board (CX 1146, 2201(e)-01, p. 2, CX 2304(m), CX 2472(b), 1380, 1386-93; Shahbazian, Tr. 4280-83, 4286-88; Loe, Tr. 10284-85; Adams, Tr. 19432).

171. Minutes of Milk Board meetings, publications, and other documentation in the record, reflect the fact that Board activities are conducted for the economic benefit of the state's dairymen (CX 2444(b), CX 811(d), 2308(d), 2461(c), 3415(b); see generally CX 2425 through CX 2472, CX 3135 through CX 3158).

172. In voting for the Marketing Order for milk and the formation of the Milk Advisory Board, the dairy farmers initially approved an assessment on each producer of 1/2 of 1 percent of gross sales value (CX 1135(n)-(o); CX 2210(E-01), p. 2; CX 2431(c)). In June 1971, upon recommendation of the Milk Advisory Board and approval of the dairy farmers, the Director of Food and Agriculture increased the permissible assessment to 1 percent of gross sales value (CX 1184, 1188, 2433(b)). Each year the Milk Advisory Board proposed for approval by the Director an annual assessment rate upon milk producers in conjunction with an annual budget of the Milk Advisory Board (CX 1189, 1191, 1193). In proposing an annual assessment rate, the Milk Advisory Board may recommend to the Director any assessment rate within the maximum (Reuhl, Tr. 2192-93, 2309-10). For 1974, the Board recommended, and the Director approved, an assessment rate of .884% out of a maximum rate of 1 percent (CX 1193).

173. The assessment levied on California dairymen provided the following amounts for the promotion of milk and other activities of the Milk Advisory Board for the years indicated:

| *Year* | *Amount* | *Exhibit* |
|---|---|---|
| 12-69 to 6-70 | $ 885,912. | CX 1380 |
| 7-70 to 6-71 | 2,616,305. | CX 1386 |
| 7-71 to 12-71 | 2,130,607. | CX 1387 |
| 1-72 to 12-72 | 5,383,129. | CX 1388 |
| 1-73 to 12-73 | 5,788,830. | CX 1389 |
| 1-74 to 12-74 | 7,625,669. | CX 1390 |
| 1-75 to 12-75 | 7,941,505. | CX 1391 |
| 1-76 to 12-76 | 9,809,656. | CX 1392 |
| 1-77 to 12-77 | 9,135,938. | CX 1393 |

### [98] Staff and Committees

174. The Milk Advisory Board employs a staff of approximately fifteen persons (CX 2403(d); Reuhl, Tr. 2104-05). These employees are not classified civil service employees of California (CX 2304(t); RX 1465; Shahbazian, Tr. 2383; Krade, Tr. 9787-88). Staff activities are directed by a manager and an assistant manager (Reuhl, Tr. 2076-77; Shields, Tr. 1866). The Milk Advisory Board itself meets every two months at which time it reviews and directs staff activity, and approves matters for submission to the California Director of Food and Agriculture for his approval (Reuhl, Tr. 2076-77; CX 800).

175. The Milk Advisory Board staff has included at various times persons directing efforts in the fields of advertising, marketing, merchandising, public relations, industry relations, and sales and development (CX 2424(c), 2430(b), 2442(c), 2448(c), 2452(c), 2453(d)). Until 1975 the Board maintained committees headed by dairymen members, to which the Board staff reported, in the following fields: Advertising, Executive, Grocery Seminar, Merchandising, Public Relations, Publicity and Dairy Princess Committee, and Research (CX 850, 903, 1031, 1060; Reuhl, Tr. 2306). Since 1975, the Milk Advisory Board has utilized only two committees, Executive and Research, with the staff reporting to the Board itself (Reuhl, Tr. 1476).

## Promotion of Milk by the California Milk Producers Advisory Board

### Overall Promotional Work

176. As in the case of the ADA of California, the Milk Advisory Board's principal methods for promoting milk and dairy products were advertising, merchandising and public relations. A 1975 Milk Advisory Board press release stated: "The sole purpose of CMPAB is to promote milk and dairy products through advertising, in-store merchandising, public relations and other promotional techniques" (CX 2210 (E-01); Shields, Tr. 1870-72; Reuhl, Tr. 2079).

177. Although advertising was doubtless the major method of

milk promotion, the Milk Advisory Board employed all the promotional techniques currently used in the commercial world. Mr. Gordon Reuhl, manager of the Board wrote in "The Dairyman" in June 1973 (CX 3144(b)): [99]

> I am often asked by dairymen and others in the dairy industry what I believe to be the most effective means of selling milk through our promotional program in California. This is difficult to answer, for we know it is a total effort which produces the sales increases we are seeing, and this includes not only advertising, but merchandising, marketing, public relations and publicity, and a variety of other activities.

Among the promotional activities conducted by the Milk Advisory Board were the following:

Generic advertising (CX 2433(c); 2434(a)).

Public relations (CX 2311; 2425(c)).

Dairy Princess Program (Tr. 9799; CX 2426(d)).

June Dairy Month (Reuhl, Tr. 2174-75; Krade, Tr. 9799; CX 1031(a)).

Restaurant awards and related industry awards (Reuhl, Tr. 2171; Krade, Tr. 9799; CX 1031(a)).

Merchandising (CX 2425(b), 2428(c)).

Grocer seminars (Reuhl, Tr. 2177; Larson, Tr. 11584; CX 2425(c), 2441(d)).

Point of sales materials (CX 180(c), 2449(b); 2461(d)).

Annual nomination and information meetings (CX 1031(b), 1227(b), 2210(g-08), p. 3).

County fair booths (Reuhl, Tr. 2176).

Research (CX 1060; Larson, Tr. 11595-99).

In general, the foregoing were a continuation, although on a larger scale, of the activities of the ADA of California. (Reuhl, Tr. 2079, 2171-74, 2176-77; Shields, Tr. 1870-71, 1892-93; Larson, Tr. 11582-84; CX 1031(a), (b)). [100]

178. The broad spectrum of milk promotional activities engaged in by the Milk Advisory Board is described by the Board's manager in "The Milk Advisor" issue of May 1977. Although this statement was made after the advertising challenged in the complaint had been terminated, it shows the scope of the Milk Advisory Board's

activities from the time of its formation at the end of 1969 (CX 2467(b)):

> To reach our 1976 objectives, the Milk Advisory Board created new, exciting programs, improved on existing activities and began investigation of ways to further expand the market for milk in California.
>
> The concept of a "total promotion program" has been enhanced with the even closer coordination of all program elements. Each department has its own specialization—its own particular job to do — and is a vital part of the total marketing program.
>
> Individually and collectively, I believe, CMAB's programs are doing what they set out to do and doing extremely well. Briefly, I'll review the past programs so you, the dairymen who pay for this, will see how the total promotion program accomplishes its marketing objectives.
>
> ADVERTISING, where the biggest portion of funds are expended, reaches consumers with a number of unique messages. The Open Your Mouth for Milk campaign with dairy farmers and consumers has been the flagship in our television advertising efforts and performed excellently. While this campaign aims at women, other campaigns have large audiences of young adults and children.
>
> MERCHANDISING is closely coordinated with advertising through individual promotions. Each promotion is created to maximize the impact on the shopper at the grocery store. Creative in-store materials, from banners to booklets, seek to give shoppers a vivid reminder to buy dairy products. [101]
>
> SALES & DEVELOPMENT is our other important contact with grocers. This department provides grocery operators with training sessions to improve their dairy sections, assuring that high quality milk products are sold to consumers. High volume chain stores and independent grocers have participated in this program and have shown significant sales increases by following recommended procedures.
>
> HOME ECONOMICS works closely in preparation of recipes and food information for use by merchandising and advertising, and conducts an intensive food page publicity program. The appealing recipes and photos you see with milk, cottage cheese, yogurt and other dairy products are created carefully and then provided to news media.
>
> PUBLIC RELATIONS & PRINCESS programs provide support for the total program with publicity materials, plus create special events and handle countless media and consumer inquiries. The Princess program continues to serve the industry's needs for a fulltime spokesperson traveling the state, meeting thousands of people.
>
> Periodically each department reviews its activities and management makes the same close appraisal of the total promotion program. We will continue to work effectively and promise you the best possible effort.

179. In 1972 the Milk Advisory Board allocated its funds approximately as follows: Advertising, 80 percent, Merchandising, 12 percent, Public Relations & Princess, 3 percent, Administration, 2 1/2 percent, Marketing, 1 1/2 percent, other, 1 percent (CX 2444(c)).

Allocations for the years 1973 through 1975 were comparable (CX 2451(b), 2456(b), 2462(b)).

Dissemination of Advertising

180. Shortly after coming into existence in December 1969, the Milk Advisory Board solicited and heard presentations by advertising agencies in order to select an agency to handle the Board's anticipated million dollar advertising program (CX 801(a), 850(a)-(b); Bier, Tr. 1454-56). As a result of this [102] solicitation, Cunningham & Walsh was engaged to handle the Board's advertising and to develop and implement an advertising campaign to promote milk (Bier, Tr. 1453-57; CX 801(a), 850(a)-(b)). Initial advertising copy was purchased and the slogan "Every Body Needs Milk" was obtained. The Milk Advisory Board and Cunningham & Walsh studied possible advertising themes and strategies and, utilizing TV, radio, print media and billboards, commenced substantial advertising and promotional campaigns to encourage milk consumption.

181. In 1971 the milk producers voted to increase their assessment to one (1) percent as already described, doubling the budget available to the Milk Board for advertising (CX 2431(b), (d); 2433(b)). The decision of California milk producers to expand the Milk Advisory Board's advertising and promotional budget by increasing the assessment rate from one-half a percent (1/2) to one (1) percent was to benefit dairymen by attempting to increase milk consumption. In addition to the increase in revenues which would be generated by an increase in milk sales, under the California pricing structure at that time an increase in demand for dairy products was a factor in granting an increase in the price the producer obtained for milk. Higher prices to dairymen tended to result when milk sales increased (Adams, Tr. 10417-18; CX 2430(a), 2431(c); see also Cal. Agri. Code, § 62062(b)). In advocating approval of the increased assessment to producers in *"The Milk Adviser,"* the Advisory Board described the benefit to dairymen from increased advertising, involving not only higher sales, but also higher prices to producers for their milk. The Board stated (CX 2431(c)):

> Now that the Milk Advisory Board program of "Every Body Needs Milk" has proved itself by creating over a 90% awareness for milk advertising in California, it is known that the MAB program is pointed in the right direction. All that is needed to continue to build sales is sufficient money to reach the consumer regularly with milk messages. Solid research tells us this.
>
> Increased Class 1 sales and per capita consumption will produce a better blend price revenue, with eventual increases in the Class 1 price to producers. Pool quotas

> [*sic*] can become more valuable and equalization of quota goes along with increased usage. In addition, the assessment cost is figured in by the Department of Agriculture as a cost of production. In other words, the consumer pays the bill. That is the way all advertising is figured by any advertiser. . . a part of production and distribution costs, included in the price of product to the consumer. [103]
>
> Let's say the Class 1 and per capita decline had been stopped in 1967, and dairymen began to realize a 1% yearly increase in sales, a reasonable figure. If that had been the case, an extra 169 million gallons of milk would have been sold in the 1967-70 period, over a three month supply of milk. Blend price revenue alone would have increased $20 million and increases in Class 1 prices would surely have resulted, adding $5.4 million per year for every 10¢ raise. And, Class 1 raises surely would be more than 10¢. This analysis has been reviewed and approved by the Bureau of Milk Stabilization.
>
> Per capita sales, down 2.2% in 1969, could have been down 2.5 to 3.5% in the high unemployment year of 1970 producing Class 1 sales declines from 1 to 2%. Instead preliminiary figures tell us that 1970 will level off in Class 1 sales and per capita sales will be down only about 1.5%. Increased advertising can turn the tide for dairymen. Everything points that way.

With an increase in the assessment on milk producers to one (1) percent, "*The Milk Advisor*" stated to California dairymen that "2 1/2 Times More Milk Advertising could be obtained, offering "Expanded Television," "Expanded Radio," "Expanded Newspapers," "Expanded Billboards," "More Magazine" ads, "More Merchandising," "More Grocer Seminars," "More Food Recipe Publicity," "More Public Relations," and "More Marketing" (CX 2431(a)).

182. The expenditures of the Milk Board for the advertising of milk were set out earlier herein. As stated, they ranged from $1,645,753 in the Board's fiscal year July 1970 to June 1971 to $5,637,199 in the year January 1974 to December 1974 (CX 1386-90).

## Marketing and Advertising Research

183. The Milk Advisory Board and Cunningham & Walsh continuously analyzed their advertising and promotional efforts and devoted substantial and professional effort to determining the most effective means of advertising and measuring success in this respect. In a 1976 review of advertising research, the Milk Advisory Board's advertising manager, stated (CX 2308(d)): [104]

> During the past six years, I believe we have used almost every known device to accurately measure the effectiveness of our advertising and promotional efforts. We know, with a great deal of precision, just how many dollars it takes to move the product and what media weight are necessary to achieve this objective. And we also know precisely what sort of return this activity brings to the dairymen - sponsors of our programs.

184. The staff merchandising manager of the Milk Advisory

Board believed the Board and its advertising agency were utilizing the most effective techniques available for effective promotion of milk through advertising. A tape recording of a Milk Advisory Board meeting in 1974 reveals the self-confidence of the Board staff in this respect (CX 4200, p. 70):

> We are the best equipped thanks to you, of Proctor and Gamble, of General Foods, General Motors, Henry Ford. None of them have any more basic knowledge of the product and what to do and how they're going to do it. No one in the business advisory capacity, research advisor, consultants or anything else can tell us what to do. We are farther ahead and more sophisticated than any one of the bunch.

Again at another meeting a Board staff member stated (CX 4200, pp. 61-62):

> Our marketing plan is correct that our primary target is to make sure that the purchasing agent, the mother or the woman of the house, is convinced that she should continue to supply it [milk] and have it [milk] on hand for her children. Under no circumstances am I going to talk about doing anything about that. That should continue. But what we would like to do, in this layering effect, is to take a couple of the other layers and drive through the housewife and get so strong to the teenagers and the children and the other members of her family, so that regardless of how she feels about pinching her pennies, that they will drive through her so they'll have enough force to ask her — in other words make her buy the product. [105]
>
> Now, a few years ago we probably couldn't do this but I'm sure we can and I think for the Fall, and with the budget money that we have available for it, that we could do a job and it would pay you more money than in any other way of just doing more of the same.

185. In devising their advertising strategy, the Milk Advisory Board and Cunningham & Walsh made major use of marketing studies, surveys, and research into consumer attitudes (CX 2308(b)-(d), 2444(b), 2449(b), 3150, 3151, 3154, 3155(a), 4200, pp. 11, 22-23, 39-40, 60). The effectiveness of their advertising and promotional activities were judged on the basis of success in increasing milk and dairy products sales. In October of 1973, the Board's manager reported to dairy farmers in *"The Milk Advisor"* (CX 3145(b)):

> It has been 24 months since the California dairymen's investment of 1% of their gross income, through the Milk Advisory Board, has been working for them to sell milk and milk products. The Green Sheet shows a Class I usage increase for every month during this period, over the same month of the previous year. And, for the first time in many, many years, we are experiencing a per capita increase in Class I consumption, making real dollars and cents sense.
>
> * * * * * * *
>
> The evident benefits are these: we now have the figures to show that, because of the increased sales we have been experiencing from July 1971 through June 1973, market milk producers of California are now receiving increased revenues of $8.90 for every $1.00 invested in their promotional program, a tremendous rate of return. And, we

> expect this return ratio to increase even further as our powerful milk sales program continues.

See also, CX 2430(a), 2431(b), (c), 2438(b), 2439(b), 2440(b), 2444(b), 2445(b), 2446(b), 2448(a), 2453(b), 2454(b), 2462(a), (b), 2467(a), 2469(b), 2471(b), 3137(a), 3141(d), 3146(c), 3147, 3153, 3157, 3158. [106]

186. In their advertising and promotional work, the Milk Advisory Board and Cunningham & Walsh were concerned with the greater income the increase in milk and dairy product sales brought to California's dairy farmers. Where promotion of whole milk tended to produce more income for the milk producers than promotion of skim or low-fat milk, or the dairymen thought this was the case, the former was emphasized. In the course of the so-called "Celebrity" advertising campaign a "Pat Boone" commercial mentioned non-fat and low-fat milk (CX 808(h), 862(b)). A draft marketing plan dated September 25, 1970, stated:

> The effects of price blending are to return pure profit to the producer when the proportion of Class I usage increases. A contrary effect comes from increasing sales of low-fat milk, which forces a larger proportion of milk fat usage in Class II and III.

Although there is some question whether this statement is wholly true, dairy farmers historically seem to have believed that there was more return to them from whole milk than from skim or low-fat milk (Adams, Tr. 10475–78; Holm, Tr. 4681–82; see also, CX 3141(d), managers column). The minutes of a meeting of the Milk Advisory Board on September 2, 1971, state in connection with the foregoing "Pat Boone" commercial (CX 808(h)):

> Chairman Warden [Chairman of Board Advertising Committee] reviewed the Committee's action in their meeting of August 20 and September 1, 1971. The Committee has taken action to:
>
> * * * * * * *
>
> (3) Establish a policy that new commercials do not contain any reference to non-fat, skim, or low-fat milks and that emphasis be placed upon whole milk, except for the Pat Boone radio and television commercials. The Boone TV commercial is to be edited to remove the "weight control" section and the non-fat and skim words if possible.

See also CX 862(b), 3000, p. 267; Holm, Tr. 4750–51; CX 825(f), 873(a). [107]

## Public Relations

187. The Advisory Board, in addition to engaging in advertising

and promotional activities to increase milk and dairy product sales, also engaged in public relations work to create a favorable public image for milk and milk products and to counter any adverse developments or publicity (Shields, Tr. 1916-17, 1940-43, 2010-11; CX 2311). In 1972 the Board retained a professional public relations firm to carry out public relations activities for the Board, the dairy industry and milk and milk products (CX 1938(a); Shields, Tr. 1897-1902). The Board's firm has prepared press releases and information material, and has responded to unfavorable industry publicity and has developed public relations programs generally (CX 818(e), 819(b), 913(b), 1038(a), 1048, 2210(g)-01, (g)-08, 2311(b)-(e)). The public relations committee and the Board's public relations firm reviewed the Board's "public relations and publicity activities" at a meeting held June 19, 1974 (CX 1048). The review noted that in the first six months of 1974 the public relations program had centered on the rising price of milk and the resulting consumer reaction (CX 1948(c)). In this area the agency had concentrated on providing news media "with accurate information on the reasons why milk prices had risen in California" using a variety of public relations techniques including the following (CX 1948(c)):

> Stories have been developed relating the specific reasons why dairymen sought higher milk prices.
>
> Background information fact sheets on the industry were supplied to hundreds of newspapers, radio and television stations.
>
> Media contact was maintained with press representatives throughout the state. Contact increased substantially prior to and during the milk boycott period.
>
> Feature articles on dairymen have been written and distributed to community and trade publications. Feature ideas have been supplied to other newspapers, radio and television stations.
>
> Television film clips and radio tapes have been produced using dairymen as subjects personalizing the industry story. [108]
>
> A television film clip and radio tape were created specifically to explain how milk prices are set in California.
>
> A press conference was held using dairy industry leaders.
>
> To facilitate coordination of information and provide media with facts about the industry, the agency has taken part in meetings with industry organizations providing facts and statements to the spokesmen and the press.
>
> Feature length stories have been provided to grocery and dairy industry trade publications covering the grocery store dairy case seminar program, interviews with and promotion of the Dairy Princess, and other CMAB programs.

> Other activities during the past six months include promotion of the speakers bureau, assisting on internal information and supporting other CMAB departments when requested.

Problem areas were identified, according to the Committee minutes, from extensive monitoring of public hearings, press reports, meetings with consumer groups and industry officials. Among the current and continuing problem areas were: resistance to higher milk prices, investigations into California's price regulating system, investigations into political contributions by the milk industry, heart disease and lactose intolerance. The Board's public relations committee stated its recommendations for the period June-December 1974 in the following language (CX 1048(d)):

> We believe the California dairy industry is facing the most critical period in decades. The problems, as listed, are not single issues to be dealt with individually. Rather, they interrelate as a major public relations problem whereby the state, national and virtually every aspect of the industry from producer to retailer is under scrutiny and attack. For example, rising costs forced milk prices upward. That, in turn, has caused extensive consumer activist reaction. Their calls resulted in a legislative study and criticism of the regulatory system. Since then, attacks on milk advertising and promotion and heightened publicity on lactose intolerance and health issues have increased. [109]
>
> All of these factors have come together and reflect unfavorably on the industry and ultimately on the public attitudes toward milk. Blunting or eliminating these attacks has been and will continue to be the goal of CMAB's public relations effort.
>
> To approach these goals we recommend a substantial increase in agency activities in line with what has developed during the past several months. Specifically, we recommend closer working arrangements with other industry organizations to effect a united public relations effort. We also recommend continuation of meetings and informational exchanges with consumer organizations to enhance understanding and mutual interests. We recommend close attention to the upcoming election period with the expectation that factual information must be supplied to interested parties so that milk does not become a "political football." And we recommend continuation of the agency's intensified news media contact work created in part by the boycott of milk.
>
> Additionally, we recommend the continuation of proven activities - press releases to the general news media, special features to community papers, radio and television features and news items, speakers bureau, Dairy Princess promotion, and general support of CMAB departments and publications.

It was recommended that the public relations budget for the Milk Advisory Board budget be increased to $75,000 for the last six months of 1974. The report stated (CX 1048(e)):

> The second half estimate assumes an even greater role for the agency in working with other dairy industry groups to effect a united PR effort and the continuation of programs to combat such problems as: consumer protest, FTC charges, Senate and Assembly investigations, attacks on health and nutritional qualities of milk, issue-

seeking candidates in the November elections. In addition, the estimate is based on our [110] anticipated role in new programs to promote milk sales. We would expect these efforts to be an integral part of CMAB's total renewed thrust in advertising, merchandising and sales promotion.

188. In meeting the problems confronted by the milk industry, the Milk Advisory Board and its public relations agency joined with other organizations to coordinate the industry's public relations activities (CX 1049(b), 1050(a), 2452(b), 3148; Shields, Tr. 2057-63). The Board supported higher milk prices through press conferences, media visits, news releases, print, radio and television advertisements, and public relations activity generally (CX 1048(c), 2449(c), 2451(b), 2456(a), (d)). In the middle of 1974, the Board reported on its public relations efforts, as follows (CX 3148; see also CX 2451(b)):

> We're confident the campaign has blunted some of the consumer resistance to higher prices, and it took some of the edge off the "Fight and Switch" boycott.

### Nutritional Education

189. Although some of the advertising of the Milk Advisory Board contained nutritional messages, the Board did not engage in nutritional educational activities as such (CX 1119(b), 2311(a); Shields, Tr. 1869, 1877, 1920-21; Krade, Tr. 9777-78). Nutrition education in connection with milk and dairy products in California is the responsibility of the California Dairy Council (Cal. Agri. Code, §§ 64001, *et. seq.*). The Dairy Council is supported by both milk producers and milk handlers, whereas the Milk Advisory Board is supported only by producers of market milk (Cal. Agri. Code, §§ 64251-52; CX 1146(j)-(k), Article IV, Section C, Subsection 1; Reuhl, Tr. 2154). Milk producers have on occasion expressed concern over supporting duplicate work (CX 860(b), 1110(z-12); Reuhl, Tr. 2153-55, 2163), and the Board has adopted a policy of avoiding overlapping efforts with those of the Dairy Council in the field of education (CX 860(b), 1146(l), Article V, Section B; Reuhl, Tr. 2154-55; Ikari, Tr. 2725-26). The Dairy Council conducts nutritional programs concerning the use of milk and milk products and the Milk Advisory Board promotes the consumption of milk and milk products (CX 1110(z-12), 2311(a); Shields, Tr. 1869; Ikari, Tr. 2723, 2725-26; Shahbazian, Tr. 4244-48; Krade, Tr. 9777-80). [111] Since nutritional and medical issues are not primarily within the expertise of the Milk Advisory Board, those matters have been handled over the years by the Dairy Council (Shields, Tr. 1918-21, 1966).

### Activities or Relationships with Other Groups

190. After formation in 1969 the Milk Advisory Board remained, through 1971, an affiliate of the American Dairy Association. During this period the Board paid an affiliation fee and purchased advertising and promotional materials (CX 907(a), 2037, 2435(b); Larson, Tr. 11607–08, 11624–26; Shields, Tr. 1867–68, 1885–86; Reuhl, Tr. 2209–15). As already described, the American Dairy Association is a national organization aimed at expanding dairy markets by increasing the consumption and the use of milk and milk products through a variety of programs (CX 903(d); see also, CX 903(b); Krade, Tr. 11086–87; see also, Shields, Tr. 1866–67, 1877–84). The Board spent the following amounts for services of the American Dairy Association including affiliation fees (CX 1380, 1386, 2435(b), 1387):

| *Period* | *Amount* |
|---|---|
| December 1969 to June 1970 | $134,374 |
| July 1970 to June 1971 | $382,055 |
| July 1971 to December 1971 | $220,800 |

191. As an affiliate of the American Dairy Association, the Milk Advisory Board participated in some of the decision-making processes of the American Dairy Association (Shields, Tr. 1890; Larson, Tr. 11619–24, 11627, 11629). The Chairman of the Milk Advisory Board held a membership on the Board of the American Dairy Association, also serving on its Executive Committee as a representative of dairymen in eight western states (CX 806(c), 2434(b); Shields, Tr. 1890–92; Larson, Tr. 11607–09, 11619–24, 11627, 11629). The Milk Advisory Board regularly sent delegates to the American Dairy Association meetings during this period of affiliation (Shields, Tr. 1890–91; Larson, Tr. 11607–09). There were a number of contracts or agreements relative to services and other relations between the Milk Board and the American Dairy Association although copies are no longer available (CX 903(b), (d); 802(g), 2037, 2038; Shields, Tr. 1867–68, 1877–84; Reuhl, Tr. 2117–20, 2215–16; Shahbazian, Tr. 4372; Krade, Tr. 11087–88; Larson, Tr. 11607–08). [112]

The Milk Advisory Board ceased its affiliation with the American Dairy Association in late 1971 or early 1972 when the United Dairy ndustries Association ("UDIA") was formed as a funding organizaion for various national trade associations of the dairy industry ncluding (CX 809(a); Reuhl, Tr. 2186) the American Dairy Associaion, the National Dairy Council and Dairy Research Incorporated CX 911(c); Reuhl, Tr. 2185). The Advisory Board was required to end ts affiliation by the California Department of Food and Agriculture ecause under the reorganized ADA structure the Milk Board was unable to exercise any control over the advertising and promotional expenditures of the new United Dairy Industries Association (CX 1521, 1522; Shahbazian, Tr. 4371-72). Members and staff of the Milk Board, however, continued to attend national meetings of the United Dairy Industries Association, the American Dairy Association, and the National Dairy Council (CX 810(a), 914(b); Reuhl, Tr. 2184-87).

192. The California Milk Producers Advisory Board disseminated advertising jointly with dairymen in the States of Oregon and Washington over the logo "California-Oregon-Washington Dairymen." This program was conducted by an organization known as the Tri-State Approval Board or the California-Oregon-Washington Approval Board. The purpose of this jointly run program was to obtain lower network television rates in promoting milk (CX 1080, 1081, 852(a), 865(b), 914(b), 3137(a); Ikari, Tr. 2727-29; Shahbazian, Tr. 4428-29).

193. The Tri-State Approval Board also on occasion sold advertising and promotional materials to other generic milk advertisers such as state affiliates of the ADA (CX 1983(e), (g-h); Krade, Tr. 9797-98; see also, CX 814(d), 881(c)). The United Dairymen of Arizona, a private generic milk promotional organization in Arizona, participated in the so-called "Milk White Is In" campaign (CX 2201, pp. 5, 13; Tr. 11218). The "Milk White Is In" brochure, distributed in Arizona, carried the identifying logo "California-Oregon-Washington-Arizona Dairymen" (CX 2201, pp. 5, 13; Ikari, Tr. 2649, 11218).

194. The Milk Advisory Board from time to time engaged in cooperative advertising or "tie-in" programs with private brand advertisers such as Nestle's, Nabisco, Post Cereals, and General Motors Corporation (CX 2201, 2449(b), 2452(c), 2461(d), 2470(a), 4200, pp. 37-38). The latter ad featured a "Milk White Monza" (CX 2201).

195. The Milk Advisory Board has maintained membership in a number of industry and trade organizations whose meetings Board members or staff attended including the Council of [113] California Growers, the Farm Bureau, the State Chamber of Commerce, the Modesto Trade Club, the American Society of Association Executives, and the Western States Conference (CX 810(a), 914(b), 921(c), 2040, 2041, 2042, 2066, 2450(b); Reuhl, Tr. 2121-22; 2177-84).

### Supervision of Milk Advisory Board by California Department of Food and Agriculture

196. As indicated in prior findings, the impetus for a California marketing order originates with an industry wishing to promote its particular commodity or product, not from the state (Krade, Tr. 9744-45; Loe, Tr. 10253-54; Rominger, Tr. 11259). That was the

situation with respect to the market milk order involved in this proceeding. The milk producers of California organized to develop and obtain a market milk order.

197. In deciding whether to approve a proposed marketing order, the California Department of Food and Agriculture must determine whether the proposed program appears likely to achieve the statutory objective of enhancing producer income. However, even if that is true nothing requires the California Director of Food and Agriculture to approve, and there have been instances where such approval was not given and a marketing order approved by an industry was not put into effect (Portello, Tr. 2802-03; Loe, Tr. 10280-82; Krade, Tr. 6715-17; Cal. Agri. Code § 58811-12; see also Cal. Agri. Code §§ 58651-54; CX 1119).

198. The actions of an advisory board formed pursuant to a marketing order are all subject to the approval of the California Director of Food and Agriculture, and that applied to the California Milk Producers Advisory Board. Whether or not prior approval of all Board actions was in fact always required, the California Director of Food and Agriculture had the authority to require it (CX 1146(d)-(h); Rominger, Tr. 11243).

199. California marketing orders typically specify the qualifications and eligibility requirements for membership on boards formed under them, and that was done in the case of the market milk order under which the California Milk Producers Advisory Board was formed (CX 1146(b)-(d), 2304(l)-(m)). Nomination meetings, previously mentioned, are held annually upon formal notice to milk producers within each district under the supervision of an agricultural economist of the Bureau of Marketing of the Department of Food and Agriculture (Shahbazian, Tr. 4175-77; Calcagno, Tr. 11644-45; Portello, Tr. 2760-62; Lee, Tr. 2407-98; Reuhl, Tr. 2173, 2305). The [114] role of the economist is to ensure that the nomination procedures are fair, and that persons nominated meet the qualifications prescribed by the Marketing Act and the Marketing Order (Portello, Tr. 2761-62; Shahbazian, Tr. 4277-78). Following a nomination meeting, the Department of Food and Agriculture economist transmits the results of the voting in the form of a written recommendation to the Director of the Department of Food and Agriculture (Scribner, Tr. 11204; Loe, Tr. 10285; Rominger, Tr. 11241-42). As stated earlier, the Director personally appoints all members and alternate members of each advisory board (Schribner, Tr. 11204; Rominger, Tr. 11241). In practically all cases the Director appoints as members those selected by the industry involved, in this case the milk producers (CX 2304(1); Portello, Tr. 2751; Shahbazian,

Tr. 4177, 4277-79), although upon rare occasions the Director has rejected persons nominated by producers (Rominger, Tr. 11253-54). There have been instances when members have been summarily removed from the boards (Shahbazian, Tr. 4278).

200. After a marketing order has been approved, the Department of Food and Agriculture permits advisory boards reasonable discretion in proposing and carrying out programs and activities in furtherance of the objectives of the marketing order involved (Krade, Tr. 9785; Erickson, Tr. 3562-63). In filling staff positions, including that of staff management, advisory boards are given latitude because "an industry knows what kind of management expertise and what kind of people that it needs to work with it in order to effectuate a program" (Krade, Tr. 9785). Although advisory boards are given latitude in the selection of a manager and staff personnel the ultimate authority for appointment and compensation resides in the Director of the Department of Food and Agriculture (Krade, Tr. 9783-84; Ikari, Tr. 2627-28; Reuhl, Tr. 2300-01; Shields, Tr. 1913; Portello, Tr. 2750; Calcagno, Tr. 11647). The Director does not necessarily accept an advisory board's recommendations with respect to salaries paid, and there were instances where the Director refused to pay the salaries sought by the Milk Advisory Board (Reuhl, Tr. 2301-02; Calcagno, Tr. 11647).

201. Expenses incurred by the Milk Advisory Board are subject to detailed control, review and approval by the California Department of Food and Agriculture (CX 2350; RX 1747; Reuhl, Tr. 2298-99; Shahbazian, Tr. 4186, 4358-60; Loe, Tr. 10305-06). All bills incurred by the Milk Advisory Board must be submitted to the Department for payment by that office (Reuhl, Tr. 2299). California administrative regulations applicable to expenditures by state agencies are also applicable to expenses of the Milk Advisory Board governing such matters [115] as travel, telephone charges, meals, per diem allowances to milk board members and staff for travel away from home, car rental charges, and purchases of supplies, equipment, and services. These regulations are applied to the Milk Board by the Department's fiscal office (CX 2350(a)-(gg); Shahbazian, Tr. 4359-60), and failure to comply with applicable state rules and regulations could result in disallowance of the claim (Shahbazian, Tr. 4360). The Department of Food and Agriculture, as indicated, reviews and approves salaries of the Milk Board staff and management, and the amounts expended for perquisites (Manager's salary: CX 1527(a), 1528(a); Reuhl, Tr. 2301-02; Krade, Tr. 9783-87; Loe, Tr. 10289-90, 10301-02; Larson, Tr. 11601-05; automobiles, Reuhl, Tr. 2296-97; Shahbazian, Tr. 4363-66; Lee, Tr. 2517).

202. In addition to applicable state regulations, the Bureau of Marketing of the Department of Food and Agriculture required the Milk Advisory Board to comply with certain of its own regulations, relative to the expenditure of Milk Board funds (CX 1465(a)-(z)55). These regulations controlled many details of Milk Board activities including the type of automobile which could be purchased for use by the Board members and staff (RX 1465(f)), the amount of travel expenses which could be advanced (RX 1465(k)), the distribution of salary checks to employees (RX 1465(m)), and the rental of equipment (RX 1465(z)-4). Early in the operation of the Milk Board, after it took over the work of the ADA of California, the Bureau of Marketing found it necessary to insist on compliance with these rules, particularly regarding Board automobiles (Reuhl, Tr. 2296-97; Shahbazian, Tr. 4365-66; Lee, Tr. 2503, 2517), and out-of-state travel by Board members and staff (CX 1520; Shahbazian, Tr. 4366).

203. All contracts or agreements of the Milk Board for goods or services must be approved by the Department of Food and Agriculture. The Board or its manager may negotiate contracts or agreements, and recommend them to the Department, but without approval no payments will be made by the Department (Krade, Tr. 9811-12, 9817-18; Shields, Tr. 1867-68, 1884, 1901; Reuhl, Tr. 2119-20, 2316-19; CX 2076; RX 1243).

204. Responsibility for Department of Food and Agriculture review and approval of Milk Advisory Board activities is assigned to the Department's Bureau of Marketing which is within the Department's Division of Marketing Services (CX 1105; Shahbazian, Tr. 4167-69; Adams, Tr. 19448-49; Rominger, Tr. 11239-40). Review and approval of the Board's activities is performed by the Department's agricultural economist assigned to the market milk order. He may approve Board activities, or if in his judgment the situation requires, refer [116] the proposed action to his superiors in the Department of Food and Agriculture for approval (Shahbazian, Tr. 4227-28, 4331; Loe, Tr. 19273-74; Rominger, Tr. 11247-48). Delegation of approval authority of the Milk Board's activities to the agricultural economist assigned to the Board by the Department of Food and Agriculture is necessary because the Chief of the Department's Bureau of Marketing is responsible for supervision of from 35 to 40 marketing orders or programs in addition to the market milk order (Lee, Tr. 2512-13; Shahbazian, Tr. 2403-04; Krade, Tr. 6711).

205. The Milk Advisory Board by resolution recommended each year to the Director of Food and Agriculture the assessment rate to be applicable to its California dairymen members for the following year (CX 1180, 1183, 1184, 1188, 1189, 1191, 1193). Each year the

Director of the Department, as already stated, appointed those who would sit as members and alternates of the Milk Advisory Board (see, CX 1250, 1251, 1255). Also, every year, the next year's budget was submitted by the Milk Advisory Board to the Director for approval, subject to his revisions, including the budget for the Board's advertising and promotional program for milk consumption (Loe, Tr. 19344-45; see also, CX 1350, 1351, 1362).

206. In conducting advertising programs, as described, the Milk Advisory Board utilized the type of television, radio, outdoor and print methods and techniques commonly and currently in use in the advertising industry. The present Director of the California Department of Food and Agriculture testified that the Milk Advisory Board was "attempting to do something for their [*sic*] commodity, so we believe that they should have the same efficient type of programs that anyone else would want" (Rominger, Tr. 11253). Advisory boards may hire advertising agencies to plan and conduct promotional programs, and this was done by the Milk Advisory Board. Most of the advisory boards involved in commodity promotion have retained advertising agencies because "it would be foolish for the state to try and have all of the expertise that is needed in many areas in-house" (Rominger, Tr. 11251-52; Krade, Tr. 9821; Lee, Tr. 2504-05, 2510). An Assistant Director of Food and Agriculture explained the reason the Milk Advisory Board chose to hire Cunningham & Walsh (Krade, Tr. 9821):

> [A]n advertising agency was retained to do the day to day promotional work in an area in advertising for the Advisory Board just like any other business entity does; promotion and advertising through an advertising agency. [117]

207. As described earlier, the Milk Board's overall advertising and promotion program, and its budget proposal to pay for that program, had to be submitted annually for approval by the assigned agricultural economist and the chief of the Bureau of Marketing of the Department of Food and Agriculture (Portello, Tr. 2754; Shahbazian, Tr. 4187-88; 4191; Loe, Tr. 10273-75, 10280).

208. The Milk Advisory Board was also required to submit all specific advertisements to the Department of Food and Agriculture and obtain approval prior to dissemination (Lee, Tr. 2514; Portello, Tr. 2757-58, 2797; Warner, Tr. 4047). Responsibility for approval of specific advertisements, as was the case with other Milk Board activities, was delegated to the agricultural economist assigned to the Board. In the absence of any problem perceived by him, the agricultural economist had authority to grant approval of proposed advertisements without review by his superiors (CX 2301, 2302; Lee,

Tr. 2512–13; Warner, Tr. 3987–88, 4053–54, 4059–61; Shahbazian, Tr. 4188–91; Loe, Tr. 19279–80; Rominger, Tr. 11240, 11247). The economist, of course, as in other matters, could bring any questions concerning advertising the Board or its staff proposed to disseminate, or was disseminating, to the attention of his superior, the Chief of the Bureau of Marketing, and to those higher in the Department of Food and Agriculture, if the judgment and opinion of higher officials was thought to be required (Warner, Tr. 3999, 4005–06; Shahbazian, Tr. 4190–91, Krade, Tr. 6739, 11168; see also, Rominger, Tr. 11247–48). The Chief of the Bureau of Marketing testified that he was only shown Milk Board advertisements when the agricultural economist who normally approved the advertisements had questions about them (Shahbazian, Tr. 4189–91).

209. In reviewing Milk Board advertising the procedure set forth in the Department of Food and Agriculture's Bureau of Marketing policy letters has generally been followed (CX 1126, 2301). One of the Bureau's policy letters specifies that an advertisement is considered approved by the agricultural economist unless he states, within ten days, reasons why the advertisement cannot be formally approved (CX 2301, 2302, Shahbazian, Tr. 4226–28).

210. In January 1974, the Department of Food and Agriculture required the Milk Board to obtain approval by a recognized authority of "[a]ll copy for nutritional, medical, or economic claims or comparisons" disseminated in the Board's advertisements (CX 2301; Portello, Tr. 2777; Shahbazian, Tr. 4218–20). In fact, where nutritional or medical claims were contained in advertisements disseminated by the Milk Board and Cunningham & Walsh for milk or milk products, the practice [118] had long been followed to have such claims reviewed and approved by Dr. George Briggs, already described, Professor of Nutrition at the University of California at Berkeley, an internationally recognized authority in the field. Review of Milk Board advertisements from the standpoint of propriety, good taste and compliance with other aspects of California Department of Food and Agriculture policy, such as the prohibition against disparagement of other products or commodities, was also conducted by the agricultural economist assigned and his superiors, if deemed necessary (Lee, Tr. 2510; Ikari, Tr. 2662–63; Shahbazian, Tr. 4250–51). On occasion an advertisement or theme the Milk Board and Cunningham & Walsh proposed to disseminate or utilize was rejected by the Department of Food and Agriculture (Reuhl, Tr. 2335–37, 2342–43, 2454–55; Portello, Tr. 2771–72; Shahbazian, Tr. 4250–51, 4335; Krade 6746).

211. The Milk Advisory Board and its advertising agency,

Cunningham & Walsh, created the advertising they disseminated over television, radio, by billboard, and in print promoting the consumption of milk and milk products, except for certain ads or themes purchased from others. The California Department of Food and Agriculture reviewed the advertising disseminated by the Milk Advisory Board and Cunningham & Walsh, and in the great majority of instances did not interfere with its publication.

212. Neither the State of California nor the California Department of Food and Agriculture, however, required or directed that advertising generally, or that any particular advertisements be published.

213. The California Department of Food and Agriculture has promulgated a series of written guidelines for "Advisory Boards, Program Committees and Councils" known as "Bureau Policy Letters" or "BPL'S" (CX 2351; RX 1465). These policy letters cover a variety of matters relating, among other things, to contracts, fair employment practices, purchases of automobiles, expenditures for gifts, confidential records, employment of aliens, the use of prizes and awards, travel advances, etc. Regulations were also issued, as already described, for the guidance of advisory boards in fiscal matters (CX 2350; RX 1747).

214. With respect to advertising, the Marketing Act of 1937 prohibits advisory boards from disseminating false or unwarranted claims in behalf of any commodity, or the disparagement of the quality, value, sale or use of any [119] other commodity (Cal. Agri. Code § 58889(c). The Department of Food and Agriculture, as early as November 7, 1958, cautioned all "Advisory Board Managers" against exaggerated statements and disparaging comments about other commodities. The chief of the Department's then Bureau of Markets wrote (CX 1126(a)):

> In connection with carrying out advertising and sales promotion activities there appears to be some disposition to make exaggerated statements and possibly also disparaging statements about other commodities. It apparently arises from a desire to make attention catching statements.
>
> In view of this we remind you that the provisions of the California Marketing Act, authorizing advertising and sales promotion activities, prohibit the use of "false or unwarranted claims in behalf of any product" or claims which would "disparage the quality, value, sale or use of any other agricultural commodity."
>
> Volumes of favorable statements can be made about California agricultural products without indulging in false or unwarranted claims. Also, we believe that it is not necessary to disparage other commodities.
>
> As an operating matter we will look to Board management to keep within the letter and spirit of the above referred to provisions. In turn we would think that Board

Managers may very properly expect cooperation from their promotional agencies in this matter. If any material is developed that may be questionable please correct it yourself or consult with us if you wish. In the last analysis the use of any material that is inconsistent with the provisions of the Marketing Act is improper and might lead to legal attack against the Board or the Department. For those of you who may not have a copy of the Act, there is attached a copy of the advertising and sales promotion authorization provision of the Act. [120]

215. On January 8, 1974, the Bureau of Marketing issued "To All Advisory Boards, Program Committees and Councils" a revised set of "Guidelines for Advertising, Trade Promotion and Public Relations Claims" (CX 2301). Although the 1958 letter described in the preceding finding, was expanded upon to some degree, the 1974 letter essentially reiterated the prohibition of false or unwarranted claims. Claims "that could be considered misrepresentation" were prohibited, as were advertisements which discredited, disparaged, or unfairly attacked "competitors, competing products, other industries, professions, or institutions." Additionally, the policy letter of January 8, 1974, provided that all advertising copy containing nutritional, medical, or economic claims or comparisons, after approval by a recognized authority, must be submitted to the assigned economist of the Department of Food and Agriculture for formal approval on behalf of the Director (CX 2301(a)).

216. A representative of the Department of Food and Agriculture was required to be present at every meeting of the Milk Advisory Board as a matter of Department policy and practice. The agricultural economist assigned to the market milk order involved in this case performed this function with respect to the Milk Advisory Board (Reuhl, Tr. 2302-03; Shahbazian, Tr. 2383; Lee, Tr. 2504; Portello, Tr. 2745-46; Warner, Tr. 4027-33).

217. Although the Milk Producers Advisory Board has some of the attributes of a private association, viewed overall it is clear that the Board is, at the least, a quasi-state agency. Notwithstanding the Milk Board's character in that respect, it is also clear that its activities advertising and promoting the sale of milk were wholly commercial in nature. The Milk Board conducted these commercial activities on behalf of California's dairymen to increase their milk sales and profits. The advertising and promotional activities of the Milk Board were not different in any essential respect from the advertising and promotional activities commonly conducted by private trade associations. [121]

## III

## CONCLUSIONS

### Respondents' Advertising

Respondents have insisted throughout that their "Every body needs milk" and "Milk has something for every body" advertising simply conveyed to the public a nutritional message that milk "was good for you" and that it was "needed" in the sense of being desirable and healthy (RPF, pp. 253-96; Resps' Post Hearing Memo. of Law, p. 11; Resps' Reply Memo. of Law, pp. 5-9; RPF, pp. 3-21). Consideration of respondents' advertising in its overall effect from the standpoint of the net impression and total message communicated, including what was said, what was shown, and what was implied and suggested, compels the judgment that the advertising went considerably beyond the mere representation that milk is "good for you," and was desirable and healthy to drink.

Reaching this judgement does not involve the application of an excessively literal standard. It is true that the word "needs" has shades of meaning. But respondents' advertising, in view of the role of milk in the national diet and American culture, communicated the message that milk was "needed" in a sense far different from, for example, "you need a new car."

Respondents' massive "Every body needs milk" campaign, and some of their "Milk has something for every body" advertisements, told people that milk was essential for proper nutrition and good health. Indeed, respondents' internal documents show that this was the purpose of the advertising. As described, in May 1971 the Creative Director of Cunningham & Walsh briefed the Milk Board's advertising committee concerning what later became the "Celebrity" campaign stating: "Message — with a quiet persuasive way, using high degree truth in advertising, give reasons why milk is needed by everybody. Break down the prejudice that milk can be dropped when a teenager" (CX 860(b)). The market studies and copy tests of respondents show that this message was, in fact, [122] communicated to the public. The "verbatims" contained in this market research show that members of the public received that communication (RX 1454). There was no communication, however, that milk was essential to life, as complaint counsel contend, but there was a communication that milk was a nutritional requirement for good health, including optimum strength and vitality. The representation that milk was a nutritional requirement for everyone for a proper diet and good health obviously contained the representation that milk was beneficial for all.

Some of respondents' advertisements conveyed the additional message that milk was beneficial for all "in large or unlimited quantities." This representation was contained in ads disseminated widely throughout California in print and over TV and on radio. In a print ad published in many newspapers, Mark Spitz is pictured holding a glass of milk. Over his picture is the caption "How much milk do I drink? Oh, maybe three or four glasses at each meal" (CX 6). In a radio continuity Pat Boone told the audience that when he was growing up he drank "a quart of milk a day per meal" which is three-quarters of a gallon of milk per day (CX 52). In another radio continuity Vida Blue, baseball star, told listeners that he drank "two and a half gallons of milk a day" (CX 57(a)). In still another, Vida Blue repeated the statement that he drank "two and a half gallons per day," adding that milk played a vital part in his athletic success (CX 58(a)). Karen Valentine told the radio audience that the rock group her husband had gotten involved with were drinking so much milk, they were drinking them "out of house and home" and that when she went to hear them play they had jugs "this big of milk" indicating very large size (CX 63). In a TV commercial Vikki Carr described herself and her family, as she grew up, as "Milk-a-holics," they all drank so much milk (CX 105(a)). [123]

The totality of these ads suggested that amounts of milk far larger than usual and normal amounts of a glass or so at a meal could be consumed by all persons beneficially. These ads were not created accidentally, there was a purpose behind them. True, the ads did not "recommend" that, for example, people emulate Vida Blue and drink "two and a half gallons" or that they drink "all they can." But they did suggest to the public that milk intake not be limited to an amount of a glass or so at a time, and that it was beneficial to consume far larger amounts. In the language of the complaint the ads did suggest that the consumption of milk was beneficial "in large or unlimited quantities."

This representation was directed to the California population generally, of which 20% to 25% are lactase deficient. Although the overwhelming majority of lactase deficient persons can consume beneficially a glass of milk at a time, two, three, four or more glasses at one time may have the capacity to cause significant symptoms in such persons. The cumulative import of all of the studies and articles is sufficient to establish the probability that this is true. The greater the quantity of milk consumed beyond a glass at one time by lactase deficient persons, the higher the likelihood that diarrhea may occur.

Specifically encouraging or suggesting that the lactase deficient population of California drink at one time large or unlimited amounts of milk was misleading and unfair in view of the capacity of such amounts of milk to cause significant symptoms in a substantial portion of this population.

Medical and scientific knowledge was sufficiently developed and disseminated by early 1970 to charge the Milk Board and Cunningham & Walsh with notice that large intakes of milk at a time might well cause significant symptoms in substantial numbers of lactase deficient persons. By 1970 articles had been published in a variety of authoritative medical and scientific journals associating the ingestion of milk and symptoms in lactase deficient persons, and indicating that lactase deficiency was not uncommon in the population. See CX 405, 682, published in 1966 in the *Journal of the American Medical Association;* CX 489, 683 and 490, published in 1967 and 1968 in the *New England Journal of Medicine;* CX 484, published in 1965 in the *American Journal of Medicine;* CX 440, 449, 519, 661 and 669, published between 1959 and 1966 in *Lancet;* CX 458, 527, 663, published between 1963 and 1965 in *Gastroenterology;* and CX 403 and 407, [124] published in 1969 in the *American Journal of Clinical Nutrition.* Additionally there were non-scientific articles in media of general circulation such as the *New York Times* issue of October 15, 1971 (RX 1508), *McCalls*, issue of September 1971 (CX 431), and programs over TV, CX 205 and 635, in March 1972, raising the question of the advisability of milk ingestion in large or unlimited amounts at a time by lactase deficient persons. Although many statements in these publications were scientifically inadequate for broad conclusions about milk drinking in general by lactase deficient persons, and many statements in the articles in media of general circulation, and over TV or radio, were exaggerated and even alarmist, the medical information available in early 1970 was sufficient to put the Milk Board and Cunningham & Walsh on notice that large milk intakes far beyond a glass at a time had the capacity to cause more than simply mild, insignificant symptoms among many lactase deficient persons.

Respondents' advertising promoting the consumption of milk was not "unfair, false, misleading and deceptive," however, except to the extent that representations were communicated to the 20% to 25% of the California population which is lactase deficient that milk consumption in large or unlimited amounts was beneficial.

The portion of the California population experiencing symptoms that might be regarded as significant from 8 ounces of milk is probably well under 1% of the population of the state over 10 years of age. In the opinion of the undersigned, it would be unreasonable to judge respondents' advertising to be "unfair, false, misleading and deceptive" because of this less than 1% segment of the population.

Even if respondents' advertising were judged from the standpoint of this small fraction of the population, however, the advertising of the Milk Advisory Board and Cunningham & Walsh was still not "unfair, false, misleading and deceptive." The symptoms experienced by this small segment of the population are not health-threatening. The bulk of those who find the symptoms to be bothersome enough that they would avoid them, have learned to associate symptoms and milk drinking, and to limit their milk intake or to avoid milk. Rather than being detrimental to the health of lactase deficient persons, milk consumption provides essential nutrients not otherwise generally obtained in the absence of milk consumption. The probabilities are very high that individuals who do not consume milk will suffer from a calcium deficiency and very likely from a deficiency of riboflavin (Dr. Paige, Tr. 8900; Dr. Briggs, Tr. 7959-60). Dr. Latham from Cornell University, internationally recognized as an authority in the field of nutrition, as described earlier, testified that within [125] the context of the United States diet it is quite difficult for individuals to get adequate amounts of essential nutrients, particularly calcium and riboflavin, without the consumption of milk (Tr. 9710).

Although it is theoretically possible to obtain all the nutrients in milk from other sources, as made clear earlier herein, as a practical matter for the ordinary person who does not make an issue of studying foods and planning his or her food intake with care, milk is "essential, necessary and needed." This is just as true for persons with "symptomatic lactose intolerance" as it is for others. Asians, Hispanics from Mexico, central or South America, Blacks, as well as Caucasians who are subject to "symptomatic lactose intolerance" must have calcium, riboflavin and the other nutrients present in milk for proper nutrition and good health. Milk in usual and moderate amounts sufficient to supply the body's needs of these nutrients is not detrimental, but is beneficial for these persons. The only possible exception raised by the evidence to this conclusion would be where a person with "symptomatic lactose intolerance" experiences true diarrhea, not simply a "soft stool," from ingestion of 8 ounces of milk at a meal. Such an event would be extremely rare if, indeed, it would ever happen. Inclusion of diarrhea as a symptom in a few reports in the literature cannot be accepted as conclusive proof that any significant number of lactase deficient persons will experience true diarrhea from 8 ounces of milk. One study, or even a few studies, are not sufficient to establish a scientific conclusion, particularly when not designed to determine the particular conclusion at issue. Rigorous scientific tests are required, and a pattern in such tests must be present before it is responsible to reach radical conclusions about symptoms from the consumption of moderate amounts of milk in the population at large.

More broadly, and in the foregoing vein, the undersigned must note that to reach conclusions which might have the tendency or capacity to lower seriously the nutritional quality of the diets of large numbers of lactase deficient Asians, Hispanics, Blacks and others, on the basis of inadequate studies, studies not rigorously controlled, studies defective in one way or another, or studies not specifically designed to determine, without uncertainty of any kind, the incidence and significance of symptoms from milk drinking would be highly irresponsible.

In resolving the issues relative to lactase deficiency and milk drinking presented by this case, the undersigned has relied on what in his judgment are the most reliable medical studies and articles, and the most reliable and [126] credible expert opinion. To reach a contrary conclusion that lactase deficient persons experience a higher incidence of more serious symptoms than determined in this decision would require, in the opinion of the undersigned, much more reliable and convincing studies than are present in this record. It would not be in the public interest to take action which might discourage milk consumption and bring about poorer nutrition among Asians, Hispanics, Blacks and others, without the most careful, thoroughly controlled medical studies, specifically designed and undertaken for the purpose, which demonstrate, without any uncertainty, that the incidence of symptoms from milk drinking by lactase deficient persons is much higher, and the symptoms much more significant, than the law judge has found. Such studies are not present in this record.

As described in detail earlier in this decision, the evidence on the proportion of lactase deficient persons having symptoms from the ingestion of an 8 ounce glass of milk, and the significance of such symptoms, is in conflict. The law judge has resolved this conflict after weighing all of the studies and the testimony of the expert witnesses, as just stated, and has concluded that the preponderance of the evidence establishes that lactase deficient persons with symptoms of any significance from drinking 8 ounces of milk constitute in all likelihood considerably less than 1% of the California population, in fact, about .7% (see *e.g.*, Findings 110-111, 132, 134).

This resolution of the evidence is based on the judgment that particular studies and expert testimony have greater reliability and probative value than other studies and testimony. Without that judgment the evidence is in such unreconcilable conflict that there is a failure of proof, and the undersigned specifically so finds. In that event, the allegations of Paragraph Nine of the complaint fail, except for the allegation respecting the consumption of large or unlimited quantities of milk, because the allegations are not sustained by a preponderance of reliable, probative and substantial evidence on the record as a whole, as required by the Commission's Rules and § 556 of the Administrative Procedure section of the U.S. Code, 5 U.S.C. 556(d).

Beyond these considerations, the advertising of the Milk Board and Cunningham & Walsh, except for that with respect to large or unlimited quantities, conveyed the same representations as contained in the dietary advice and recommendations disseminated over decades by the Federal government itself through the Department of Agriculture, and other federal agencies, and through a host of state, local [127] and private agencies and organizations, upon the prompting of the Federal government or following its example. This advice to the public was pervasive, commencing in early grades for school children and extending into a whole variety of activities where advice could be given to the nation's public on proper eating habits.

If all that has been written in this initial decision were put aside and opposite conclusions reached, the dissemination throughout the country by the Federal government and other influential bodies, continuing to the present day, of dietary advice not different in essential message from that communicated to the public by the Milk Board and Cunningham & Walsh, would render the entry of a cease and desist order in this case unjust and unwarranted.

The Department of Agriculture is the leading agency in the Federal government for the education of the public in nutrition (Dr. Page, Tr. 8807-11; RX 1624(d)-(f)). For the past 50 years the Department of Agriculture has promulgated food guides for good nutrition for the nation's public (Dr. Page, Tr. 8818-22, 8895; RX 1618(a)-(j)). Since 1941 the Department of Agriculture food guides have been based on the RDAs of the National Academy of Sciences, translating RDAs into terms of foods understandable to the general public (Dr. Page 8818-22; RX 1618(e)).

Going back to WW II, the food guides were known as "Basic Seven," and were widely disseminated via mass media and other channels of communication to help people eat wisely during wartime conditions. Milk has always been included in the Department of Agriculture's food guides as a separate group (Dr. Page, Tr. 8831-32).

The current food guide of the Department of Agriculture is known as the "Basic Four" (Dr. Page, Tr. 8821-22). An example of a Federal government publication incorporating the "Basic Four," and giving dietary advice to the public, is *Food for Fitness - A Daily Guide*, which has been circulated widely with only minor changes since 1958 (RX 347; Dr. Page, Tr. 8843). The "Basic Four" recommendation of RX 347, first published in 1958 and slightly revised in 1973, and circulated throughout the country, is reprinted herein (RX 347(a)).* It instructs the public for good nutrition and for good health to select foods every day from four groups, "Milk Group," "Meat Group," "Vegetable-Fruit Group," and "Bread-Cereal Group." Milk is stated to be a dietary *requirement* every day "for everyone;" adults are admonished to drink "2 or more cups" every day. *Food Is More Than Just Something To Eat*, Department of Agriculture Bulletin No. 216, published in July 1976, and massively disseminated in cooperation with advertising agencies and trade associations, communicates [129] to this day the same dietary advice to the public (RX 356). The Department of Agriculture disseminated dietary guidance to the public specifically advising, *in haec verba*, that every one *needs* milk, for example, in *Getting Enough Milk* dated 1965, also reproduced (RX 395(b)-(c)).* In RX 345 *"Milk in Family Meals": A Guide for Consumers*, published in 1972, and reprinted in this decision,* the opening message was "Milk is a basic food that everyone in the family *needs* every day" (Emphasis added). State agencies disseminated similar material advising that everyone *needed* milk every day (RX 346, 393-94). This dietary advice was also disseminated in Spanish by the Department of Agriculture and state agencies (RX 339, 360, 361, 371, 373, 374). See also, *Food Guide for Older Folks* (RX 350(f)); *Daily Food Guide, Some Choices for Thrifty Families* (RX 343(a), (b)); *Food and Your Weight* (RX 369(i); and Dr. Page, Tr. 8896). An example of the dietary advice disseminated by private agencies is contained in *Diet & Dental Health* published by the American Dental Association (RX 386). It states categorically "Everyone needs MILK every day" (RX 393(d)). See also the American Medical Association publication *Eat Foods From Each Group Daily* (RX 384).

The "Basic Four" food guide, in which milk and milk products is one of the four groups required in the diet of everyone every day, is the Department of Agriculture's key tool for teaching proper eating habits to the nation's public (Dr. Paige, Tr. 8850-51). The "Basic Four" food guide is "as official as anything could get" (Dr. Briggs, Tr. 7689-90). Not only is it used in U.S. Department of Agriculture publications, but by virtually all other federal, state and private agencies and organizations providing advice to the public on good eating habits. See *Facts about Nutrition,* RX 348(p), (q); *What You Should Know About Grade A Milk,* RX 1517; *Eat Foods From Each Group Daily,* already mentioned, published by the American Medical Society, RX 384; *Food, A Guide For Every Day, the 4-4-3-2 Way,* RX 339.

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*See Appendix.

Communications in official U.S. Government publications recommending milk as a dietary requirement and telling the public that all individuals need milk every day such as "adults * * * sometimes underestimate their need for milk" "adults, all ages: 2 or more cups [daily]" (RX 395), published in 1965, "Some Milk Every Day For Everyone" (RX 347(c)), published in 1966, "Milk is a Basic Food that Everyone in the Family Needs Every Day" (RX 345(c))*, published in 1972, and "Amounts Recommended: Some milk every day for everyone" (RX 356(y)), published in 1976, are the same representations contained in respondents' advertising. Respondents' advertising did not take these representations and messages [133] of the federal government and the Department of Agriculture as to the need for milk "out of context." The Milk Board's advertising conveyed to the public, with the exception already noted respecting large or unlimited quantities, the identical messages communicated to the public by the Federal government. These dietary recommendations were being made to the California public as well as to the rest of the nation by the Federal government long before respondents began their "Every body needs milk" campaign, and continued to and during the trial of this proceeding.

The U.S. Department of Agriculture and other U.S. agencies obviously were, and are, aware of milk allergy and lactose intolerance to the same degree as the Milk Board and Cunningham & Walsh, yet circulated and continue to circulate dietary advice to the public, including lactase deficient persons and population groups, that everyone needs milk every day. No revisions have been made and the dietary advice, as stated, continues to date. Dr. Page, an expert in nutrition from the Department of Agriculture, testified in this proceeding that she did not believe that any of the Department's publications needed revision to reflect the existence of milk allergy or "symptomatic lactose intolerance" (Tr. 8882-87; CX 643(e)).

Under the circumstances, an order in this proceeding would be contradictory to what the Federal government has been telling the public for decades. An order would be wrong if that advice is proper, and an order would be unjust if the dietary advice of the Department of Agriculture and other federal agencies is incorrect.

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*See Appendix.

Beyond the foregoing, no order is appropriate in this case because an order would involve an unnecessary exercise of federal power over activities of an instrumentality under the control of the people of California. Although as concluded in this initial decision, the Federal Trade Commission has the authority to review the advertising of the Milk Board, and to issue an order, if necessary, no order is necessary in this proceeding. The California Milk Producers Advisory Board is completely within the control of the people of California through their elected representatives. The legislature of the State of California enacted legislation permitting the creation of the Milk Board and can enact legislation at any time putting an end to its existence. The Milk Board is under the supervision of the California Director of Food and Agriculture. The Director of Food and Agriculture, as an appointed official, is responsible to the [134] Governor of California. In an ultimate sense, therefore, the Governor of the State of California has full and complete supervision over the activities of the Milk Board.

There is no evidence that supervision over the Milk Board and its advertising has been abdicated by California's elected representatives or by its appointed officials. Nor have California's elected representatives or appointed officials indicated a lack of concern respecting advertising or promotional practices of the Milk Board, or an intent to permit unfair, false, misleading and deceptive advertising. On the contrary, such advertising is specifically prohibited and there is every indication that California's appointed officials and elected representatives have been, and are, vigorous in preventing such advertising and promotional practices.

Added to these facts is the fact that the subject advertising, regardless of how it is viewed, has been discontinued for almost a half a decade. There is no likelihood whatever that it will be resumed in view of the continued scrutiny of the Milk Board by California's governmental officials and elected representatives. These circumstances are in contrast to the situation which prevails in the case of private corporations which are not so readily amenable to public control. There can be no question, in the opinion of the undersigned, that an order in this proceeding is not necessary. There is no public interest in an order in this proceeding, no matter what view is taken of the Milk Board's advertising.

## Jurisdiction

Respondents argue that the Commission lacks jurisdiction over the Milk Producers Advisory Board because it is neither a person nor a corporation within the meaning of the Federal Trade Commission

Act. In the opinion of the undersigned, this argument is without merit. Section 4 of the Act defines a "corporation" as:

> * * * any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated * * * which is organized to carry on business for its own profit or that of its members * * *

The record is clear that the Milk Board was formed to promote the sale of milk and in doing so to promote the economic well-being of California's milk producers (California [135] Agricultural Code, § 58654; CX 1110(z-84)). The fact that the Milk Board is not literally a profit making body does not exempt it from the coverage of the Act. *Community Blood Bank* v. *Federal Trade Commission*, 405 F.2d 1011, 1017 (8th Cir. 1969). The Milk Board was a vehicle for increasing the profits of the California dairy industry and its assessment paying members. This is sufficient for the purposes of the Act. *Federal Trade Commission* v. *National Commission on Egg Nutrition*, 570 F.2d 157 (7th Cir. 1977), *cert denied*, 99 S. Ct. 86 (1978). Indeed, the activities of the Milk Advisory Board can fairly be described as wholly commercial advertising and promotion to increase milk sales, essentially comparable to the advertising and promotional activities which might be anticipated from a private trade association.

The Milk Board argues that it is an agency of the State of California whose activities are beyond the reach of the Commission's jurisdiction because of the so-called "state action" exemption enunciated in *Parker* v. *Brown*, 317 U.S. 341 (1943). In *Parker* v. *Brown*, the Supreme Court exempted from the operation of the Sherman Act a "prorate" marketing program for raisins mandating production quotas and price maintenance through an industry board authorized by the State of California and supervised by the California Department of Food and Agriculture. The express purpose of the California program was to alleviate an oversupply of raisins by restricting competition among raisin growers. 317 U.S. at 346. The marketing program and a committee to carry out the program, were established pursuant to the California Agricultural Prorate Act.

Confronted with the need to resolve conflicting state and federal law, the Supreme Court held that the raisin program, concededly anticompetitive, but considered by the California legislature to be necessary for the survival of California's raisin industry, was not subject to the Sherman Act. The Court found that Congress in enacting the Sherman Act had not intended to reach official "state action" stating, 317 U.S. at 352:

> The State in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish

monopoly but as sovereign imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. [136]

The application of *Parker* v. *Brown* hitherto has always occurred in situations where, contrary to the policy of the Sherman Act, a state has directed the displacement of competition for a public purpose in achieving an objective thought to be necessary for the well-being of its industries or its citizens. The doctrine has never been applied in a case involving allegations of false advertising, and it is difficult to conceive of the application of the doctrine in such a case.

The Sherman Act established a national policy against monopoly and in favor of free competition. The Federal Trade Commission Act established a national policy against false advertising. It is conceivable that there may be economic situations where a state might properly conclude that the over-riding public interest required the regulation of competition in particular industries, creating the conditions for a possible exemption from the policy of the Sherman Act. But there can be no legitimate state interest in freeing its industries or citizens from the operation of the Federal Trade Commission Act to permit false advertising. In short, where allegations of false advertising are concerned, there can be no "state action" exemption to the national policy incorporated in the Federal Trade Commission Act.

The criteria for the application of the *Parker* v. *Brown* doctrine to this proceeding are lacking in any event. The exemption of *Parker* v. *Brown* is a narrow one. To secure a "state action" exemption in this case respondents must demonstrate:

1. The advertising of the Milk Board was compelled, rather than just permitted, by the State of California acting in its sovereign capacity.
2. The Federal Trade Commission Act directly conflicts with the regulatory scheme of the State of California which mandated the advertising in controversy.

These criteria have not been met this proceeding.

The dissemination of advertising is not an activity mandated by the State of California. The state permitted, but did not command, the advertising of milk by the state's milk producers through the Milk Advisory Board. Notwithstanding the foregoing, it is certainly true that no [137] particular type of advertising was mandated, and certainly not false and misleading advertising which would conflict with the Federal Trade Commission Act. The Court in *Goldfarb* v.

*Virginia State Bar,* 421 U.S. 773 (1975), found compulsion by the state was integral to a "state action" exemption. The Court stated that the threshold inquiry when a "state action" defense is raised is whether the questioned activity is required by the state acting as sovereign. Finding the use of minimum fee schedules by the state bar to be violative of the Sherman Act, the Court said (421 U.S. at 791):

> It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the state acting as sovereign.
>
> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.

In the case of the Milk Board, the questioned activity is advertising which is alleged to be false and misleading under the Federal Trade Commission Act. When the Milk Board came into existence, the State of California did not require that advertising in general nor that any particular advertisements or types of advertisements be disseminated by it, nor did the state require those activities to continue. Mere state authorization, approval, or encouragement of an acceptable activity, such as advertising, confers no "state action" immunity from federal laws.

Provisions of the California Marketing Act of 1937 subjecting raisin growers to production and pricing restraints represented a command of the state, not present in this proceeding. Recent Supreme Court cases have followed the standard of *Goldfarb* that an exemption will not apply when the state has not compelled particular activities. *City of Lafayette* v. *Louisiana Power & Co.,* 435 U.S. 389 (1978); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977); *Cantor* v. *Detroit Edison Co.,* 428 U.S. 579 (1976); *Goldfarb* v. *Virginia* State Bar, 421 U.S. 773 (1975). [138]

Relying on *Asheville Tobacco Board of Trade, Inc.,* v. *Federal Trade Commission,* 263 F.2d 502 (4th Cir. 1959), complaint counsel contend the state action defense is inapplicable because of the absence of adequate state supervision of the Milk Board and its advertising. The *Asheville* decision, however, did not turn on the degree of supervision over the Tobacco Board exercised by the state of North Carolina. Rather, the court cited the lack of supervision by North Carolina to demonstrate that there was no compulsion by the state on the Tobacco Board to perform the acts in question. The relevant inquiry in *Asheville,* and with respect to the Milk Board, is whether the state mandated the actions, not whether they exercised control and supervision over the actions.

The Milk Board's activity fails to qualify for the state action exemption on a second ground. The state action exemption was created in *Parker* v. *Brown* to reconcile conflicting state and federal directives. Here there is no conflict between the Federal Trade Commission Act and California law. Unlike the mandated anticompetitive programs of the California Agricultural Prorate Act in *Parker* v. *Brown* which by their very nature directly conflicted with the Sherman Act, advertising under the Agricultural Code of California plainly does not by its very nature conflict with the Federal Trade Commission Act. It is obviously not advertising which is prohibited by the Federal Trade Commission Act, rather it is a particular type of advertising which is false or has the capacity to mislead that is prohibited.

Indeed, there is no conflict in this case between state and federal law because California law and the Federal Trade Commission Act both prohibit unfair and deceptive advertising. In *Cantor*, the Court rejected a state action defense noting, *inter alia*, that the state regulatory program was not inconsistent with federal directives. The Court commented that the "mere possibility" of a conflict was an insufficient basis for implying a "state action" exemption, 428 U.S. at 596. See also, *United States* v. *Philadelphia Nat. Bank*, 374 U.S. 321, 350-351 (1962). In the instant case not only is there no conflict between federal law and the state regulatory program, there is complete accord. The California Agriculture Code § 58889, (CX 1110(z-91)) provides: **[139]**

> No advertising or sales promotion program shall be issued by the director which makes use of false or unwarranted claims in behalf of any such product, or disparages the quality, value, sale, or use of any other commodity.

Exemption of the Milk Board's advertising of milk from regulation by the Commission is clearly not necessary to enable the Milk Board to carry out the activities authorized by the California legislature. Review by the Commission of the advertising and the prohibition of "unfair, false, misleading and deceptive" advertising, if any, will not interfere with or prevent the advertising and promotion of milk as authorized by the California legislature. The Milk Board can advertise and promote milk effectively through truthful advertising. Accordingly, there is no need in this case to invoke the state action exemption to protect the state of California's sovereignty over regulatory activities essential to its governmental function.

The final basis on which jurisdiction is contested is the failure to join the state of California and its Director of Food and Agriculture on the ground that they are indispensable parties. This contention is without foundation. Neither the State of California nor the Director are indispensable parties. In *Williams* v. *Fanning*, 332 U.S. 490 (1947), the Court held that a superior governmental official was not an indispensable party where the remedy did not require such official to perform an affirmative act. If any order were to be issued in this proceeding it would bind only the Milk Advisory Board and Cunningham & Walsh. Furthermore, an order binding the Milk Advisory Board and Cunningham & Walsh would not be unenforceable and of no effect. So long as the Milk Board is in existence it may be compelled to observe the requirements of an order. Neither the Director of Food and Agriculture nor other state officials could lawfully attempt to prevent the Board from observing the requirements of an order.

The fact that neither the Director nor the state have been named parties cannot cause either prejudice. The state has been granted limited intervention on the jurisdictional issue. Both the Director and the state have been permitted to raise issues, if desired. No affirmative action is sought through this proceeding by either the State of California or its Director of Food and Agriculture. Nothing in this proceeding can alter their position or legal rights for the worse. Nor can there be any prejudice to the Milk Board or Cunningham & Walsh due to the fact that neither the Director nor the state are parties. [140]

Final

The Federal Trade Commission has jurisdiction over the California Milk Producers Advisory Board and Cunningham & Walsh, Inc. for the purpose of reviewing its advertising and promotional practices and preventing unfair or deceptive acts or practices in commerce.

The California Milk Producers Advisory Board is a corporation and a person within the meaning of the Federal Trade Commission Act, organized, existing and doing business under and by virtue of the laws of the State of California. At all times relevant hereto, it has been engaged in commerce within the meaning of Section 5 of the Federal Trade Commission Act, and has been engaged in and has caused the dissemination of advertisements through various means in commerce.

Cunningham & Walsh, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York. At all times relevant hereto, it has been engaged in commerce within the meaning of Section 5 of the Federal Trade Commission Act, and has been engaged in the dissemination and has caused the dissemination, of advertisements through various means in commerce.

Neither the State of California nor its Department of Food and Agriculture are indispensable parties to this proceeding.

With the exception of the advertising referred to in the next paragraph, none of respondents' advertising challenged in the complaint has been unfair, false, misleading and deceptive.

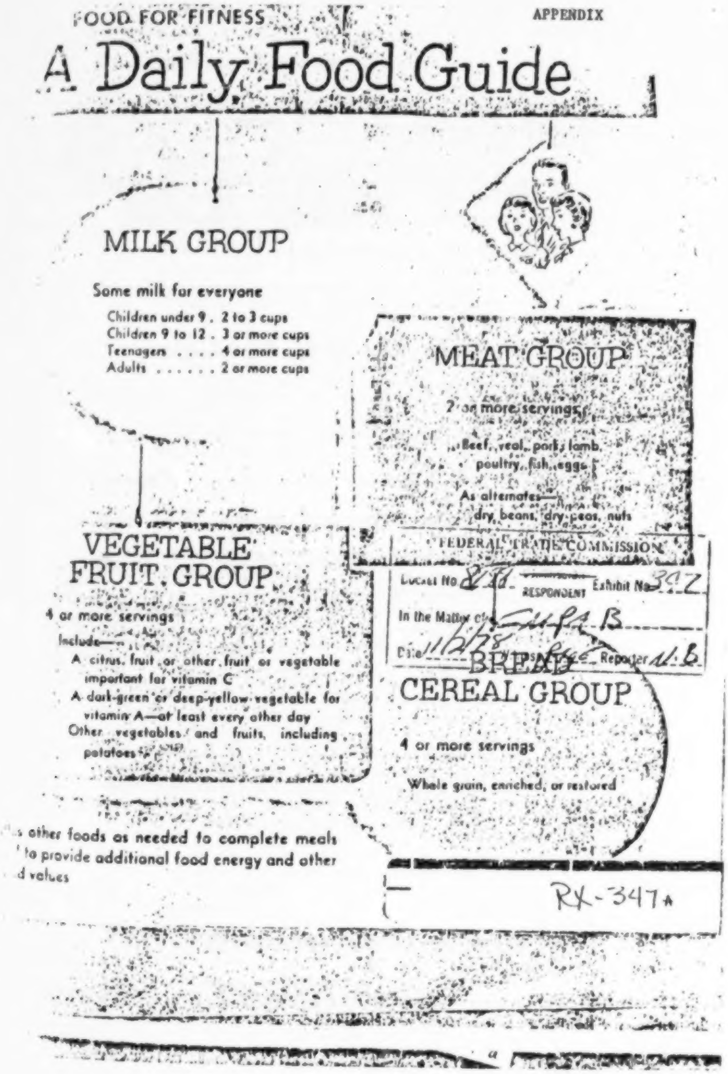
It was unfair and misleading for respondents to represent to lactase deficient persons, who constitute a substantial segment of the population, that the consumption of large or unlimited quantities of milk at a time is beneficial. Ingestion of large or unlimited amounts of milk at one time by such persons may cause symptoms which are troublesome or discomforting, although not health threatening.

There is public interest in this proceeding, but there is no public interest in the issuance of an order against the California Milk Producers Advisory Board or its agent Cunningham & Walsh. [141]

For the reasons stated in this initial decision, issuance of an order against the California Milk Producers Advisory Board and its agent Cunningham & Walsh, Inc. is unnecessary, unwarranted and inappropriate.

The complaint should be, and hereby is, dismissed.

APPENDIX



FOOD FOR FITNESS

# A Daily Food Guide

## MILK GROUP

Some milk for everyone

Children under 9 . 2 to 3 cups
Children 9 to 12 . 3 or more cups
Teenagers . . . . 4 or more cups
Adults . . . . . . 2 or more cups

## MEAT GROUP

2 or more servings

Beef, veal, pork, lamb, poultry, fish, eggs

As alternates—
dry beans, dry peas, nuts

## VEGETABLE FRUIT GROUP

4 or more servings

Include—
- A citrus fruit or other fruit or vegetable important for vitamin C
- A dark-green or deep-yellow vegetable for vitamin A—at least every other day
- Other vegetables and fruits, including potatoes

## BREAD CEREAL GROUP

4 or more servings

Whole grain, enriched, or restored

s other foods as needed to complete meals
to provide additional food energy and other
d values

FEDERAL TRADE COMMISSION
Docket No [illegible] RESPONDENT Exhibit No 347
In the Matter of CMPAB
Date 11/2/78 Reporter N. B

RX-347

APPENDIX

# getting enough MILK

## MILK . . . *one of the best foods*

### Why you need milk

Milk contains many valuable nutrients. It is especially important for these three:

- Calcium—a mineral needed throughout life for healthy bones.
- Riboflavin—a B vitamin, one of the essential nutrients for healthy skin and nerves. It also helps body cells to use other nutrients carried to them by the blood.
- Protein—the main material needed for building and repairing all body tissues.

Many people get too little of these three nutrients for their best nutritional health.

It's hard to get enough calcium and riboflavin, in particular, without a good deal of milk. In this country's food supplies, milk provides three-fourths of all the calcium, nearly half of the riboflavin, one-fourth of the protein.

Much of the work that nutrients do for your body depends on their getting together with other nutrients. One reason why milk is so excellent a food is that it contains many different nutrients in favorable proportions that can readily form efficient work teams for your body's nutrition.

2

F1 C-1-10

Docket No. 8589 ~~COMMISSION'S~~ RESPONDENT'S Exhibit No. 375b

APPENDIX

## How much milk is enough?

Nutritionists consider calcium needs chiefly when they figure the amounts of milk to have daily for good nutrition.

The need for milk increases from childhood through the teens as more calcium is required to keep up with the needs of the growing body. Adults can get along with less milk than teenagers, but they sometimes underestimate their need for milk. Expectant mothers and nursing mothers need extra milk for calcium.

Here are the amounts of milk recommended by nutritionists for use daily:

Children, under 9 years: 2 to 3 cups (1 pt. to 1½ pt.)
Children, 9 to 12 years: 3 or more cups (1½ pt. or more)
Teenagers: 4 or more cups (1 qt. or more)
Adults, all ages: 2 or more cups (1 pt. or more)
Expectant mothers: 3 or more cups (1½ pt. or more)
Nursing mothers: 4 or more cups (1 qt. or more)
(Expectant teenage mothers and nursing teenage mothers need more milk than other teenagers.)

Milk products, such as cheese and ice cream, and prepared dishes made with milk can provide some of this quota. So can fluid or dry skim milk, buttermilk, or evaporated milk.

## How to estimate milk you get in meals

With a little easy arithmetic, you can get a pretty good idea of how much milk you are getting from milk products and prepared dishes, along with the amount of milk you may drink. If you tally the total in a few days' meals, you can judge how well you measure up to the quota recommended by nutritionists.

On the basis of the calcium they provide, the following are alternates for 1 cup (½ pt.) of milk:

1½ ounces of Cheddar cheese
1 pound of cream cheese
11 ounces of cottage cheese
1⅔ cups of ice cream
1 cup of ice milk

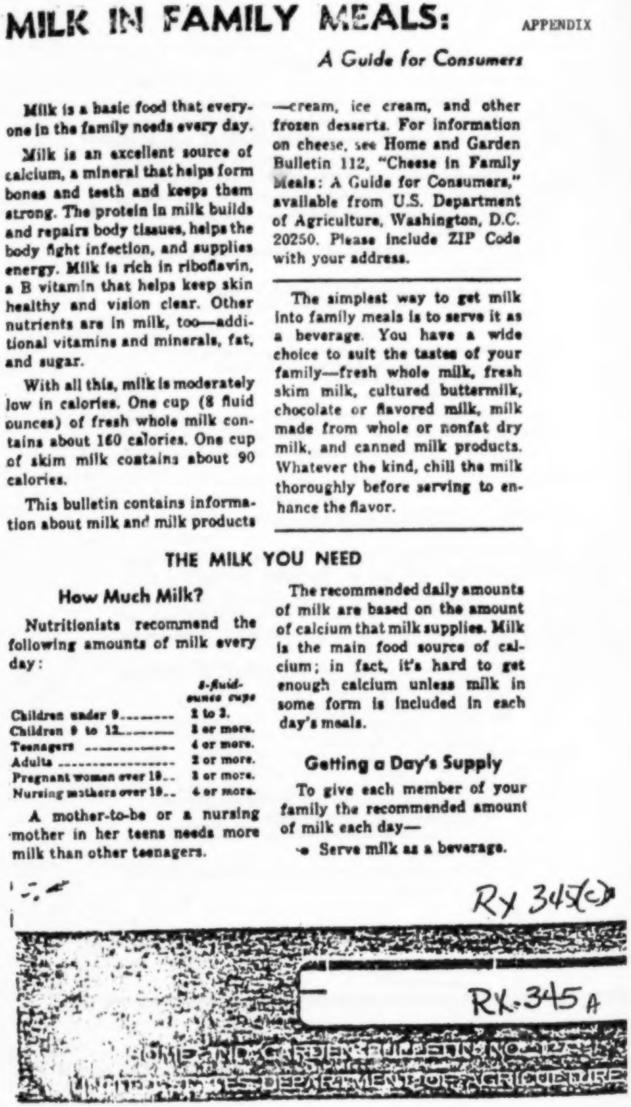
In food prepared with milk, each serving can provide:

½ to 1 cup of milk in creamed soups
¼ to ½ cup of milk in scalloped or creamed vegetables, fish, eggs, or meat
¼ to ⅔ cup of milk in desserts such as puddings, custards, and cream pies

F1 0[illegible]

Docket No 8788 COMMISSION'S RESPONDENT'S Exhibit No C-375

APPENDIX



# MILK IN FAMILY MEALS:

*A Guide for Consumers*

Milk is a basic food that everyone in the family needs every day.

Milk is an excellent source of calcium, a mineral that helps form bones and teeth and keeps them strong. The protein in milk builds and repairs body tissues, helps the body fight infection, and supplies energy. Milk is rich in riboflavin, a B vitamin that helps keep skin healthy and vision clear. Other nutrients are in milk, too—additional vitamins and minerals, fat, and sugar.

With all this, milk is moderately low in calories. One cup (8 fluid ounces) of fresh whole milk contains about 160 calories. One cup of skim milk contains about 90 calories.

This bulletin contains information about milk and milk products—cream, ice cream, and other frozen desserts. For information on cheese, see Home and Garden Bulletin 112, "Cheese in Family Meals: A Guide for Consumers," available from U.S. Department of Agriculture, Washington, D.C. 20250. Please include ZIP Code with your address.

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The simplest way to get milk into family meals is to serve it as a beverage. You have a wide choice to suit the tastes of your family—fresh whole milk, fresh skim milk, cultured buttermilk, chocolate or flavored milk, milk made from whole or nonfat dry milk, and canned milk products. Whatever the kind, chill the milk thoroughly before serving to enhance the flavor.

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## THE MILK YOU NEED

### How Much Milk?

Nutritionists recommend the following amounts of milk every day:

| | *8-fluid-ounce cups* |
|---|---|
| Children under 9 | 2 to 3. |
| Children 9 to 12 | 3 or more. |
| Teenagers | 4 or more. |
| Adults | 2 or more. |
| Pregnant women over 19 | 3 or more. |
| Nursing mothers over 19 | 4 or more. |

A mother-to-be or a nursing mother in her teens needs more milk than other teenagers.

The recommended daily amounts of milk are based on the amount of calcium that milk supplies. Milk is the main food source of calcium; in fact, it's hard to get enough calcium unless milk in some form is included in each day's meals.

### Getting a Day's Supply

To give each member of your family the recommended amount of milk each day—

- Serve milk as a beverage.

Ry 345(c)

RX-345 A

HOME AND GARDEN BULLETIN NO. 127

UNITED STATES DEPARTMENT OF AGRICULTURE

## FINAL ORDER

The administrative law judge filed an initial decision dismissing the complaint in this matter on July 31, 1979. No appeal from the initial decision having been filed and the Commission having determined that the case should not be placed on its own docket for review and that the initial decision should become effective as provided in Rule 3.51(a) of the Commission's Rules of Practice (16 C.F.R. 3.51(a)),

*It is ordered*, That the initial decision shall become effective on September 24, 1979.

## IN THE MATTER OF

# FORD MOTOR COMPANY, ET AL.

### FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9073. Complaint,* Feb. 10, 1978 — Final Order, Sept. 21, 1979*

This order, among other things, requires Francis Ford, Inc., a Portland, Ore. Ford dealer, to cease failing to dispose of repossessed vehicles in a manner designed to obtain the best possible price; provide information regarding the disposition of such vehicles to defaulting customers; properly calculate surpluses realized from the sale of the vehicles; and repay such surpluses in a timely fashion. The order further requires respondent to identify all surpluses realized back to February 10, 1976, and to notify affected consumers of their existence. Additionally, respondent is required to maintain specified records for at least three years.

### *Appearances*

For the Commission: *Bruce D. Carter, Dean A. Fournier* and *David R. Pender.*

For the respondents: *Michael J. Esler, Haessler, Stamer, Tilbury & Esler,* Portland, Ore.

## INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

JAN. 3, 1979

## I. PRELIMINARY STATEMENT

### A. History of the Case

This case began on February 10, 1976, when the Commission issued a complaint charging Ford Motor Company ("Ford"), Ford Motor Credit Company ("Ford Credit"), and Francis Ford, Inc. ("Francis Ford") with violations of Section 5 of the Federal Trade Commission Act ("FTC Act").

On March 24, 1976, Francis Ford filed its answer, admitting certain allegations of the complaint, denying others and asserting six defenses. Prehearing conferences were held [2] on April 13, 1976 and on February 3 and July 22, 1977. Complaint counsel filed their witness and document lists and trial brief on December 5, 1977. On March 17, 1978, this case was withdrawn from adjudication as to Ford and Ford Credit for purposes of considering a proposed consent agreement executed by these respondents and complaint counsel

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*Complaint published in 93 F.T.C. 402.

This agreement was subsequently placed on the public record for comment.

Hearings with respect to Francis Ford were held from March 21-28, 1978 in Seattle, Washington. On June 26 and 27, 1978, Francis Ford filed a trial brief and list of witnesses, and its exhibit list was filed on July 10, 1978. Francis Ford presented its defense from July 24-28, 1978 in Seattle. The final record consists of 2,166 pages of testimony and argument and almost a thousand exhibits.

The record in this case was closed on September 1, 1978. Complaint counsel and Francis Ford filed their proposed findings on October 13, 1978 and their replies on October 30, 1978. At my request the Commission granted me an extension of time to January 8, 1979 to file this initial decision.

## B. Allegations of the Complaint

The complaint alleges that Francis Ford, a Ford dealer, arranges the financing of its retail sales of motor vehicles through Ford Credit or other lenders. When Ford Credit finances a sale, it is alleged, it provides a retail installment contract form which names the customer as buyer and the dealer as seller and which states that the contract is to be assigned to Ford Credit for value, that the buyer is to be indebted to the dealer or its assignee and that the dealer or its assignee is to be a secured party holding a security interest in the vehicle.

The complaint further alleges that if the buyer defaults, Francis Ford has undertaken the obligation, either by express or implied representations in its retail installment contracts, to account to the defaulting buyer for any surplus arising from the resale of repossessed collateral; however, the complaint states, despite the fact that the laws of most states (derived from Article Nine of the Uniform Commercial Code ("UCC")), require a secured party, after default and repossession of the collateral, to account for any surplus [3] of proceeds[1] from the sale of the collateral, Francis Ford has, in a substantial number of instances, deprived defaulting buyers of substantial amounts of money which are rightfully theirs by:

(1) Failing to institute or follow correct procedures for determining the existence or amounts of surpluses realized from the sale of repossessed vehicles,

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[1] Defined in the complaint as that sum which is "in excess of the amount needed to satisfy all secured indebtedness, reasonable expenses of retaking, holding, preparing for sale, selling, and the like, and allowable legal costs and fees." (Complaint, Par. Five)

(2) Failing to disclose the existence of these surpluses to defaulting buyers, and

(3) Wrongfully retaining such surpluses in violation of the defaulting buyers' statutory and contractual rights.

Finally, the complaint alleges that repurchase dealers,[2] one of which is Francis Ford, have failed to inform defaulting buyers of facts necessary to their exercise of the right of redemption granted by state law, and that this failure to disclose material facts has the tendency and capacity to hinder defaulting buyers in exercising this right. This allegation was, however, withdrawn by complaint counsel at the beginning of the hearings.

The following findings of fact, conclusions of law and proposed order are based upon the record in this case and upon the proposed findings and replies of the parties. Any proposed findings not adopted herein in substance or verbatim are rejected either because they are irrelevant or because they are not supported by the record. [4]

## II. FINDINGS OF FACT

### A. Francis Ford's Business

1. Francis Ford is an Oregon corporation with its office and principal place of business at 509 S.E. Hawthorne Boulevard, Portland, Oregon (Ans. ¶ I).[3] It is one of more than 6,000 franchised Ford dealers. It sells new and used cars and trucks and operates parts and service departments. These separate operations are required of franchised dealers by Ford (Tr. 1239-41). Francis Ford's total sales exceeded $13 million during each of the years 1974 and 1975 (CX's 2321-22). Its pre-tax profits from all of its operations were $112,406.00, or .0085% of total sales in 1974 (CX 2321) and $18,934.00 or .0014% of total sales in 1975 (CX 2322).

2. Francis Ford is one of the two highest-volume Ford dealers in the Portland area (Tr. 157). It sells about 2,400 vehicles annually, most of which are sold to retail customers rather than to wholesale

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[2] Dealers who, by contract, agree that Ford Credit and other lending institutions may return repossessed vehicles to them. The lending institutions then receive from these dealers a "payoff" which consists of the unpaid balance of the retail installment contract adjusted by certain charges and credits. The repurchase dealer then resells the vehicle to a third party. (Complaint, Par. Seven)

[3] Abbreviations used in this decision are:

CX - Commission exhibit.
RX - Respondent's exhibit.
Tr. - Transcript of testimony.
Ans. - Francis Ford's answer to the complaint.
Adm. - Pages 13-14 Francis Ford's response to complaint counsel's second and third requests for admissions dated March 13, 1978.

purchasers or "fleet" operators (CX's 2321-22; Tr. 177). Francis Ford maintains two lots for the retail sale of used vehicles to the public (CX 2358).

3. In calendar year 1975, Francis Ford sold 878 used cars and trucks at retail and 283 used cars and trucks at wholesale (CX 2322). In calendar year 1974, Francis Ford sold 1,093 used cars and trucks at retail and 403 used cars and trucks at wholesale (CX 2321).

4. As of December 31, 1977, 588 retail installment contracts sold or assigned by Francis Ford to Ford Credit were outstanding, and they amounted to a total receivable of approximately $1,868,000 (Tr. 38-39).

### B. Commerce

5. All Ford motor vehicles sold by Francis Ford are manufactured and assembled at plants located outside the [5] State of Oregon. They are shipped to Francis Ford in response to orders placed by Francis Ford with Ford's office in Seattle, Washington (Tr. 472-73).

6. Portland, Oregon is situated adjacent to the Columbia River, the boundary between the States of Oregon and Washington. Portland is the hub of a retail trading zone which includes Clark and Skamania counties in southwestern Washington, and is a Standard Metropolitan Statistical Area which includes Clark County (Stipulation, Tr. 1011-13). Francis Ford advertises its new and used cars and trucks for sale in this market through broadcast (television and radio) and print media (CX's 3601-07, 3622-26, 3631-34C; Tr. 158-62, 175-76). Vancouver is the largest city in Clark County, Washington, and is located immediately across the Columbia River from Portland.

7. The normal dissemination areas of several of the Portland-based television channels and radio stations which carry Francis Ford advertising extend into the State of Washington, including metropolitan Vancouver (Tr. 160-62).

8. In 1975, Francis Ford spent $221,578 on advertising allocated as follows: $16,113 to institutional advertising and promotion, $145,060 to new car advertising, and $60,405 to used car advertising (CX 2322). In calendar year 1974, Francis Ford spent $197,622 on advertising, allocated as follows: $10,835 to institutional advertising and promotion, $146,343 to new car advertising, and $40,444 to used car advertising (CX 2321).

9. Francis Ford's advertising volume in the Portland *Oregonian* and *Oregon Journal* newspapers totaled approximately $134,000 in each of the years 1974 and 1975 (Adms. 10 & 11). The *Oregonian* and *Journal* have substantial interstate circulation: Over 16,000 copies of

the daily edition of the *Oregonian,* 4,800 of the daily edition of the *Journal,* and 33,000 of the *Oregonian* Sunday edition are distributed outside the State of Oregon. Most of this out-of-state circulation is in the State of Washington, about half of it in Clark County (Stipulation, Tr. 1011-13). Francis Ford also advertises occasionally in the Vancouver, Washington *Columbian* (Tr. 158).

10. Francis Ford advertises in the Vancouver, Washington telephone directory yellow pages as well as in the yellow pages for Portland and St. Helens, Oregon (Tr. 164-68). In all of these yellow pages advertisements, Francis Ford's ads appear in conjunction with ads for Washington-located auto dealers (including Ford dealers) who compete with Francis Ford (CX's 3610-13, 3615-16; Tr. 172-73). [6]

11. Francis Ford arranges for other types of advertising and promotional activity in other areas of the State of Washington (CX's 3604, 3606, 3608, 3622-26, 3631-33; Tr. 162-63, 169-75).

12. Francis Ford makes occasional sales of motor vehicles to residents of states other than Oregon, primarily to persons who reside in the Vancouver, Washington area (Tr. 158, 171).

13. Over half of the retail installment contracts executed by Francis Ford customers are sold or assigned to Ford Motor Credit Company's Portland branch office, which provides financing to Ford dealers and their retail customers in an area of responsibility extending from Oregon northward to Longview, Washington (Tr. 37, 191-93). Ford Credit has other branch offices engaged in like activity throughout the United States (Tr. 34-36). A total of 724 such contracts were sold by Francis Ford to Ford Credit's Portland branch in 1976-77 (Tr. 38).

14. When vehicles sold by Francis Ford are thereafter repossessed and returned to it by the financing institutions it does business with, the repossessions may take place outside the State of Oregon or may involve an out-of-state resident who was either the original customer from whom the vehicle was repossessed or who was the purchaser upon resale after repossession (Tr. 1048-50, 1072-81, 1087-89, 1097-98). Of the 43 repossession transactions discussed below, at least 3 involved out-of-state residents as the original customers (CX's 2771, 3021, 3083-84). Four involved repossession at out-of-state sites (CX's 2416, 2928B, 2963A-B, 3027-30), and in three the resales were to out-of-state residents (CX's 2595, 2934, 3390; Tr. 1049).

15. In connection with its original sales and post-repossession resales of vehicles, Francis Ford has shipped used vehicles to out-of-state purchasers (CX 2595; Tr. 1049-50), and has initiated or

participated in the transmission across state lines of credit reports and various instruments of retail installment credit, title registrations, licensing documents and related correspondence and payments (CX's 2922, 3083-84, 3393), and other business papers related to the extension and enforcement of credit obligations (CX 2938A-B).

16. Approximately three years before issuance of the present complaint, Francis Ford entered into a consent agreement in which it admitted the Commission's jurisdiction, [7] under the "in commerce" standard then applicable, with respect to various alleged practices including representations in newspapers and broadcast advertising, handling of customers' deposits, and preparation of retail installment contracts (82 F.T.C. 1501 (1973)).

17. Francis Ford maintains a substantial course of trade in motor vehicles and motor vehicle credit in commerce, and that trade affects commerce, as "commerce" is defined in the FTC Act.

## C. Francis Ford's Retail Installment Contracts

18. About 70 percent of Francis Ford's retail sales of motor vehicles are financed in whole or in part. These consumer credit sales are drawn up on retail installment contracts which are preprinted forms supplied either by Ford Credit or by the United States National Bank of Oregon ("U.S. Bank"). Francis Ford sells, assigns or transfers over half of these contracts to Ford Credit; the remainder go to U.S. Bank (Tr. 179, 191-93).

19. The Ford Credit installment contract form calls for monthly installment payments by the debtor to the seller (Francis Ford) which are secured by a security interest in the vehicle by Francis Ford or its assignee. The contract provides for its assignment to Ford Credit (CX 2311). The U.S. Bank installment contract form is substantially similar to the Ford Credit form except that it contains a provision for its assignment to U.S. Bank (CX 2314B).

20. The Ford Credit contract form states that: "This contract shall be governed by the laws of the state in which the original Seller [Francis Ford] is located . . .", and identifies the security interest created thereby as "a security interest under the Uniform Commercial Code . . ." (CX 2311). The "default" provision of the contract states that:

> Seller shall have all the rights and remedies of a Secured Party under the Uniform Commercial Code, including the right to repossess the Property . . . and to recondition and sell the same at public or private sale. (CX 2311)

[8] The U.S. Bank contract form used in such transactions recites that: "The parties [Francis Ford and its customer] agree that their

relations, rights and duties under this agreement shall be governed by the substantive law of the State of Oregon" (CX 2314B). The "repossession resale" provision of the contract states, *inter alia*, that:

> Creditor Dealer will give Customer reasonable notice of the time and place of any public sale or of the time after which any private sale or other intended disposition is to be made. . . . Expenses of retaking, holding, preparing for sale, selling or the like shall include Creditor-Dealer's reasonable attorneys' fees and legal expenses. (CX 2314B)

21. The law referred to above, the UCC, was enacted in Oregon in 1961 and includes a provision that a secured party may, in the event of default, repossess the collateral and sell, lease or otherwise dispose of it and that he "must account to the debtor for any surplus . . ." (ORS ¶ 79.5040(2)).

22. If repossession of a vehicle financed by Ford Credit occurs, Ford Credit sends a form notice to the customer (and to Francis Ford) which states:

> The [repossessed vehicle] will be sold by [Ford Credit] or its assignee at a private sale at any time after 10 days from the date shown above unless redeemed by you prior to such sale. The proceeds will be applied first to the payment of the expenses of retaking, holding, preparing for sale and selling said property and reasonable attorney's fees and legal expenses incurred by [Ford Credit], then to the satisfaction of the balance due under the contract covering the financing of said property, and then to the satisfaction of any indebtedness secured by any subordinate security interest in said property. *Any surplus will be paid to you* and, unless prohibited by law, you will remain liable for any deficiency. (emphasis added) (CX's 1240, 2678; Tr. 955)

[9] 23. A similar statement appears in another Ford Credit form which is executed by defaulting customers when they voluntarily surrender their vehicle to Ford Credit:

> [T]he undersigned [customer] hereby voluntarily surrenders and returns to you [Ford Credit] the above-described commodity for . . . disposition . . . in conformance with law . . . The undersigned hereby requests and authorizes you to dispose of this property at public or private sale and to apply the net proceeds received therefrom against the amount of the undersigned's present indebtedness to you. If the net proceeds so realized shall be less than the said unpaid balance, after deducting your expenses, the undersigned agrees to remain liable to you for the difference thereof, plus a reasonable fee . . . as attorney fees . . . *If the net proceeds so realized is more than said unpaid balance, you agree to pay the excess to me.* (emphasis added) (CX 2655)

24. The installment contract forms and their incorporation of state law constitute an implied promise by Francis Ford, as a secured party, to account for and pay to the customer any surplus resulting from its resale or other disposition of a vehicle repossessed from the customer, and these forms, along with the notices referred to in

Findings 22 and 23, have the capacity and tendency to lead customers to believe that any surpluses realized after repossession will be paid to them.

## D. Repurchase Agreements

25. Since August 15, 1967, Francis Ford has been party to a series of agreements with Ford Credit under which each retail installment contract sold or assigned by Francis Ford to Ford Credit has been governed by the terms of a "Retail Plan" set forth in a Ford Credit dealer manual titled "Automotive Finance Plans for Ford Motor Company Dealers" (CX's 2301, 2303). These agreements provide further that each retail installment contract sold or assigned to Ford Credit is deemed assigned on a "repurchase" basis unless otherwise specified (CX's 2301, 2303). **[10]**

26. U.S. Bank also has a repurchase agreement with Francis Ford which is similar to Ford Credit's (CX's 2307A–B, 2314B; Tr. 191–92, 1482–83).

27. Under these repurchase agreements Francis Ford is obliged, in the event of a default by the customer, and upon the lender's request and the return of the vehicle, to pay to the lender the outstanding balance on the loan (CX's 1015[4] and 1016, p. 20; CX 1014, p. 22; CX 2311;[5] Tr. 1277).

28. Since January 1973, the "repurchase" portion of the Ford Credit retail plan has included the following provision:

> EXCESS PROCEEDS ON RESALES OF REPOSSESSIONS
>
> If the proceeds (less reasonable selling expenses) received by the dealer from his resale of a repossessed vehicle exceed the repurchase price of the vehicle, he should pay the excess to the customer as required by law (CX's 1015 and 1016, p. 22).

[11] On March 9, 1973 and on July 29, 1974, Francis Ford accepted and agreed to Ford Credit retail plans containing the "excess proceeds" provision (CX 2301).

29. The repurchase agreement between Francis Ford and U.S. Bank also contains an admonition that surpluses realized on resales

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[4] CX 1015, p. 20 states:

> The Retail Plan contemplates a sharing of responsibility between the Dealer and Ford Credit with respect to vehicles covered by retail installment contracts on which the customer has defaulted. The standard Retail Plan is a repurchase plan under which Ford Credit assumes responsibility for confiscated vehicles, converted vehicles, certain collision damages to vehicles and for repossessing and returning vehicles to the Dealer after default, and the Dealer assumes the responsibility for repurchasing and merchandising repossessed vehicles.

[5] The Ford Credit retail installment contract form states:

> REPURCHASE: The [dealer] guarantees payment of the full amount remaining unpaid under said [retail installment] contract, and covenants if default be made in payment of any installment thereunder to pay the full amount then unpaid to [Ford Credit] upon demand, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

of repossessed vehicles should be paid to the defaulting customer as required by the UCC (CX 2307A).

30. All retail installment contracts sold or assigned by Francis Ford to Ford Credit and U.S. Bank are subject to repurchase agreements (Tr. 39, 189, 191–92, 1482–83).

## E. The Benefits of Repurchase Financing

31. Mr. James Woods, the secretary-treasurer of Francis Ford, testified that it arranges for financing its customer's vehicle purchases because its competition does so, but that because of the costs involved in handling installment contracts, Francis Ford would much rather sell cars for cash (Tr. 1276–77).

32. However, it is apparent that repurchase financing, the only type of financing available to automobile dealers in the Portland area (Tr. 189, 191), does provide certain benefits to Francis Ford. Foremost, of course, is the fact that financing sells automobiles[6] (Tr. 178–79, 1489, 1514, 2286).

33. There are other tangible monetary benefits which Francis Ford realizes from its repurchase agreements. When it assigns an executed retail installment contract to a financing institution on a repurchase basis, the financing institution credits a share of the total finance charge to Francis Ford. Francis Ford's share of the finance income is the amount by which the finance charge negotiated between Francis Ford and the consumer exceeds the amount of finance income for the financing institution as agreed upon between Francis Ford and that institution. For example, the interest rate which Ford Credit charged on new cars at the time of hearings was 6 percent. If the total finance charge negotiated by Francis Ford were $1,560 on a hypothetical contract, and as a result of its 6 percent rate, Ford Credit's finance charge was $1,200, Francis Ford would retain the difference between $1,560 and $1,200–$360 (Tr. 45–46).

34. Francis Ford's sale of cars on retail installment contracts also enables it to sell credit life, accident and [12] health insurance to many customers. It receives a commission of between 35 percent and 37 1/2 percent on its sales of such insurance. Credit life, accident and health insurance meet the customer's obligation under the installment contract if the customer suffers a misfortune covered by the policy. These policies protect the customer against repossession due to sudden loss of income, while protecting Francis Ford against being called upon to perform its obligations under the repurchase agreement with the financing institution (Tr. 180).

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[6] "If everybody sold for cash, all dealers would sell far less cars today than they do by having a contract" (Tr. 1277).

35. "Profit centers" are the revenue generating activities of a merchandising firm which ultimately provide for payment of its indirect or fixed (overhead) expenses (Tr. 546–47). Finance and insurance income may be a major profit center for a dealership (CX 319A–F). Francis Ford realized $127,827 in finance and insurance income in 1974 and $124,407 in such income in 1975 (CX's 2321–22).

## F. Repossession

### 1. Calculating the Payoff

36. During calendar year 1974, approximately 91 repossessed vehicles were returned to Francis Ford pursuant to its repurchase agreements with Ford Credit and U.S. Bank (Adm. 9). Approximately 85 repossessed vehicles were returned to Francis Ford by these lending institutions in 1975 (Adm. 8).

37. When Ford Credit and U.S. Bank return a repossessed vehicle to Francis Ford, they calculate a "payoff," that is the amount which the defaulting customer owed them but which, by virtue of the repurchase agreements, Francis Ford now owes them. Francis Ford then looks to the defaulting customer to reimburse it for the payoff plus other legitimate expenses incurred in preparing the repossessed vehicle for sale and in reselling it.

38. The payoff does not equal the amount owed on the installment contract, for it is adjusted by credits for any prepaid but unearned finance charges or insurance premiums, and by charges for such items as collision damage and expenses of repossession by the financial institution (CX's 1016, pp. 20–22; 2307A–B, 2396A, 2564, 2566A–2569, 2571; RX 2565; Tr. 55–59, 62–63). [13]

### a. Finance Charges

39. When Francis Ford sells a vehicle under a retail installment contract, the contract customarily provides for the customer to pay a finance charge which is included in the face amount of the contract (*e.g.*, CX 2581A).

40. When Francis Ford assigns a retail installment contract to Ford Credit or U.S. Bank, the financing institution credits Francis Ford's reserve account with the amount by which the gross finance charge negotiated between Francis Ford and the customer exceeds the discount rate agreed to between Francis Ford and the financing institution (CX 1054A–C; Tr. 46–50, 1509–11; Finding 33). The financing institution then sends Francis Ford a check for the unpaid balance owing on the vehicle plus the amount of any premiums for creditor's life, accident, or health insurance financed under the

contract which Francis Ford has arranged through its independent broker (CX 2396A; Tr. 48-49).

41. The Ford Credit and U.S. Bank retail installment contract forms used by Francis Ford provide that if the buyer prepays the obligation in full, the buyer will receive a rebate (credit) of the unearned portion of the finance charge computed under the Rule of 78 (sum of the digits method)[7] after deducting an acquisition fee of $15 (CX's 2311 [¶ 14], 2441, 3421, 3461).

42. In the event of an early payoff by a customer purchasing a vehicle under a retail installment contract held by a financing institution pursuant to a repurchase agreement with an automobile dealer, the gross finance charge is prorated by the financing institution under the Rule of 78. The face amount of the contract is then reduced by the amount of the unearned gross finance charge to obtain the payoff. The amount of the finance charge previously credited to Francis Ford, being a part of the gross finance charge, is also prorated under the Rule of 78, and the unearned portion is charged to its reserve account. No charge is made to the customer for the unearned finance charge Francis Ford or the financing institution would have earned had the contract continued for its maximum term (CX's 1954A-C, 2396A, 2431, 3516; Tr. 2267-71).

43. Professor Johnson, one of Francis Ford's expert witnesses, gave an example of proration under the Rule of 78, assuming that the finance institution made a loan on which it assessed a finance charge of $100 for 12 months. [14] If the debtor paid off the loan prior to the end of its term, after 60 percent of the finance charges were earned by the finance institution, $40 would be credited to him under the Rule of 78. If an automobile dealer, because of a repurchase agreement, were entitled to 20 percent of the finance charge ($20) he would, upon early payment, be required to refund his share of the unearned finance charges. In such a case, the finance institution would credit the same amount ($40) to the debtor and would charge the dealer's reserve account for his share—$8 (20 percent of $40)—of the unearned finance charge (Tr. 2267-71).

44. In the event of a repossession under a retail installment contract held by Ford Credit under a repurchase agreement followed by a subsequent redemption of the vehicle by the customer, the customer's payoff and Francis Ford's chargeback are accounted for in the same method as reflected in Finding 42 except that any out-of-pocket expenses incurred in making the repossession are added to the payoff amount to be paid by the redeeming customer (CX 2396A;

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[7] The "Rule of 78" is a method for prorating finance charges and insurance premiums in the event of early payoff, redemption, or repossession under a retail installment contract (CX 3516; Tr. 55-56, 88, 2267-73).

Tr. 62-63); and, in the event of a repossession from a customer purchasing a vehicle under a retail installment contract held by a financing institution pursuant to a repurchase agreement, Francis Ford's payoff and chargebacks are accounted for by the same method as in Finding 42 (CX's 2396A, 2431; Tr. 69-70, 2267-71).

45. The amount of the Francis Ford's chargeback representing its share of the unearned finance charge for the period after early payoff, redemption, or repossession is not charged or collected as an expense from the customer (CX's 2396A, 2431; Tr. 56-58, 62-65, 69-71, 2270).

### b. Insurance

46. When Francis Ford sells creditors' life, accident, or health insurance in connection with the sale of a vehicle under a retail installment contract, the gross insurance premium is included in the face amount of the contract (*e.g.*, CX 2581A). Francis Ford obtains such insurance through independent brokers, and receives a share of the insurance premium (Tr. 1178).

47. In the event of an early payoff by a customer purchasing a vehicle under a retail installment contract held by Ford Credit pursuant to a repurchase agreement where the customer has purchased creditor's life insurance from Ford Life Insurance Company, Ford Credit prorates the amount [15] of the gross insurance premium under the Rule of 78. The face amount of the obligation is then reduced by the amount of the unearned gross premium. The portion of the gross premium previously credited to Francis Ford is prorated under the Rule of 78 and the unearned portion is charged back to the dealer (CX 2396A; Tr. 52, 55-56, 85-88, 139).

48. In the event of either an early payoff or repossession on a direct loan on which U.S. Bank has sold creditor life, accident, or health insurance and received a commission, the gross insurance premium is prorated and the balance owing is reduced by the amount of the unearned gross premiums (Tr. 1526-33).

## 2. Resale of the Repossessed Vehicle

### a. Francis Ford's Practice

49. Francis Ford engages in substantial sales of used vehicles to retail customers (Finding 3). When, pursuant to its repurchase obligation, Francis Ford receives a repossessed vehicle from Ford Credit or U.S. Bank, it treats most of them in the same manner as

other used vehicles which it has obtained through other methods and often sells them at retail.[8]

50. There is some evidence in the record that Francis Ford has obtained prices close to retail book value for repossessed vehicles:

a. The Wallace P.[9] repossession was resold for $1,425 on 6/21/75 (CX 2501). It was a 1969 Ford Pickup, Model F100 (CX 2561), with 87,855 miles on it at the time of resale (RX 2570A). The retail blue book value for this vehicle was $1,560 (RX 10, p. 234), less a mileage adjustment of $135 (RX 10, p. 10), leaving a retail blue book value of $1,425. [16] The wholesale blue book value for this vehicle was $1,125 (RX 10, p. 234), less a mileage adjustment of $100 (RX 10, p. 10), leaving a wholesale blue book value of $1,025.

b. The Hugh W. repossession was resold for $5,275 on 8/13/75 (CX 2503). It was a 1975 Ford Elite with 9,220 miles on it at the time of resale (RX 2609A). The retail blue book value for this vehicle was $5,270 (RX 11, p. 102), plus a mileage adjustment of $100 (RX 11, p. 8) leaving a retail blue book value of $5,370. The wholesale blue book value for this vehicle was $4,150 (RX 11, p. 102), plus a mileage adjustment of $75 (RX 11, p. 8), leaving a wholesale blue book value of $4,225.

c. The Gregory D. repossession was resold for $2,702 on 3/15/75 (CX 2504). It was a 1973 Pinto, two-door, S/W, four-speed manual transmission, with 27,173 miles on it at the time of resale (RX 2637B). The retail blue book value for this vehicle was $2,605 (RX 9, p. 95), plus a mileage adjustment of $100 (RX 9, p. 10) and less an accessory adjustment for manual transmission of $65 (RX 9, p. 11), leaving a retail blue book value of $2,640. The wholesale blue book value for this vehicle was $1,950 (RX 9, p. 95), plus a mileage adjustment of $75 (RX 9, p. 10) and less an accessory adjustment for manual transmission of $50 (RX 9, p. 11), leaving a wholesale blue book value of $1,975.

d. The Benjamin T. repossession was resold for $4,750 on 8/12/75 (CX 2506). It was a 1975 Mustang II Ghia, V-8 (RX 2671), with 3,365 miles on it at the time of resale (RX 2684). The retail blue book value for this vehicle was $4,675 (RX 11, p. 102), plus a mileage adjustment of $65 (RX 11, p. 10) and plus an accessory adjustment of $265 (RX 11, p. 102), leaving a retail blue book value of $5,005. The wholesale blue book value for this vehicle was $3,650 (RX 11, p. 102) plus a mileage adjustment of $50 (RX 11, p. 10) [17] and plus an accessory adjustment for V-8 engine of $200 (RX 11, p. 102), leaving a wholesale blue book value of $3,900.

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[8] Forty-one of the 43 repossessed vehicles on which Francis Ford realized surpluses were sold at retail by a person to whom Francis Ford paid a salesman's commission (CX's 2501-43; Tr. 932).

[9] Complaint counsel have requested that the full names of the persons involved in the repossessions analyzed in this decision not be revealed.

e. The Ronald A. repossession was resold for $3,295 on 2/18/75 (CX 2509). It was a 1972 Ford Gran Torino, two-door, sports roof (RX 2761), with 53,669 miles on it at the time of resale (RX 2756A). The retail blue book value for this vehicle was $2,885 (RX 8, p. 94), less a mileage adjustment of $200 (RX 8, p. 9), leaving a retail blue book value of $2,685. The wholesale blue book value for this vehicle was $2,175 (RX 8, p. 94), less a mileage adjustment of $150 (RX 8, p. 9), leaving a wholesale blue book value of $2,025.

51. In practice, Francis Ford has never compared income and expenses on repossessed vehicles at the time they were resold to determine whether surpluses resulted therefrom (Tr. 1086–87, 1175). Instead, Francis Ford has assumed, because of the way it values repossessed vehicles, that their resale always resulted in a deficiency (Tr. 1253, 1373, 1375).

52. The one occasion on which Francis Ford did compare income and expenses on repossessed vehicles resulted from a June 27, 1975 letter from the Commission's Seattle Regional Office. In response to this letter, and upon the advice of its then counsel, Francis Ford prepared and submitted to the Seattle Regional Office in July 1975 a summary tabulation of income and expenses on each of 27 repossessed vehicles returned to it by Ford Credit and U.S. Bank between October 1 and December 31, 1974 (CX 2344; Tr. 210–24, 1119–21, 1135, 1161). This summary tabulation was drawn from various types of records maintained by the dealership, including (a) records showing costs directly attributable to preparation and resale of the vehicles and (b) records showing certain department-wide and overall dealership expenses, indirect in nature (*e.g.*, imputed capital costs, general advertising, lot maintenance and other overhead items such as phone, water, lights and rent), which Francis Ford apportioned to the 27 vehicles on a prorata basis (Tr. 1123–24, 1128–31, 1134).

53. Among the records of direct outlays for these repossessed vehicles which Francis Ford consulted in preparing these tabulations were the internal repair orders it had generated at the time of reconditioning the 27 vehicles in question. For purposes of its response to [18] the Commission's Seattle Office, Francis Ford altered many of the repair orders applicable to these vehicles by crossing out figures which it concluded were too low and entering higher or additional figures (Tr. 1146–51).

54. According to this analysis, and taking the figures supplied by

Francis Ford at face value, 22 of the 27 vehicles had been resold (as of July 16, 1975) and 10 of the 22 had generated surpluses ranging in amount from $19.15 to $923.93 and totaling $3,195.84 (CX 2344).

55. On or about July 23, 1975, upon advice of its then counsel, Francis Ford prepared and sent to each of the persons from whom the above 10 vehicles had been repossessed a check in the amount of the "surplus"—or "amount over and above sales expenses"—thus determined (*e.g.*, CX's 3336, 3339; Tr. 221–24).

56. Except for the 10 checks drawn on or about July 23, 1975 in connection with its response to the Commission's Seattle Office, Francis Ford has never paid or attempted to pay any money to defaulting customers as a refund of surplus and has never advised defaulting customers in any way that money was received by Francis Ford in excess of its expenses and other outlays on the vehicles repossessed from such customers (Adm. 3A; Tr. 222, 483–84).

### b. Wholesale Value vs. Resale Price

57. Francis Ford attempts to justify its conduct by arguing that it need not compute surpluses because the value which should be assigned to repossessed vehicles is not the actual selling price (generally a retail price) but an estimated wholesale value.

58. Financial institutions in the Pacific Northwest, including Portland, Oregon, do sell repossessed vehicles,[10] often through auto auctions, at wholesale (Tr. 118–19, 1890–91); and, when they compute surpluses or deficiencies, can legally (and complaint counsel concede this (Tr. 1223)) use the wholesale price as the "fair market value" of the vehicle.[11] [19]

59. Because the wholesale price seldom exceeds the payoff when financial institutions are obliged to resell repossessed vehicles, they rarely realize surpluses. A loan officer for the U.S. Bank testified that he had seen no surpluses on the sale of repossessed vehicles in more than 20 years (Tr. 1505). The local office manager of Ford Credit said that he had seen only one surplus on the sale of repossessed vehicles in 16 years (Tr. 406).

60. However, Francis Ford, unlike Ford Credit and U.S. Bank, has used car facilities through which it can, and does, sell repossessed cars and it often obtains a retail price on those resales; nevertheless, Francis Ford claims that it makes no economic sense to require it to credit a defaulting customer with the price at which a

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[10] Vehicles which are not returned to dealers under repurchase agreements, and which the financial institutions therefore must dispose of.

[11] See *Mount Vernon Dodge. Inc.* v. *Seattle-First Nat'l Bank*, 18 Wn. App. 569, 570 P.2d 702, 712 (1977).

repossessed vehicle was sold, for that price was realized through Francis Ford's, not the customer's, efforts.

61. This argument finds some support in the testimony of two experts called by Francis Ford. Professor Dale O'Bannon, a teacher of economics at Lewis and Clark College in Portland, Oregon, testified with respect to the economic concept of "opportunity cost"—that is, a cost which has occurred by foregoing some particular kind of activity—and its application to the issue of repossession surpluses (Tr. 1571–72).

62. Professor O'Bannon, after being asked to make certain assumptions,[12] testified that a repurchase dealer loses the opportunity to make a normal sale when he is forced to fulfill his repurchase obligations (Tr. 1583). **[20]** At the same time, the defaulting purchaser (assuming that there is a surplus calculated on the basis of the actual resale price) would receive the value added by the dealer, a value which is due to the dealer's capital investment (Tr. 1587, 1645).[13] Thus, according to Dr. O'Bannon, "economic fairness" dictates that a dealer who resells a repossessed vehicle at retail, and who is permitted by law to recover reasonable expenses, should be permitted to retain the difference between its wholesale value and the price at which it was sold. This figure would include commissions, necessary repairs to the vehicle, contributions to overhead, and profit[14]—that is, his normal gross margin (Tr. 1594–95).

63. Professor Robert Johnson, director of the credit research center, Purdue University, has a doctorate in finance and was a consultant under contract with the Federal Trade Commission's Office of Policy Planning who was hired to evaluate proposed trade regulation rules on creditors' remedies, one of which deals with repossession practices (Tr. 2149–50). This proposed rule would require that the defaulting customer be credited, when calculating a surplus or deficiency, with the retail value of the repossessed article (Tr. 2154).

64. In testifying on the effects of the relief sought by complaint counsel, Professor Johnson postulated a hypothetical repossession in which the wholesale value of the vehicle was $2,000, the payoff was

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[12] a. That a dealer in used vehicles has limited capital and limitations on his capacity to sell cars;
b. That the dealer has substantial experience in choosing and selling used cars for his account;
c. That the dealer has available to him virtually every current make and model of used vehicle;
d. That the dealer is required to use his capital to buy back, as a forced purchaser, a repossessed car and sell it at retail. (Tr. 1578)

[13] It is apparent that in some cases, Francis Ford's facilities and professional sales staff have generated a higher resale price on repossessed vehicles than would have been obtained by the defaulting purchaser if he had resold it (Tr. 722, 731, 770, 772, 786, 798, 892), and it can be said that Francis Ford's efforts have added value to the vehicles.

[14] According to Dr. O'Bannon, profits are an expense because they "are nothing more than the cost of keeping a firm in business." (Tr. 1595).

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$2,000 and the gross margin was $400 (*i.e.,* the vehicle was sold for $2,400) (Tr. 2174).

65. If complaint counsel prevail, according to the Professor, the defaulting customer, rather than the dealer, would be entitled to the $400 margin.[15] The "loss" of [21] this $400—and the probability of similar "losses" on other repossessions—would force the dealer to make adjustments in his business: he might lower the price he pays for trade-ins, raise the prices of cars he sells, or take steps to weed out those customers who are repossession risks and, in the process, deny credit to customers who would have been good risks (Tr. 2176-78). There would also be an industrywide impact on creditors, who would resort to nonrecourse financing (Tr. 2180-81), on credit sales, which would be lower, on new car sales and on new car prices (Tr. 2183-84).

66. Despite what appears to be a logical basis for the theories of Professors O'Bannon and Johnson, I cannot accept them for several reasons. The first—a legal one—will be discussed in my conclusions of law. Second, the theories are based on an assumption—the unlimited availability of every make and model of used car—which is questionable (Tr. 1591, 1607, 1906, 2249). Third, there would be a potential for substantial abuse if the dealer were permitted to retain his "normal" margin on the resale of a repossessed vehicle, for the computation of that margin would depend on a wholesale appraisal by the person who would benefit from application of the theories of Francis Ford's experts (Tr. 2300-01).

67. Professor Johnson conceded that economists prefer that value be established through an arm's length transaction rather than by an appraisal but he argued that abuse could be prevented by setting up an enforcement procedure that would "make it in the self interest of the wholesale manager to accurately establish the wholesale price" (Tr. 2327). However, neither he nor any other witness outlined the procedure which could be used or gave any estimate of the costs which might be involved in policing wholesale appraisals by retail dealers. Furthermore, in addition to the fact that it is required by the UCC and Oregon law, the virtue of complaint counsel's theory is that it makes computation of surpluses or deficiencies relatively simple, for the price to be used is one which has been determined in an arm's length transaction. Finally, I cannot ignore the requirement of the UCC because of possibly adverse economic effects if the proposed order were imposed upon the automobile industry for this

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[15] The hypothetical assumes no out-of-pocket costs to prepare the car for sale (Tr. 2175).

is a question of administrative discretion which only the Commission has the authority to deal with. [22]

68. For these reasons, I find that the appropriate price for determining whether Francis Ford realized a surplus or suffered a deficiency on the resale of repossessed vehicles is the actual resale price of those vehicles.

### G. Allowable Expenses

#### 1. Overhead

69. The parties agree that under the UCC Francis Ford can deduct from the price at which it sells a repossessed vehicle all costs directly resulting from its repossession, preparation for sale and resale. However, complaint counsel argue that only these costs are deductible and that overhead (indirect) expenses are not.

70. In support of their position, complaint counsel called Dr. Gerald L. Cleveland, a professor of accounting at Seattle University. Dr. Cleveland testified that the following overhead expenses should not be allowed as deductions when a dealer calculates a surplus or deficiency because this would allow the dealer to recover the same expenses twice:

a. Rental expenses for a used car lot.
b. Imputed interest on dealer funds invested in a repossessed car.
c. Interest on funds borrowed by the dealership.
d. Depreciation on the dealership's buildings.
e. Administrative accounting expenses.
f. Salaries of supervisors.
g. Salaries of lot boys. (Tr. 540, 561-65, 566-67, 654-55, 694-95)

71. Although he claimed that his theory is based upon accepted accounting principles, Dr. Cleveland's conclusion seems to be derived not from widely accepted principles but from his belief that a dealer who resells a repossessed automobile is a fiduciary of the defaulting customer with respect to surpluses (Tr. 557). Dr. Cleveland believes that a dealer-fiduciary [23] should not benefit from his trust (Tr. 560) but he has not, in my opinion, satisfactorily explained what accepted accounting principle prohibits a fiduciary from recovering legitimate overhead expenses.

72. I must conclude, as did respondent's expert witness, Mr. James W. Porter, that a dealer who repossesses a vehicle does incur overhead expenses in preparing it for sale and in reselling it which do not duplicate overhead expenses which were incurred when the car was sold to the defaulting purchaser. Mr. Porter, a CPA who has

performed accounting functions for some 350 automobile dealerships since 1946 (Tr. 1730), testified that while accountants might differ over whether certain costs are fixed or not, accountants agree that overhead costs are considered costs of sale which should be allocated (deducted) from the resale price of a repossessed vehicle (Tr. 1770-71, 1804).

73. While I accept the principle that a dealer does incur overhead expenses when he resells a repossessed vehicle, the problem of determining what that cost is forces me to conclude that, as a practical matter, overhead should not be deductible from the resale price of that vehicle. Mr. Porter's explanation of how overhead would be allocated to the resale of each repossessed vehicle in a dealer's inventory reveals that a cost study of Francis Ford's business would have to be done periodically to determine these expenses (Tr. 1757-63, 1768-72, 1824).

74. I agree with Dr. Cleveland that in setting up a system under which Francis Ford should be required to account for surpluses (or deficiencies) on repossessed vehicles, the paramount consideration should be simplicity and minimal cost of compliance (Tr. 557-58). Allowing the allocation of overhead might impose expenses for a cost accounting system which exceed the overhead expenses which are computed. Furthermore, Commission compliance efforts would be greatly complicated, for the validity of the cost allocations would have to be determined periodically.

75. Disallowing overhead expenses is not, in my opinion, unfair, for other businesses involved in repossessions which have overhead expenses do not deduct them when they compute surpluses or deficiencies. Financial institutions deduct only out-of-pocket expenses (those directly resulting from the repossession) in calculating the amount of a surplus or a deficiency (CX 1225A-E; Tr. 167-68, 694, 1226). In computing surpluses or deficiencies realized on nonrecourse repossessions, Ford Credit deducts from the [24] resale price only the payoff balance and the out-of-pocket expenses paid out to third parties (Tr. 703-04). Overhead is not included as an expense (Tr. 704).

76. In the period from 1972 through 1974, Ford Credit's Central Collections Department attempted to collect deficiencies for Ford dealers with respect to certain repurchase accounts. In determining the collectible expenses of dealers, Ford Credit included only the dealer's out-of-pocket expenses (Tr. 707).

77. Since 1971 or earlier, on the advice of counsel, Damerow Ford Company of Beaverton, Oregon (a competitor of Francis Ford) has computed and paid surpluses realized upon the resale of repossessed

vehicles by deducting the payoff, direct costs of repairs, and sales commission from the resale price. Overhead has not been deducted (Tr. 839–51).

### 2. Over and Underallowances

78. An overallowance may occur when a vehicle is received by an automobile dealer in trade. An overallowance is the amount by which the agreed trade-in amount exceeds the wholesale value of the vehicle (Tr. 674, 1015–18, 1020–23). An underallowance may occur when a vehicle is received by an automobile dealer in trade. An underallowance is the amount by which the agreed trade-in amount is less than the wholesale value of the vehicle (Tr. 682, 1016–17, 1019, 1032).

79. Francis Ford had underallowances and overallowances on some of the repossession dispositions in evidence in this proceeding (RX's 2663–64, 2702–03, 2763, 2765; Tr. 1995, 2003, 2006, 2014).

80. Overallowances or underallowances affect the determination of resale proceeds for a repossessed vehicle (Tr. 554). An overallowance is a subtraction from the selling price of the repossessed vehicle and an underallowance is an addition to the selling price (RX 2400D; CX 2344).

### 3. Other Expenses

The out-of-pocket expenses which are allowable when computing a surplus or deficiency include the cost of repairs in preparing the vehicle for resale, towing and storage charges, and commissions paid to salesmen and their supervisors who actually participate in the sale of the repossessed vehicle. Post-resale repairs are also allowable if they are a condition of sale. [25]

82. Contrary to Francis Ford's claim, I find that chargebacks on the unearned portion of finance charges or insurance premiums are not an expense and cannot be deducted from the resale price of a vehicle which it repossesses.

### 4. Surpluses Realized by Francis Ford on Sales of Repossessed Vehicles

83. Complaint counsel offered in evidence 43 charts which analyze the sale by Francis Ford of repossessed vehicles (CX's 2501–43). Their proposed findings duplicate each of these charts with some corrections (for example, on line 26, commissions paid by Francis Ford to assistant sales managers which complaint counsel now concede are deductible expenses).

84. I find that the charts accurately reflect, as to each transaction, the resale price of the vehicle in question, the net payoff made by Francis Ford to the financial institution, adjustments to the resale price for overallowance or underallowance and all legitimate expenses incurred by Francis Ford in preparing the vehicle for sale and in reselling it.

85. The repossession charts disclose, and I find, that Francis Ford realized the following surpluses, in six of which it made some payment to the defaulting customer. In only one of those six cases did the customer receive the total surplus.

| *CX #* | *Customer Name* | *Amount of Surplus* | *Payment by Francis Ford to Customer* |
|---|---|---|---|
| 2501 | Wallace P. | $545.86 | None |
| 2502 | Bruce S. | $268.00 | None |
| 2503 | Hugh W. | $ 89.74 | None |
| 2504 | Gregory D. | $848.35 | None |
| 2505 | Stanley D. | $513.65 | None |
| 2506 | Benjamin T. | $153.02 | None |
| 2507 | Odeh D. | $633.36 | None |
| 2508 | Richard W. | $281.14 | $149.92 |
| 2509 | Ronald A. | $460.60 | None |
| 2510 | Lloyd D. | $220.16 | None |
| 2511 | Raymond H. | $327.17 | None |
| 2512 | L. C. Y. | $806.48 | None |
| 2513 | Art F. | $221.85 | None |
| 2514 | Richard L. | $173.14 | None |
| 2515 | Birdie T. | $336.96 | None |
| 2516 | John C. H. | $169.31 | None |
| 2517 | William K. | $161.02 | None [26] |
| 2518 | Dale W. | $110.98 | None |
| 2519 | Charles R. | $506.87 | None |
| 2520 | Gary R. | $411.01 | $80.12 |
| 2521 | Robert S. | $ 71.50 | None |
| 2522 | Harold L. | $611.02 | $230.72 |
| 2523 | Steve C. | $544.93 | None |
| 2524 | Rex B. | $386.56 | None |
| 2525 | Matt M. | $385.61 | None |
| 2526 | Thomas B. | $1,064.43 | None |
| 2527 | Daniel D. | $348.03 | None |
| 2528 | Robert C. | $605.67 | None |
| 2529 | Harry E. | $184.26 | None |
| 2530 | Keldon A. | $ 96.37 | None |
| 2531 | Jack D. | $ 76.01 | None |
| 2532 | William M. | $1,164.29 | None |
| 2533 | Brian K. | $133.44 | None |
| 2534 | Thomas H. | $351.22 | None |
| 2535 | Paul M. | $377.35 | $85.17 |
| 2536 | Lee B. | $547.79 | $738.63 |
| 2537 | John R. H. | $1,045.73 | None |

| | | | |
|---|---|---|---|
| 2538 | Patricia C. | $518.26 | $201.19 |
| 2539 | Robert T. | $152.50 | None |
| 2540 | Paul S. | $368.66 | None |
| 2541 | Clifford B. | $232.20 | None |
| 2542 | John B. | $299.44 | None |
| 2543 | Charles M. | $333.91 | None |

These repossession transactions produced over $17,000 in surpluses initially withheld by Francis Ford. Francis Ford continues to retain some $15,000 from the surpluses in 42 of the transactions.

### H. The Typical Defaulting Customer

86. As would be expected, and as has been found in some studies, many of the customers from whom vehicles are repossessed have financial problems, are ill, or unemployed (Johnson, Tr. 2226). Included among the Francis Ford customers whose vehicles were sold at a surplus were a customer who could not read (Tr. 896), a person whose spouse was suffering a mental breakdown at the time of the repossession (Tr. 828), and a person who had lost his $425 per month job and was no longer able to make his $171 monthly payments on the financing Francis Ford had arranged ($64 per month for the borrowed down payment and an additional $107.10 payments on the retail installment contract held by Ford Motor Credit) (Tr. 748, 754, 755). Other specified reasons for default which are listed in legible documents in the record include reduced income (CX's 2779, 2925, 2964A, 3025A, 3343A), unemployment (CX's 2855, 3104B), and bankruptcy (CX 3145A). [27]

## III. CONCLUSIONS OF LAW

### A. The FTC Act and the Definition of "Unfair"

The theory of the complaint is that the retention of surpluses on the resale of repossessed vehicles is an "unfair" practice within the meaning of Section 5 of the FTC Act. This vague standard has, fortunately, been fleshed out considerably in the past several years by the Commission, most clearly in the following definition which was quoted by the Supreme Court in *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n. 5 (1972):

> The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair: "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise — whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of fairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes

substantial injury to consumers (or competitors or other businessmen)" 'Statement of Basis And Purpose of Trade Regulation Rule 408 . . .' " 29 Fed. Reg. 8324, 8355 (1964)

Complaint counsel argue that Francis Ford's retention of surpluses meets all three of the "unfairness" definitions announced by the Commission; the practice is, they claim, a violation of state law; it is immoral, unethical, oppressive and unscrupulous; and, it injures those consumers who they call "repossession victims."

### B. The UCC and Oregon Law

Oregon law regarding the obligation to pay surpluses realized on the resale of repossessed vehicles is, according to complaint counsel, derived from Article 9 of [28] the UCC (Oregon Revised Statutes (ORS) §§ 79.1010-79.5070). Francis Ford, on the other hand, argues that a dealer's rights with respect to repossessed vehicles are controlled not by Article 9, but by Article 2. If applicable in this case, Article 2 would permit Francis Ford to recover consequential damages, including overhead costs and lost profits when a customer defaults, for UCC § 2-708(2) provides:

> If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer. . . .

Francis Ford relies on the draftsmen's comments to § 9-113 for its claim that it is entitled to lost profits and overhead under Article 2: "[A] seller who reserves a security interest by agreement does not lose his rights under the Sales Article (Article 2) . . ." (§ 9-113, Comment 5). This comment is taken out of context. The language of § 9-113 and other comments on that section make it very clear that the rights of a secured party on default by the debtor are governed by Article 2 *only* if the security interest arises *under* Article 2, *e.g.*, liens arising by operation of law where the buyer does not have possession of the goods. In this case, however, Francis Ford's security interest arises from a specific provision of Article 9 (see UCC § 9-102(1)) and, since Article 9 creates that interest, Article 9, not Article 2, defines the rights and obligations of the secured party and the debtor.

Francis Ford's argument is also erroneous because UCC § 2-708 provides for seller's damages only if there has been nonacceptance or repudiation by the buyer. Such breaches occur under Article 2 when a party by overt communication or action informs the other party that he does not intend to render any performance under the contract or when a party hinders the other party from any performance. (See UCC § 2-610 and *J. White and R. Summers*

*Handbook of the Law Under the Uniform Commercial Code,* 1972, pp. 168-175). Since repossessions by dealers occur only after a vehicle has been sold by delivery and acceptance (performance by both buyer and seller) § 2-708 is inapplicable, and Francis Ford's citation of cases allowing recovery of lost profits is misplaced because they concern either nonacceptance or repudiation of a contract and do not deal with Article 9 security interests. [29]

Finally, the drafters of the UCC intended Article 9 to be "a comprehensive scheme for the regulation of security interests in personal property . . ." UCC § 9-101, Official Comment. Its aim is to provide a unified structure for the regulation of sales made on credit where the goods serve as a security for the extension of credit, whereas Article 2 deals with the formation of unsecured sales contracts and the rights of the parties to those contracts. It was not intended to govern secured transactions[16] and I do not accept the argument that its provisions are controlling here.

UCC § 9-102(1) states that Article 9 applies to any transaction which is intended to create a security interest in personal property and to any sale of accounts or chattel paper. Security interests[17] created by pledge, assignment, conditional sale and other devices are expressly included under the coverage of Article 9. UCC § 9-102(2).

Pursuant to the retail installment contract it enters into with its customers and UCC § 1-201(37), Francis Ford is a secured party. When Francis Ford sells or assigns its security interest in the financed vehicle either to Ford Credit or U.S. Bank, those institutions become the secured parties:

> "Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts or chattel papers have been sold. UCC § 9-105(1)(m), and Comment 2.

When either Ford Credit or the U.S. Bank repossesses a vehicle and returns it to Francis Ford pursuant to a repurchase [30] agreement, Francis Ford once again becomes the party holding a security interest in the vehicle:

> A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party.

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[16] See UCC § 2-102:

> Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction. . . .

The comment to this section states that the words, "security transactions" are "used in the same sense as in the Article on Secured Transactions (Article 9)."

[17] Defined in UCC § 1-201(37) as "an interest in personal property or fixtures which secures payment or performance of an obligation."

Such a transfer of collateral is not a sale or disposition of the collateral under this Article. UCC § 9-504(5).

After Francis Ford fulfills its repurchase obligation and resells the repossessed vehicle, it, as the secured party, is required to pay any surplus due, and may pursue any deficiency owed by, the defaulting customer:

If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. . . . UCC § 9-504(2).

In its retail installment contracts with customers, Francis Ford recognizes and acknowledges its duty under state law to pay any surpluses realized upon resale of a repossessed vehicle (Findings 20, 21).

### C. Francis Ford Has Realized, and Has Not Paid, UCC Surpluses

#### 1. Introduction

There is no serious dispute that Francis Ford is required by state law to pay surpluses to defaulting customers; rather, the dispute is over the price which may be used, and the deductions which may be made from that price, in calculating a surplus or deficiency. The language of the UCC and court interpretations of that language reveal that complaint counsel's claims are correct, *i.e.*, (1) that the price which must be used under the UCC to calculate surpluses or deficiencies is, for dealers such as Francis Ford, the actual price (in many cases the retail price) at which the repossessed vehicle was sold and (2) that overhead is not a deductible expense which may be charged against the resale price. [31]

#### 2. Actual Sale vs. Wholesale Appraisal

Francis Ford argues that the amounts which should be credited to the repossessions analyzed by complaint counsel are the wholesale values of the vehicles, not the prices at which they were sold. This position is contrary to the repurchase agreements Francis Ford has with U.S. Bank and Ford Credit. The Ford Credit agreement refers to "excess proceeds on resale," and the U.S. Bank version speaks of ". . . an excess of net proceeds upon the sale. . . ." (Finding 28 and CX 2307A). Furthermore, the notices sent to defaulting customers by Ford Credit and to Francis Ford contemplate that the repossessed vehicles will be sold (Finding 22).

Section 9-504 of the UCC also supports complaint counsel's argument:

> A secured party after default may sell, lease or otherwise dispose of any or all of the collateral . . . the proceeds of disposition shall be applied . . . to . . . the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like. . . . UCC § 9-504(1).
>
> Disposition of the collateral may be by public or private proceedings. . . . Sale or other disposition. . . . UCC § 9-504(3). See also Comments 1, 5 and 6.

The words "sell," "lease" or "otherwise dispose" clearly refer to a situation in which the dealer parts with possession of the vehicle,[18] and indeed, Francis Ford did so in the repossessions analyzed above. Nowhere—in the UCC, the comments, or court interpretations—is there any suggestion that a dealer who sells a repossessed vehicle at retail can assign a wholesale value to it for purposes of meeting his obligations under § 9-504. Such an interpretation would defeat its purpose: [32]

> The purpose of § 9-504(5), UCC, is to insure that the value of repossessed collateral is measured by a bona fide sale in the marketplace, and not by an artificial value [such as] the balance due on the debtor's contract. *Reeves* v. *Associates Financial Services Co., Inc.*, 197 Neb. 107, 247 N.W.2d 434, 439 (Neb. App. 1976).

See also *Carter* v. *Ryburn Ford Sales, Inc.*, 451 S.W.2d 199 (Ark. Sup. Ct. 1970), an action by a Ford dealer to recover a Ford truck. In computing the deficiency, the dealer's calculation was based on his having credited the debtor with an estimated value of the vehicle. This "purchase" by the dealer was held to be not in conformity with the Uniform Commercial Code. To the same effect see *Vic Hansen & Sons, Inc.* v. *Crowley*, 57 Wis.2d 106, 203 N.W.2d 728, 733 (1973), where the court said such "a practice has no place in a private sale of a debtor's collateral . . ." Also, California's motor vehicle law contains a provision parallelling UCC § 9-504 which makes it clear that the surplus is to be determined from the proceeds of resale. The statute provides for a written accounting itemizing the following data on each repossessed vehicle: (1) the gross proceeds of the disposition, (2) reasonable and necessary expenses incurred in retaking, holding, preparing for and conducting the sale, and certain attorneys' fees and legal expenses, and (3) satisfaction of the indebtedness. Cal. Civ. Code § 2983.2(b). It goes on to recite that:

> In all sales which result in a surplus, the seller or holder shall furnish [such] an accounting [to the debtor/buyer]. Such surplus shall be returned to the buyer within 45 days after the sale is conducted. [Cal. Civ. Code § 2983.2(c)].

I also reject Francis Ford's argument that § 83.830(1)(b) of

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[18] UCC § 9-505 does permit retention of collateral in discharge of an obligation under certain circumstances but the fact that this section was included in the UCC indicates that § 9-504 contemplates the secured party's relinquishment of the collateral.

Oregon's Consumer Credit Act permits it to value repossessed vehicles at wholesale and that the Act therefore repeals the UCC's requirement that the resale price of the vehicle be credited to the defaulting customer. First, many vehicles are sold within 90 days of repossession and, if they are sold at retail, that price would be the "fair market value" under the Act. Second, if a particular vehicle were not sold at the time a deficiency suit were brought, I believe that the Oregon courts would require a retail dealer such as Francis Ford to value the vehicle at an estimated retail price for purposes of computing any deficiency. [33]

### 3. Retail vs. Wholesale Disposition and the "Best Possible Price"

While I accept the proposition that Francis Ford must value repossessed vehicles at their actual selling prices, and not at estimated wholesale values, this conclusion produces a rather interesting result, for what the defaulting customers are owed under UCC § 9-504 is not the result of some intrinsic residual values in the repossessed vehicles (after the payoff and repossession expenses are satisfied) but is dependent upon the status of the reseller. For example, if Ford Credit repossesses a vehicle from a defaulting customer and, because it has no repurchase agreement with a dealer, disposes of it at wholesale (since it has no retail facilities), the wholesale price would, complaint counsel concede (Finding 58), be the "proceeds" which, under § 9-504, Ford Credit would use to calculate a surplus or deficiency. If that wholesale price were equal to the payoff plus legitimate expenses, the defaulting purchaser would not receive any payment of surplus. On the other hand, if Francis Ford, by virtue of its repurchase agreement, took possession of the same vehicle and resold it at retail, it would, under the UCC, be obliged to credit the same defaulting customer with the retail price. If that retail price exceeded the payoff plus legitimate expenses, a surplus would be owed the defaulting customer.

Francis Ford asks why it cannot assign a wholesale value to vehicles which it repossesses which is equal to the wholesale price which Ford Credit can lawfully assign to vehicles which it repossesses. The answer which complaint counsel give—that Ford Credit has no retail facilities while Francis Ford does—is not convincing for it tends to support Professor O'Bannon's argument that surpluses are realized because of Francis Ford's retail facilities and expertise (Finding 62).

The answer is much simpler: Despite the apparent soundness of Professor O'Bannon's economic argument, the UCC requires a retail dealer like Francis Ford to compute surpluses or deficiencies using the price at which the repossessed vehicle was sold, and that price would generally be the retail price, for disposition at retail rather than at wholesale would usually realize the best possible return on the collateral. The view that the secured party should obtain the best possible price for the collateral which he holds is based on the theory that he is a fiduciary with respect to the collateral:

> [I]f the creditor decides to liquidate the collateral, he must act as the debtor's fiduciary in disposing of the assets. *United States* v. *Terrey*, 554 F.2d 685, 693 (1977).

In *Vic Hansen & Sons, Inc.* v. *Crowley*, 57 Wis.2d 106, 203 N.W. 2d 728, 731 (1973), the Wisconsin Supreme Court held: [34]

> Prior to the enactment of the Uniform Commercial Code in Wisconsin, this court held that the secured party owed a duty to the debtor to use all fair and reasonable means in obtaining the best price for the property on sale. [citations omitted] This duty was not abandoned upon the enactment of the Code. The purpose of the Uniform Commercial Code is the protection of both the creditor and the debtor. Each party to the transaction has certain duties. The duty of the secured party in this instance was to obtain the best possible price it could obtain for the collateral for the benefit of the debtor.

Similarly, in *Elster's Sales* v. *El Bodrero Hotel, Inc.*, 250 Cal. App.2d 258, 58 Cal. Rptr. 492, 493 (1967), a California court concluded that:

> [The] policy of the law . . . requires a repossessing seller to resell at the best obtainable price on commercially reasonable terms. [citations omitted] This policy tends to protect a defaulting buyer from any greater loss by way of deficiency judgment than the market reasonably justifies . . .

The secured party's obligation was described as follows in *Foster* v. *Knutson*, 84 Wn.2d 538, 549, 527 P.2d 1108, 1115 (1974):

> He is required to use his best efforts to sell the collateral for the highest price and to have a reasonable regard for the debtor's interests.

See also, *Credit Bureau Metro, Inc.* v. *Mims*, 119 Cal. Rptr. 622, 623 (1975) (". . . failure to use 'best efforts' to obtain the highest possible price for the collateral is a breach of the secured party's obligation to act in good faith and in a commercially reasonable manner."); *Luxurest Furniture Manufacturing Co.* v. *Furniture Warehouse Sales, Inc.*, 132 Ga. App. 661, 209 S.E.2d 63, 65 (1974) (the seller must exercise "due diligence in attempting to get the best price obtainable"); *Dynalectron Corp.* v. *Jack Richards Aircraft Co.*, 337 F.Supp. [35] 659, 663 (W.D. Okla. 1972) (secured party must use "due diligence" to get the best price); *GMAC* v. *Elwell*, 7 UCC Rep. Serv. 1074 (N.Y. Civ. Ct. 1970) ("pledgee owes to the debtor the duty of obtaining the best price upon a sale of the pledged chattel," a duty violated by GMAC's sale of the vehicle to itself with no effort to obtain a fair price from any purchasers).

### 4. Overhead Is Not an Allowable Expense

Section 9-504(1)(a) permits the secured party to charge the defaulting purchaser with:

> the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party. . . .

The UCC does not define the term "reasonable expenses" but complaint counsel argue that common law precedents, incorporated into the UCC by reference, call for the conclusion that the only "reasonable expenses" are out-of-pocket costs and that overhead is not an allowable expense.

Sections 9-207 and 9-504 establish the rights and duties of a secured party with respect to collateral in his possession. Section 9-207, which applies to collateral held before a default, requires the secured party to use reasonable care in the custody and preservation of such collateral, and provides that reasonable expenses incurred by the secured party in caring for and preserving the collateral are chargeable to the debtor and are secured by the collateral unless there is agreement to the contrary.

The draftsman's comments to these two sections indicate that they follow common law precedents. UCC § 9-207, Comment 2; § 9-504, Comment 2. Under the pre-Code pledge law to which these two sections refer, a pledgee was entitled to charge to the debtor only out-of-pocket expenses actually incurred in maintaining and preserving the collateral. The pledgee was not entitled to charge for expenses that would have been incurred regardless of the debtor's default, and it has been held that under the UCC, only reasonable out-of-pocket expenses [36] can be allowed. Professor Grant Gilmore, the original reporter on Article 9, states with respect to the out-of-pocket principle:

> The rule seems to be well-established that only "direct" expenses — the out-of-pocket costs of repossession, storage and the like incurred in connection with the particular goods — can be claimed by the secured party. The courts have regularly turned down attempts to include indirect expenses — such as the secured party's general cost of doing business — or to avoid the necessity of proving actual expenses by using the 15 percent formula which is also used in the attorneys' fees clause. 2 Gilmore, *Security Interests in Personal Property*, § 43.5 (1963).

This position is supported by the case law prior to enactment of

§ 9-504 of the UCC, as well as decisions under the UCC. For example, in *Cherner* v. *Lawson*, 162 A.2d 492 (D.C. App. 1960), the seller of an automobile sought a deficiency judgment from the defaulting buyer after resale of the repossessed automobile. The deficiency arose largely because the seller claimed as an expense 15 percent of the resale price. That amount was estimated to be a portion of his cost of doing business attributable to the resale of the buyer's car (*i.e.*, overhead). The conditional sales contract under which this deduction was claimed contained a provision which allowed the seller to apply the "expenses of retaking, storing, repairing and selling" against the proceeds of sale. The court stated the issue as:

> Whether a defaulting purchaser may be held liable for claimed expenses of resale when such expenses are not directly attributable to the resale. *Id.* at 493.

The court held that general business and indirect expenses which would have been incurred regardless of whether the resale had taken place could not be charged to the defaulting buyer's account.

> It is a general rule, applicable to sales and conditional sales, that upon resale the vendor is entitled to the costs and expenses directly attributable to repossession and resale, but we have found no authority holding the purchaser liable for general and indirect expenses. [37]
>
> * * * * * * *
>
> Cherner's claim that a percentage of its general cost of doing business is chargeable to appellee on resale is essentially the same contention put forth in the above-cited case, i.e., a claim for general business expenses. We hold such expenses are not recoverable. The vendee is liable for direct expenses of resale, such as the salesman's commission which was here allowed; but the vendee is not liable for expenses which are incurred incident to doing business and which would have been incurred by the vendor if no default in this particular sale had ever occurred. *Id.* at 493.

In *A to Z Rental, Inc.* v. *Wilson*, 413 F.2d 899 (10th Cir. 1969), a secured party was allowed to deduct only its direct expenses of obtaining possession of the repossessed collateral and selling it. Expenses incurred in defending against the debtor's counterclaims were denied because they were in the nature of a general business expense. In an earlier case, *Shepherd Tractor & Equipment Co.* v. *Page*, 158 F.2d 655, 657 (5th Cir. 1947), the buyer and the seller of heavy equipment sued each other over the terms of their contract. The seller resold the equipment to a third party when the buyer refused to perform. He then sought damages from the original buyer. He claimed he was entitled to be compensated for expenses incurred in connection with the resale of the equipment and estimated this as "ten per cent . . . 'That includes my office people, employees that are employed in the sale of equipment and cost of telephone calls.' " In holding that the seller was not entitled to deduct overhead, the court stated he could only deduct:

> . . . his reasonable and necessary expenses directly incurred in the resale. These do not include any part of his general business expenses, nor even the time of a salaried employee who made the sales. [158 F.2d at 657].

While a dealer does incur overhead expenses in the resale of a repossessed vehicle (Finding 72), the courts' interpretations of the relevant UCC sections reject the argument that overhead is an allowable expense. Therefore, I find that complaint counsel's repossession charts (Finding 85) properly exclude Francis Ford's overhead expenses. [38]

In conclusion, Francis Ford's failure to calculate and pay surpluses to defaulting customers, despite its acknowledged duty to do so, is without question a violation of Oregon law and that failure is, therefore, a violation of Section 5 of the FTC Act because it offends the public policy expressed in that law. *Sperry & Hutchinson, supra.*

### D. Are Francis Ford's Acts Deceptive, Immoral, Fraudulent, or Injurious to Defaulting Customers?

Francis Ford has withheld surpluses from defaulting purchasers in violation of Oregon law. This alone justifies entry of an order; however, complaint counsel argue that the record establishes that Francis Ford's practices are also violations of the FTC Act because they are immoral, unethical, oppressive, unscrupulous and injurious to defaulting customers. Complaint counsel also urge a finding—apparently to support a potential court proceeding under Section 19 of the FTC Act—that Francis Ford's practices are those which a reasonable person would have known to be dishonest or fraudulent.

Since the 43 defaulting customers whose vehicles were repossessed were without question entitled by state law to the surpluses realized on the resale of those vehicles, Francis Ford's practice of withholding those surpluses is immoral, unethical and unscrupulous.

Complaint counsel also claim that Francis Ford has deceived defaulting customers by failing to honor the promises made by Ford Credit that surpluses would be paid (Findings 22 and 23). I disagree, for there is no evidence, and I will not indulge in any inference, that defaulting customers originally purchased their vehicles from Francis Ford in reliance upon Ford Credit's promise that, in the unlikely event of a repossession, surpluses would be paid by Francis Ford.

Nor, in the light of the uncontradicted testimony of Francis Ford's expert witnesses (Findings 61-65) can it be said that complaint counsel have proved that defaulting customers were injured by Francis Ford's failure to pay surpluses.

The defaulting customers were entitled to the surpluses pursuant to Oregon law and, in that sense, they were deprived or injured by not receiving what was owed them, but I take it that complaint counsel perceive an economic injury which Francis Ford's acts have caused and which exists independent of state legal obligations. [**39**]

This theory has been seriously questioned by two knowledgeable witnesses—one of whom was hired by the Commission to advise it with respect to certain credit practices. Both concluded that Francis Ford's retail facilities and expertise increased the value of the repossessed vehicles and both concluded that the defaulting customers have done nothing which entitle them in an economic sense to the difference between the vehicles' wholesale value and their actual resale price.

Complaint counsel reply that its finance and insurance income compensate Francis Ford for repossession losses (Finding 35) and that it should not be allowed to keep surpluses, but while I agree that complaint counsel's position is legally sound, Francis Ford's finance and insurance income have nothing to do with whether defaulting customers are entitled to the surpluses as a matter of economic logic.[19]

Thus, while I cannot conclude that the testimony of Professors O'Bannon and Johnson legally justifies the retention of surpluses, I find that it raises serious questions about the alleged substantial injury to defaulting customers, serious enough to require a finding that complaint counsel have not met their burden of proof on this issue.

Whether Francis Ford's practices were those "which a reasonable man would have known under the circumstances was dishonest or fraudulent. . . ." (FTC Act, Section 19(a)(2)), is not an issue which I have the authority to decide. In *Control Data Corp.*, 86 F.T.C. 1093, 1094-95 (1975), the Commission invited the parties to brief two issues, one of which was:

> . . . To what extent, if any, should evidence be presented and findings be made [in the administrative proceeding] on the issue whether the challenged acts [**40**] or practices are such "that a reasonable man would have known under the circumstances [that they are] dishonest or fraudulent. . ."?

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[19] Ford Credit also receives income from financing, but when it is forced to sell repossessed vehicles, rather than returning them to dealers, it usually realizes no surplus because it disposes of them at wholesale (Finding 59). In such a case, the defaulting customer need not be credited with the retail price, even though the vehicle is undoubtedly later sold at retail. Why then, logically, should a defaulting customer whose vehicle is luckily sold by a retail dealer because of a repurchase obligation be economically entitled to a surplus which is generated by the sale at retail?

The Commission held in this case that while the roles of the Commission and court to whom the Commission might apply for consumer redress will frequently overlap, "the law judges should not permit the discovery and reception of evidence relevant only to Section 19 issues." *Id.* at 1097. Extending the logic of this decision, if discovery is not permitted with respect to Section 19 issues, then findings are not authorized. The "dishonest or fraudulent" issue raised by complaint counsel is related solely to Section 19, for Section 5 liability does not require resolution of these issues, and I can make no findings with respect to them.

## E. Summary

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Francis Ford.
2. This proceeding is in the public interest.
3. In the calculation of surpluses or deficiencies on the resale of a repossessed vehicle, the secured party must obtain the best possible price for the vehicle and must credit the defaulting purchaser with the actual resale price of the vehicle.
4. In the calculation of surpluses or deficiencies on the resale of a repossessed vehicle, "reasonable expenses" do not include overhead.
5. Francis Ford has violated the UCC and Oregon law by failing to pay to defaulting customers surpluses realized on the resale of their repossessed vehicles, and that practice is immoral, unethical and unscrupulous.
6. Francis Ford's violation of the UCC and Oregon law is also a violation of Section 5 of the FTC Act.
7. Complaint counsel have failed to establish that Francis Ford's acts and practices are substantially injurious in an economic sense to defaulting purchasers.
8. The entry of the order attached to this decision is in the public interest. [41]

## F. Description of the Order

### 1. Justification

The order which will be entered in this case incorporates some provisions which are contained in the proposed consent order, agreed to on March 10, 1978, between the Commission and the other parties in this case, Ford and Ford Credit. It requires Francis Ford to cease and desist from failing to pay to defaulting customers surpluses which it realizes on the resale of repossessed vehicles. It also requires Francis Ford to compute surpluses or deficiencies in accordance with a detailed accounting procedure, and orders Francis Ford to determine whether, since 1974, it has realized surpluses on the resale of repossessed vehicles. If it has, Francis Ford must notify those customers to whom surpluses are owed.

The cease and desist provisions of the order are appropriate in this case for they bear a reasonable relationship to Francis Ford's unlawful acts and will prevent them in the future. *FTC* v. *National Lead Co.*, 352 U.S. 419, 428–30 (1957); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611 (1946); *FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 394–95 (1965). The affirmative duties imposed upon Francis Ford by the order are justified because they are "needed to fully remedy the violations found or their continuing effects." *Genesco, Inc.*, 89 F.T.C. 451 at 477 (1977).

## 2. Definitions

Part I of the order contains definitions which are similar to those in the Ford and Ford Credit order. A number of definitions are contained in the order which were not in the notice order and some definitions, such as the one for allowable expenses, have been changed from those in the notice order to clarify the accounting procedure which Francis Ford will be required to use in the future.

The most important definition, the one detailing "allowable expenses" has been adopted because Francis Ford is entitled only to out-of-pocket costs of retaking, reconditioning and reselling repossessed vehicles. A definition of "diligent efforts" has been added to dissipate any uncertainty as to what qualifies as a good faith effort to notify defaulting purchasers.

One term which is referred to differently in this order is the price at which Francis Ford must resell repossessed vehicles. In the Ford and Ford Credit proposed order this price is referred to as the "commercially reasonable price" (Par. II C3) and in this order it is referred to as the "best possible price" (Par. I H). However, this difference has no [42] practical effect. In the Ford and Ford Credit proposed order the "commercially reasonable price" is described as ". . . the best available price." Both orders require the parties to make every reasonable effort to generate the highest possible net return for a customer's account. While disposition at retail by Francis Ford would probably result in the best possible price for the repossessed vehicle in most cases, Francis Ford has sold some repossessed vehicles at wholesale in the past and may do so in the future. The last sentence of the "best possible price" definition proposed by complaint counsel recognizes this possibility and requires Francis Ford to maintain documents which show that disposition at other than retail was reasonable. I have not, however, adopted the second sentence of the definition which reads:

> As a retail dealer in used cars, respondent's dispositions of repossessed vehicles shall normally be by retail sale to an independent third party for the best possible price.

I have stricken this sentence because I do not believe Francis Ford should be ordered to dispose of repossessed vehicles "normally by retail sale" for this suggests that wholesale sales by Francis Ford would usually be commercially unreasonable while the following sentence recognizes that such dispositions would be proper so long as Francis Ford could establish that those dispositions resulted in the best possible price.[20]

### 3. Substantive Provisions

Part II of the order mandates the specific notification and payment steps which Francis Ford must take to ensure that defaulting customers will receive surpluses. It requires that surpluses be paid within 45 days of the resale[21] and directs that an accounting statement accompany the payment (II A and B). Other provisions prohibit Francis Ford from failing to dispose of repossessed vehicles in a manner designed to [43] obtain the best possible price (II C) and from failing to apply for rebates or credits owed the customer (II D).

Paragraph II E (II F in complaint counsel's proposed order) prohibits Francis Ford from obtaining from its customers a waiver of the customers' right to a refund of a surplus. This prohibition, which is also included in the Ford and Ford Credit proposed order, is necessary to foreclose an avenue by which Francis Ford might circumvent its responsibilities under the order:

> In carrying out this function [of preventing illegal practices in the future] the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity. *FTC* v. *Ruberoid, Co.*, 343 U.S. 470, 473 (1952).

Thus, even though the UCC (§ 9-505) and state law (ORS 79.5050) might permit such waivers, I believe that this right can be denied to Francis Ford because it may abuse that right.[22]

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[20] See *Vic Hansen & Sons, Inc.*, *supra* at 733: "There is no requirement or prohibition that the secured party sel at, 'wholesale' or 'retail.' All that is required is the best possible price under the circumstances."

[21] The period specified for surplus payments in California's motor vehicle law. Cal. Civ. Code § 2983.2(c)

One provision sought by complaint counsel which I have not ordered is that Francis Ford include in its installment credit instruments a statement to the effect that:

a. no expenses other than reasonable expenses incurred as a direct result of repossessing (including any legally permissible attorney's fees and court costs), holding, preparing for sale and selling the vehicle may be deducted from the proceeds in determining a surplus or deficiency; and [44]

b. any surplus realized on the resale or other disposition of the vehicle is to be paid to the customer. (II E in complaint counsel's proposal).

Because Francis Ford will be required by other order provisions to inform all defaulting customers of their rights to surpluses, I see no need to require it to tell all of its customers of the existence of such rights in the event of a default.

Paragraph II F (II G in complaint counsel's proposed order) is necessary because Francis Ford may, since it will be required to pay surpluses, also decide to collect deficiencies. In view of Francis Ford's past illegal acts, a prohibition on the collection of excess deficiencies is, I believe, appropriate. See *FTC* v. *National Lead Co., supra* at 431: "[T]hose caught violating the Act must expect some fencing in."

According to the staff's description of the Ford-Ford Credit order, Ford's "owned" dealerships will be required to pay surpluses realized on vehicles repossessed as far back as 1974. Other dealers will be sent bulletins "urging" them to pay surpluses on past repossessions but they cannot be required to do so.

Complaint counsel's proposed order would require Francis Ford to identify unpaid surpluses back to June 25, 1971 (III A), to inform credit reporting agencies about customers incorrectly reported as owing a deficiency (III B), to locate and notify defaulting customers of those surpluses (III C and D) and to pay to those customers surpluses arising subsequent to February 10, 1973 (III E).

Complaint counsel do not explain why Francis Ford should be required to compute surpluses as far back as 1971 when other Ford dealers need not do so. Therefore, I have changed III A to require the identification of surpluses back to May 1, 1974.

I have adopted proposed paragraphs III B, C and D. However, I am deleting part III E from the Francis Ford order.

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[22] Compare *Spiegel Inc.* v. *FTC*, 540 F.2d 287 (7th Cir. 1976). Here, citing *FTC* v. *Sperry & Hutchinson, supra*, the Seventh Circuit found that the Supreme Court "left no doubt that the FTC had the authority to prohibit conduct that, although legally proper, was unfair to the public." *Id.* at 292.

Complaint counsel argue that part III E is justified because the Commission has, despite the decision in *Heater* v. *FTC*, 503 F.2d 321 (9th Cir. 1974), consistently held that it has the power under Section 5 of the FTC Act to order restitution. *Curtis Publishing Co.*, 78 F.T.C. 1472, 1514-17 (1971); *Credit Card Service Corp.*, 82 F.T.C. 191, 207-08 (1973); *Universal Credit Acceptance Corp.*, 82 F.T.C. 570, 650-52, 656-57, 666-68 (1973); *Holiday Magic, Inc.*, 85 F.T.C. 90 (1975), and *Genesco, Inc.*, 89 F.T.C. 451, 478 (1977). [45]

While I may have the power to order restitution,[23] complaint counsel have not convinced me that it is justified in this case. The notice order did inform Francis Ford that the Commission might seek consumer redress, but only under Section 19 of the FTC Act. This section of the Act would require the Commission, assuming that it enters an order in this case, to apply to a district court for redress.

Despite the fact that the Commission fought so vigorously for the passage of Section 19, the staff of the Seattle Regional Office apparently believes that the procedures it dictates are so cumbersome that it should not be used: "[I]t is only sound judicial administration to raise this issue [restitution] within the administrative proceeding so as to avoid burdening both Francis Ford and the Commission with a subsequent proceeding in District Court under Section 19(a)(2)" (Complaint counsel's conclusions of law, p. 34).

The Commission was well aware of the potential complexities of a Section 19 proceeding as opposed to Section 5 restitution when it issued this complaint, and as far as I am concerned, the statement that it might apply to the courts for consumer redress under Section 19 forecloses complaint counsel's last minute change of theory.

Furthermore, while the Commission disagrees with the *Heater* decision and can press its contrary views on restitution in other circuits, it is, in my opinion, bound by that decision with respect to activities occurring within the jurisdiction of the Ninth Circuit. Since Francis Ford is located in Oregon, I do not believe that I have the authority to order restitution.

Part IV requires that for at least three years Francis Ford maintain records pertaining to its compliance with the order. Recordkeeping provisions in Commission orders, designed to augment compliance checks, are necessary and proper. *Genesco Inc.*, *supra* at 479. Parts V and VI contain provisions which are standard in all Commission orders. [46]

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[23] One might even argue that requiring the payment of surpluses is not restitution, for in *Genesco*, *supra* at 4 it was held that although the order required respondent to honor refund requests:

> A thorough reading of the order entered herewith discloses that restitution, although proper, has been ordered.

Nevertheless, complaint counsel view their proposal as requiring restitution, and I will deal with it on that basis.

## ORDER

I. *It is ordered,* That for purposes of this Order the following definitions shall apply:

A. "Respondent" means Francis Ford, Inc., a corporation, and its successors and assigns. It does not include Ford Motor Company nor Ford Motor Credit Company.

B. "Vehicle" means an automobile or truck and any and all parts, accessories, and appurtenances repossessed therewith. A van is deemed a "truck."

C. "Adjusted balance" means the unpaid balance as of the date of repossession (1) less applicable finance charge and insurance premium rebates, (2) less all amounts received for collision insurance claim payments except those for which the corresponding vehicle damage is repaired, and plus (3) other charges authorized by contract or law and actually assessed prior to repossession.

D. "Proceeds" means whatever is received by respondent upon its disposition of a repossessed vehicle, excluding finance charges, sales taxes, separately priced warranties and service contracts insofar as the charges therefor are itemized in documents provided at that time to the party to whom disposition is made. Any underallowance realized on the disposition shall be included. The amount of any lawful overallowance given on such a disposition may be deducted if (1) the amount so deducted was determined at the time of the disposition and is no greater than the excess of the trade-in allowance over the wholesale value of the vehicle taken in trade on the repossessed vehicle as that [47] value is shown in a current recognized guidebook used in the area, (2) overallowances are given and contemporaneously recorded in the normal course of respondent's sales or leases of nonrepossessed vehicles, and (3) correctly determined underallowances are included in the proceeds of other repossessed vehicle dispositions wherever applicable.

E. "Allowable expenses" means actual out-of-pocket expenses incurred by respondent as a direct result of a repossession. The expenses must be reasonable and result directly from the repossessing, holding, preparing for sale or reselling of the vehicle, and be not otherwise reimbursed to respondent nor prohibited by contract. They are limited to the following charges (insofar as permitted by state law) and no others:

1. amounts paid to persons who are not employees of respondent nor of a financing institution which financed the prior sale, for repossessing, towing or transporting the vehicle;
2. filing fees, court costs, cost of bonds, fees and expenses paid to

a sheriff or similar officer, and fees and expenses paid to an attorney who is not an employee of respondent nor of the financing institution, for obtaining possession of or title to the vehicle;

3. fees paid to others to register or obtain title to or legally required inspection of the vehicle;

4. amounts paid to others for storage (excluding charges for storage at facilities owned or operated by respondent); [48]

5. labor and associated parts and supplies furnished by respondent for the repair or reconditioning of the vehicle in preparation for resale, computed at the following cost rates:

a. The cost rate for labor of mechanical technicians employed in respondent's retail repair shop (for mechanical work) or for body-paint technicians employed in respondent's retail body shop (for body work) shall be based on actual time spent on the vehicle and may not exceed the greater of:

(i) the sum of respondent's average hourly base rate for that category of technicians (mechanical, body-paint, or heavy truck) plus 20 percent of that average hourly base rate to cover fringe benefits, provided that such data is reflected in a file identifiable with that vehicle, or

(ii) the sum of the average hourly base rate for that category of technicians plus the average annual hourly cost for voluntary and legislated fringe benefits for that category of technicians computed in accordance with the "long form" Warranty Labor Rate Request (Ford Form FCS 9716, [49] April 1978) (Attachment A hereto), provided that such data is reflected in a file identifiable with that vehicle;

b. The cost rate for labor for other reconditioning, clean-up and preparation work performed by employees of respondent shall be based on actual time spent on the vehicle and may not exceed the base hourly wage rate for the employees involved plus 20 percent of their base hourly wage rate to cover fringe benefits, provided that such data is reflected in a file identifiable with that vehicle;

c. The cost rate for parts shall not exceed respondent's cost for the parts used as listed in the current manufacturer's catalogue.

*Provided, however,* that if the amount of respondent's payoff to the financing institution is reduced because of insured collision damage, or if respondent receives any payment for collision damage or warranty work, then the corresponding vehicle work performed shall not be an allowable expense, but if a payoff adjustment is for uninsured collision damage, the corresponding vehicle work performed shall be deemed an allowable expense. [50]

6. amounts paid to others for labor and associated parts and supplies purchased for the repair or reconditioning of the vehicle in preparation for resale;

7. sales commissions paid for actual participation in the sale of the particular vehicle, computed at a rate no higher than for a similar, non-repossessed vehicle, but excluding all portions of commissions attributable to the selling of service contracts, warranties, financing or insurance;

8. a proportionate share of expenditures for advertisements which specifically mention the particular vehicle;

9. fees and expenses paid to others for auctioning the vehicle;

10. expenses for telephone calls and postage incurred in arranging for the repossession, holding, transportation, reconditioning or resale of the vehicle; and

11. amounts respondent was contractually required to pay and did pay to reimburse the financing institution to which payoff was made, for expenses such as repossession of the vehicle or allowance for uninsured collision damage, if such expenses were not included in the payoff.

F. "Surplus" means the excess of (1) the proceeds plus any applicable rebates or credits not deducted by the financing institution, over (2) the adjusted balance, allowable expenses, and [51] amounts paid to discharge any other security interest provided for by law. A negative (minus) amount produced by such calculation is referred to herein as a "deficiency."

G. "Diligent efforts" means that in any case where the full surplus or disclosure is not actually received by the defaulting customer within the specified time frame, respondent's efforts to effectuate such payment and/or disclosure shall meet at least the following criteria: The payment and/or disclosure are to be sent by regular mail within the specified time frame to the customer's last residence address known to respondent or available from the financing institution, with the face of the envelope (1) showing respondent's name and return address and (2) indicating that it is to be forwarded and that if there is no forwarding address it is to be returned to the sender. If the envelope is returned undelivered, the payment and/or disclosure are to be sent to the most recent of the following known addresses: the last employment address known to respondent or available from the financing institution; the address provided by the military locator service (if applicable); or the address of a co-signer, relative or other person through whom the customer may be reached. If an insurance rebate or other credit is received after a surplus payment has been sent, a further payment in the additional amount is to be sent in the same manner within 45 days of respondent's disposition of the vehicle or within 10 days of receiving the rebate, whichever is later. If [52] such a rebate is received after a prior computation had indicated there was no surplus, a second computation is to be made and any surplus sent in the same manner and within the same time limit.

H. "Best possible price" means that respondent will exercise every reasonable effort to market the vehicle for the highest possible net return for the debtor's account (in terms of proceeds less allowable expenses). For each disposition of a repossessed vehicle by respondent other than by retail sale, respondent shall retain contemporaneous documentation showing with specificity that such manner of disposition could reasonably be expected to produce a greater net return for the debtor's account than would retail sale.

II. *It is further ordered,* That respondent and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension and enforcement of motor vehicle retail credit obligations, and in connection with the disposition of repossessed motor vehicles, in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act, as amended), do forthwith cease and desist from:

A. Failing to determine the following information and to disclose or make diligent efforts to disclose such information to the defaulting customer in substantially the manner indicated on Attachment B hereto, "Resale of a Repossessed Vehicle," within [53] forty-five (45) days of respondent's disposition of a repossessed vehicle:

1. the date, place and manner of disposition;
2. the adjusted balance, itemized to reflect the unpaid balance and all rebates and other adjustments thereto;
3. the proceeds and allowable expenses, itemized and excluding all expenses other than allowable expenses;
4. the amount of surplus or deficiency. Provided that such disclosures need be not made where respondent can establish that no surplus resulted from the disposition, unless an attempt is made to collect a deficiency from the defaulting customer or from his or her successors or assigns.

B. Failing to pay or make diligent efforts to pay each surplus in full to the defaulting customer or to his or her successors or assigns, accompanied by disclosures as required by Paragraph II A above, within forty-five (45) days of respondent's disposition of the vehicle.

C. Failing to dispose of any repossessed vehicle in a manner designed to obtain the best possible price.

D. Failing to apply promptly for any rebate or credit owing to the defaulting customer's account. [54]

E. Taking any action to obtain or attempt to obtain or bring about a waiver of a customer's right to a refund of surplus, including such waivers as may arise from failure to object to a proposal to retain the vehicle.

F. Collecting or attempting to collect from a defaulting customer or from his or her successors or assigns, by any means, a deficiency in excess of either the amount (1) permissible under applicable state or federal law, or (2) the amount determined in accordance with the definitions set forth in Part I of this order,

*Provided* that no customer's waiver of rights or failure to object to any secured party's proposal to retain the repossessed vehicle shall limit respondent's obligations under this order to account for and pay any surplus.

III. *It is further ordered,* That respondent:

A. Proceed immediately to identify, back to May 1, 1974, the existence and amount of each unpaid surplus arising from respondent's dispositions of repossessed vehicles in which respondent held or acquired a security interest or the rights or duties of a secured party at or after default. This identification shall be completed within ninety (90) days of the effective date of this order. [55]

B. For each defaulting customer entitled to a surplus identified under Paragraph III A above but previously reported to a credit reporting agency by respondent or a representative of respondent as owing a deficiency, advise the credit reporting agency of the correct facts within 120 days of the effective date of this order.

C. Endeavor in good faith, through contacts with credit reporting agencies, state licensing and employment offices, and other reasonably accessible research sources and records (including published directories), to locate each defaulting customer entitled to a surplus identified under Paragraph III A above, or the successors or assigns of such customers with respect to their surplus rights.

D. Disclose or make diligent efforts to disclose in writing to each defaulting customer, successor or assign located pursuant to Paragraph III C above, within 150 days of the effective date of this order: (1) the same items of information specified in Paragraph II A of this order, and (2) in clear lay language, in substantially the form indicated on Attachment C hereto, "Notification Letter," the rights and remedies of such customer, successor or assign under applicable state law and under this order. [56]

IV. *It is further ordered,* That respondent maintain the following records relating to each repossessed vehicle returned to respondent:

A. Records of payment and of efforts to disclose and pay surpluses and locate defaulting customers entitled thereto under Parts II and III of this order, including but not limited to canceled checks, returned envelopes and copies of disclosures and other communications (showing dates and manner of mailing).

B. Business records underlying each item specified in Paragraph II A of this order, including but not limited to payroll records and warranty labor rate forms pertinent to determinations of "cost rates" of labor under Paragraph I E 5 of this order.

C. Such other records as the Commission may determine to be useful for efficient monitoring of compliance with this order.

Each such record shall be retained by respondent for at least three years and shall be available for inspection and copying by authorized representatives of the Commission.

V. *It is further ordered,* That respondent shall forthwith deliver a copy of this Order to each of its operating departments, divisions and related business enterprises, and applicable provisions thereof to all present and future personnel of respondent engaged in the [57] sale or offering for sale of motor vehicles and/or in the consummation of any extension of consumer credit or in bookkeeping, accounting or recordkeeping for respondent; and that respondent secure from each such person a signed statement acknowledging receipt of the order or provisions.

VI. *It is further ordered,* That:

A. Respondent shall, within sixty (60) days after service of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

B. Respondent shall, within one hundred eighty (180) days after the effective date of this order, submit to the Commission a report demonstrating respondent's compliance with Part III of this order, including the number of repossessions and surpluses identified, together with a detailed description of respondent's manner of identifying and attempting to disclose such surpluses and of locating and attempting to locate defaulting customers entitled thereto. [58]

C. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation and dissolution of subsidiaries, or any other corporate change which may affect compliance obligations arising out of this order.

## OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

This case involves the alleged failure of a large Portland, Oregon automobile dealer to refund to its customers surpluses resulting from the repossession and resale of those customers' cars. The complaint was issued on February 10, 1976, and charged Ford Motor Company, Ford Motor Credit Company, and Francis Ford, Inc. with violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by virtue of alleged failures to refund surpluses. On March 17, 1978, the case was withdrawn from adjudication with respect to Ford Motor Company and Ford Motor Credit Company, which had signed consent agreements (subsequently accepted and made final by the Commission) in disposition of the charges of the complaint. Proceedings as to the remaining respondent, Francis Ford, continued with hearings before Administrative Law Judge (ALJ) Lewis Parker. He entered an initial decision on January 4, 1979, that largely sustained the complaint, although not entirely to the satisfaction of complaint counsel who, along with respondent Francis Ford, have brought this matter to the Commission on cross appeals.

Judge Parker's decision deals ably (and, for the most part, we have concluded, correctly) with the issues raised by both sides, but, this being in some respects a case of first impression, with possibly significant ramifications for others besides the litigants, we shall retrace a few of his steps. The parties appear to have no serious differences with respect to the facts of this matter; their dispute is principally over the legal and alleged "policy" determinations that should govern the decision. [2]

### A. Background

Francis Ford is one of the two highest-volume Ford dealers in the Portland, Oregon, area (Tr. 157),[1] with sales of roughly 2400 vehicles per year, and revenues in excess of $13 million during each of the two years preceding issuance of the complaint. (I.D. 1) About 70 percent of Francis Ford's retail sales of motor vehicles are financed in whole or in part, either through Ford Motor Credit Co. or the United States National Bank of Oregon. (I.D. 18)

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[1] The following abbreviations will be used in this opinion:

I.D. - Initial Decision, Finding No.
I.D.p. - Initial Decision, Page No.
Tr. - Transcript of Testimony, Page No.
CX - Complaint Counsel's Exhibit No.
RX - Respondent's Exhibit No.

When a customer purchases a car on credit, he or she will typically execute an installment contract that calls for monthly installment payments and grants a security interest in the automobile as protection against nonpayment. (I.D. 19) The contract is then assigned by Francis Ford to the lending institution. By agreement with both Ford Motor Credit Co. and U.S. National Bank of Oregon, each retail installment contract assigned to these institutions is deemed to be assigned on a "repurchase" basis unless otherwise specified. (I.D. 25-26) Under its repurchase agreements, Francis Ford is obliged, in the event that a customer defaults and the lender repossesses the car, to pay to the lender the outstanding balance on the loan, in return for which Francis Ford receives back the repossessed car.

### B. The General Duties of a Second Party with Respect to Repossessed Collateral

The duties of Francis Ford with respect to repossessed collateral are governed by the Uniform Commercial Code, which has been adopted in Oregon, Oregon Revised Statutes (ORS) §§ 71.1010-79.5070.[2] The form contracts executed by Francis Ford impose upon it the same obligations. (I.D. 20-21) As the recipient of the collateral from the finance company, Francis Ford has all the rights and the duties of the secured party:

> *A person who is liable to a secured party under a* guaranty, indorsement, *repurchase agreement or the like and who receives a transfer of collateral from* [3] *the secured party* or is subrogated to his rights *has thereafter the rights and duties of the secured party.* Such a transfer of collateral is not a sale or disposition of the collateral under this article. UCC §9-504(5); ORS §79.5040(5), emphasis added.

*See also Reeves* v. *Associates Financial Services Co.*, 197 Neb. 107, 247 N.W.2d 434, 439 (1976).

A principal duty of a secured party, and the one at issue here, is the obligation to account to the debtor for any surplus realized on the repossessed collateral:

> If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. . . . UCC §9-504(2); ORS §79.5040(2).

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[2] The UCC is also law in 48 other states and the District of Columbia. In Louisiana, repossessions and resales of collateral are judicially supervised.

Francis Ford does not dispute its general obligation to pay surpluses under applicable state law, but it quarrels with complaint counsel's and Judge Parker's characterization of the manner in which the existence of a surplus is to be determined.

## C. Computation of Surpluses: Complaint Counsel's Position

In the view of complaint counsel and Judge Parker, the existence of a surplus is to be determined by comparing (1) the proceeds realized from a "commercially reasonable" sale of the repossessed collateral [UCC §9-504(3); ORS §79.5040(3)] with (2) the indebtedness secured by the security interest plus (3) "the reasonable expenses of retaking, holding, preparing for sale, selling, and the like. . . ." [UCC §9-504(1); ORS §9.5040(1)].[3] [4]

In conducting a commercially reasonable sale of the collateral, the secured party acts as a trustee or fiduciary of the debtor and is obliged to seek the best possible price. *United States* v. *Terrey,* 554 F.2d 685, 693 (1977); *Dopp* v. *Franklin Nat'l Bank,* 374 F. Supp. 904, 910 (S.D.N.Y. 1974); *Vic Hansen & Sons, Inc.* v. *Crowley,* 57 Wis. 106, 203 N.W.2d 728, 731 (1973). *See also* discussion of authorities at I.D. pp. 33-35. "Reasonable expenses" in complaint counsel's and Judge Parker's view include only the direct, out-of-pocket expenses of the secured party, and thus exclude general allowances for dealer overhead or profit on resale of the repossessed item.

Where the proceeds of the resale exceed the sum of the consumer's indebtedness plus the reasonable expenses incident to the resale, a surplus exists. Applying this formula, Judge Parker found that during the period of 1974-75 Francis Ford realized at least 43 surpluses, of which only one was paid in full and five in part, leaving in excess of $15,000 withheld from consumers entitled to refunds. (I.D. 85-86)[4] [5]

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[3] Where applicable, the law also allows the secured party to deduct from the proceeds of resale when determining the existence of a surplus or deficiency "the reasonable attorneys' fees and legal expenses incurred by the secured party" but only "to the extent provided for in the agreement and not prohibited by law." [UCC §9-504(1); ORS §79.5040(1)]. Before payment of a surplus, the UCC also provides for satisfaction of any "subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed." [§9-504(1)(c); ORS §79.5040(1)(c)]

[4] At trial, complaint counsel introduced compilations of alleged surpluses based upon records reflecting resale prices of repossessed automobiles, the indebtedness of the consumers involved, and the direct out-of-pocket expenses incurred by Francis Ford in preparing the automobiles for resale. Francis Ford introduced evidence to show that in some respects complaint counsel's compilations understated the magnitude of direct out-of-pocket expenses, and complaint counsel, accordingly, corrected their compilations to take account of this testimony. The ALJ found in his initial decision that these corrected compilations presented by complaint counsel reflected the extent of surpluses realized by Francis Ford, based on the legal formula for computing surpluses urged by complaint counsel. (I.D. 83-85) Francis Ford argues in its appeal brief, p. 46, that at least 17 of these compilations omit expenses proven at trial, and that three other cars (plus one of the 17) should have been excluded because they were demonstrator units sold to Francis Ford salesmen. With respect to the 17 compilations, each of them does include some allowance for costs of repairs and reconditioning. Respondent presumably claims that allowance

*(Continued)*

## D. Computation of Surpluses: Francis Ford's Practice

Having carefully reviewed the testimony of all witnesses in this case, it remains somewhat unclear to us precisely how (or whether) Francis Ford attempted to determine the possible existence of surpluses when it obtained repossessed automobiles. It seems clear that no effort was routinely made to compare the proceeds of an actual resale of the collateral with the debtor's indebtedness and expenses incident to the resale, however they might be calculated. (I.D. 51)[5]

Two other possibilities as to how Francis Ford dealt with its legal obligations under the UCC prior to the trial in this case are suggested by the record. Some of the testimony indicates that Francis simply regarded its own repurchase of a repossessed car from the finance company as constituting a proper UCC sale for purposes of determining the proceeds. By definition, this method would always result in the "proceeds" equalling or falling short of the indebtedness, since the price at which Francis Ford repurchased from the finance company would be essentially the amount owed by the defaulting consumer to the finance company.[6] Thereafter, Francis Ford would regard the repossessed vehicle as its own, and any resale would [6] be treated as would the resale of any used car. Thus, a company official testified:

> . . . the sale occurs at the time Ford Motor Credit sends the vehicle back to Francis Ford. Francis Ford treats it as a sale and a purchase at that point. It does not seek deficiencies. It buys the car back at the pay-off figure and then puts it on the books at the low figure of the actual cash value, and so no surplus exists and no accounting is necessary. (Tr. 952)

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was not made for all such costs, but respondent has given no citations whatsoever to record evidence that would allow this claim to be verified, and it, therefore, must be rejected. With respect to the demonstrator units, we agree with complaint counsel that their purchasers should be treated no differently from any others.

[5] Francis Ford contends that "reasonable expenses of retaking" should include dealer's overhead, an issue we shall discuss later. As a Francis official noted, however, "We have no document that shows all of the proceeds of the sale to all of the expenses." (Tr. 930) After being contacted by representatives of the Federal Trade Commission, Francis Ford did prepare an after-the-fact accounting of the proceeds and expenses of repossession sales for the three month period of October 1 to December 31, 1974. (CX 2344) Even after adding substantial allowances for overhead items including lot maintenance, phone, water, lights, rent, and advertising that did not mention the repossessed vehicle, Francis' tabulations revealed the occurrence of several surpluses, which it paid in July, 1975. (I.D. 52, Tr. 221-24) Thereafter, Francis resumed its practice of making no comparison of repossession costs and proceeds, and its practice of paying no surpluses.

[6] The amount paid by Francis Ford to the finance company to repurchase a repossessed automobile is called the "payoff". (I.D. 37-38) The payoff does not usually equal the amount owed by the consumer on his or her installment contract at the time of repossession. When a repossession occurs, the finance company will credit the consumer for any prepaid but unearned finance charges or insurance premiums. Similarly, the finance company will charge the consumer for any costs incident to effecting the repossession, such as towing. This establishes the consumer's total indebtedness. Francis Ford is liable to the finance company, at most, for the amount owed to the finance company by the customer, and so the price at which it would repurchase the collateral could never exceed the consumer's indebtedness, by definition. There was testimony that in certain instances finance companies might not charge the dealer for all costs of repossession. (Tr. 1494) Where this occurs, the payoff would fall slightly short of the consumer's total indebtedness.

The same official later testified:

> Mr. Fournier, at the time that we purchased a vehicle [from the finance company] which was a repossession, Francis Ford's position has been and is, it is our vehicle. Whatever plus or minus cost is incurred, is an internal item based upon something that is ours. We have never calculated whether we made a profit or a loss. I have said that. (Tr. 1086)

Testimony to the same effect occurs at Tr. 1133, 1137, and 1378.

This approach to the determination of surpluses is plainly unlawful under the Uniform Commercial Code, which specifies that:

> A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. *Such a transfer of collateral is not a sale or disposition of the collateral under this Article.* [§9.504(5); ORS §79.5040(5), emphasis added.]

Alternatively, Francis Ford suggests that its practice was to assign an estimated wholesale valuation to each repossessed automobile at the time it was repurchased from Ford Motor Credit or United States National Bank of Oregon. (Tr. 932, 1164, 1251) This wholesale valuation was treated as constituting the "proceeds" from the repossessed vehicle, and in Francis Ford's view, such "proceeds" never exceeded the amount owed by the customer. Francis Ford's wholesale valuation, however, appears to have been based upon a subjective assessment by its own officials, rather than upon the results of an arms-length market transaction, or even upon the estimation of a market reporter, such as the Kelly Blue Book, although Francis Ford argues that it used the blue book plus the judgment of its own used car manager. (Tr. 1251)

Testimony of Francis Ford officials further indicates that they approached whatever subjective valuation of the proceeds they may have undertaken with the attitude that a surplus simply could [7] not occur. One officer testified that he assumed if there were a surplus, the debtor would not have returned the car in the first place, but would have sold it himself. (Tr. 1373) The same witness indicated that Francis Ford had never really given thought to the surplus problem before the Federal Trade Commission's investigation. (Tr. 1167) Another Francis Ford officer testified that in his opinion any repossession would show a loss (Tr. 236) and that there was no way a surplus could occur. (Tr. 508) This is certainly the case if, as a Francis official repeatedly testified, it was Francis' practice to value repossessed vehicles at the *lower* of wholesale value or cost. (Tr. 1371)

Based upon our review of the testimony, we doubt that Francis

Ford made any serious attempt to determine whether a surplus might exist with respect to the repossessed cars it repurchased from its lenders. Assuming, however, *arguendo,* that it did in fact attempt to measure surpluses by means of comparing its used car manager's estimate of wholesale value with the amount of indebtedness, it is obvious that this method, also, is impermissible under the law. As Judge Parker found, the UCC clearly contemplates that the proceeds from a repossessed vehicle will be determined upon the basis of an actual marketplace *sale* of the repossessed collateral. I.D. pp. 31-32. As one court has put it:

> The purpose of section 9-504(5), U.C.C., is to insure that the value of repossessed collateral is measured by a bona fide sale in the marketplace, and not by an artificial value, usually the balance due on the debtor's contract, set by a repurchase or guaranty agreement between a seller and a finance company. *Reeves* v. *Associates Financial Services Co., Inc., supra,* 247 N.W.2d at 439.

[*See also First National Bank of Fairbanks* v. *Engler,* 537 P.2d 517, 521 (Alaska, 1975); *Farmers State Bank of Parkston* v. *Otten,* 87 S.D. 161, 204 N.W. 2d 178, 180 (1973).]

The practical wisdom of this plain legal requirement is apparent. To allow determination of an automobile's wholesale value to be based upon a subjective appraisal by the very party obliged to refund any surplus resulting from that appraisal is much like assigning Count Dracula to guard a blood bank. The intolerable conflict of interest that results can be predicted to deprive the debtor of any realistic opportunity to obtain credit for the fair value of the repossessed collateral. Even one of respondent's expert witnesses, who argued that the proceeds should be measured by a wholesale rather than a retail valuation of the repossessed collateral, acknowledged that such wholesale valuation should be the result of a commercially reasonable, arms-length marketplace transaction, in order to avoid so-called "low-balling" by the used car dealer. (Tr. 1631-32)

Since the only marketplace transaction that occurred with respect to repossessed collateral at Francis Ford was the dealership's resale of the collateral at retail, it is that sale by which [8] the existence of any surpluses must be calculated.[7]

### E. Calculation of Surpluses: Allowable Expenses

Francis Ford argues further that even if the foregoing is so, it is nevertheless entitled to count as expenses an allowance for general firm overhead and profit upon the repossession.[8] We agree, however, with Judge Parker, that only direct "out-of-pocket" expenses are properly counted as "reasonable expenses" incident to a repossession. In the words of Professor Grant Gilmore, the original reporter on Article 9:

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[7] Of the 43 surpluses found by Judge Parker, 41 resulted from resales at retail, one resulted from resale to a Francis employee (CX 2518, 2954) and one from a resale identified as "wholesale" on the order form (CX [illegible] 2530). ORS §§83.830 and 83.840 are not inconsistent with Francis' obligation to credit buyers with the proceeds from resale of repossessed cars. *See* Appendix A.

> The rule seems to be well-established that only "direct" expenses — the out-of-pocket costs of repossession, storage and the like incurred in connection with the particular goods — can be claimed by the secured party. The courts have regularly turned down attempts to include indirect expenses — such as the secured party's general cost of doing business — or to avoid the necessity of proving actual expenses by using the 15 percent formula which is also used in the attorneys' fees clause. *2 Gilmore, Security Interests in Personal Property,* §43.5 (1963).

The parties have each done a good job of demonstrating the general irrelevancy of each other's case citations on this point, but as best as the Commission can determine, Professor Gilmore's conclusion is supported by what limited precedent does directly address it, and we have discovered no law to the contrary. The principal case is *Cherner* v. *Lawson,* 162 A.2d 492 (D.C. App. 1960) in which the court concluded:

> The question is whether a defaulting purchaser may be held liable for claimed expenses of resale when such expenses are not directly attributable to the resale. It is our opinion that the question should be answered in the negative. . . .
>
> [9] The vendee is liable for direct expenses of resale, such as the salesman's commission which was here allowed; but the vendee is not liable for expenses which are incurred incident to doing business and which would have been incurred by the vendor if no default in this particular sale had ever occurred. 162 A.2d at 493.[9]

In a case strikingly similar to this one, *State* v. *Ralph Williams' Northwest Chrysler Plymouth,* 87 Wash.2d 298, 553 P.2d 423 (1976), *appeal dismissed,* 430 U.S. 952 (1977), a Chrysler dealer was sued under Washington State's "little FTC Act" for, *inter alia,* failure to refund surpluses. In discussing the charges (which were sustained, with restitution ordered) the Washington Supreme Court observed that a study introduced into evidence

> . . . presented numerous occasions in which the dealership made a profit on

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[8] As noted at p. 5, n. 5, *supra,* Francis Ford did not ordinarily attempt to compute the costs, direct or otherwise, that it believed could properly be deducted. On the one occasion when it did so, after commencement of the Commission's investigation, its tabulations revealed the occurrence of numerous surpluses even allowing for overhead expenses. *See* n. 5, *supra.* Thus, Francis would be in violation of the UCC even were it allowed to charge overhead and reap a second profit on repossession sales.

[9] *Cherner* construed substantially identical provisions of the *Uniform Conditional Sales Act,* §21, providing for deduction of "reasonable expenses". As the comment to Section 9-504 of the UCC notes, "Subsection (1) in general follows prior law in its provisions for the application of proceeds and for the debtor's right to surplus and liability for deficiency."

> repossession sales after deducting the allowable costs of resale. This profit was never returned to the consumer whose car had been repossessed, nor was there even a procedure set up to do so. RCW 62A.9-504 [Washington State's equivalent of UCC §9-504] requires appellants to return this profit to the consumers. 553 P.2d at 440.

The court did not address the issue of the meaning of "allowable costs" directly, but its use of the term "profit" to characterize the amount to which defaulting consumers were entitled appears to reflect a view that the dealership was not entitled to realize a second profit upon resale of repossessed collateral.

No case that we have been able to discover since enactment of the Uniform Commercial Code addresses the question of allowable overhead expenses head on.[10] This may be, however, because the rule [10] is considered sufficiently well established by earlier authority that creditors have not generally sought to include overhead expenses as charges against the debtor. Certainly it was the practice of other creditors who testified in this proceeding not to charge overhead to the debtor in calculating the existence of a deficiency or surplus, (e.g., Tr. 147, 707, 851, 1520), and echoing Professor Gilmore's sentiments, another major treatise advises that:

> Any attempt by the secured party to recover a share of his overhead costs for the realization will probably be met by a rule of damages limiting recovery to the cost and expenses directly attributable to repossession and resale. 1 Bender's UCC Service, *Secured Transactions*, §8.01 at 864 (rev. 1975).

Respondent also suggests at various points in its briefs that the expenses allowed to a secured party should be measured by the standard of Section 2-708 of the UCC, entitled "Seller's Damages for Non-Acceptance or Repudiation." Section 2-708(1) provides that where the buyer wrongfully refuses to accept or repudiates the seller's tender, the measure of damages is

> . . . the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

If the foregoing is inadequate to place the seller in as good a position as performance would have done, then the measure of damages under UCC §2-708(2) is:

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[10] In reaching this conclusion, we have reviewed the cases cited by respondent in defense of allowing recovery of general overhead expenses. Like many of the cases cited for the contrary proposition by complaint counsel, these cases do not directly confront the issue. *Mt. Vernon Dodge, Inc.* v. *Seattle-First National Bank*, 18 Wash. App. 569, 570 P.2d 702 (1977), dealt only with the question of whether a bank that had repossessed collateral was obliged to dispose of it at retail or whether wholesale disposition would adequately preserve the customer's rights. *Cornett v. White Motor Corp.*, 190 Neb. 496, 209 N.W.2d 341 (1973), involved the allowability of repair/reconditioning costs which are acknowledged to be allowable by complaint counsel, and *In re Nibauer*, 9 UCC Rep. Serv. 941 (E.D. Pa. 1971), concerned what is also a direct out-of-pocket cost in the context of the transaction involved there.

> . . . the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

In fact, we believe that the wording of this section lends support to complaint counsel's view that the meaning of "reasonable expenses" in Section 9-504 must be limited to direct, out-of-pocket expenses, [11] because it indicates that the drafters of the UCC were quite aware of, and able to express the concept of "profit (including reasonable overhead)" as distinct from "costs" or "expenses", when they thought it appropriate to do so. Reference to "profit", in Section 2-708 compared to "reasonable expenses" in Section 9-504 suggests a clear intent to exclude profit from the purview of "reasonable expenses."

As Judge Parker points out at I.D. pp. 28-29, Section 2-708 simply does not, by its terms, govern the rights of the parties following a repossession. It applies only where there has been repudiation or non-acceptance by the buyer. In the transactions involved here, the buyers have already accepted the goods, but subsequently defaulted. Nor do we see anything anomalous about this diverse treatment of two distinct situations. A seller who tenders goods and finds them wrongfully rejected is entitled to make a profit, including overhead, on those goods. In the repossession situation, however, that profit is already included in the sales price, which the seller automatically recovers in full from the proceeds of the repossession sale before being required to pay any surplus. It is only a second profit, or a second share of overhead on the resale of the same goods that the secured party is denied by the law.

To be sure, there are respectable economic arguments as to why the foregoing ought not to be so, and why a secured party ought to be allowed to realize a second profit on repossessed goods. Francis Ford argues at great length that it is not economically sound to deprive the seller of an allowance for overhead and profit, because these are genuine expenses and add value to the collateral. Complaint counsel argue, to the contrary, that the disposition of repossessed collateral must be viewed as the process of liquidating a debt (even though it takes the form of selling a car) and that it would be just as unfair to allow the creditor to realize a second profit or amortize overhead on its debt collection activities as it would be to allow that to be done where the debt collection took the form of bringing a lawsuit.[11] Each

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[11] If a secured party, instead of repossessing and reselling the collateral, chose instead to bring a lawsuit to recover the entire contract balance, it would not be suggested that the creditor could charge the debtor for overhead allocable to the time required by the creditor and its employees to prepare for the lawsuit. That is simply

(Continued)

of these views has something to commend it, and we [12] have discussed each at greater length in Appendix B to this opinion. It is not the Commission's role in this proceeding, however, to determine what the rights of Oregon consumers should be. It is only our role to determine whether consumers have been deprived of rights that they now possess. We think that the weight of relevant authority plainly favors complaint counsel's position and that from the standpoint of public policy, this position is an eminently sound one.

We conclude, therefore, that Francis Ford has systematically failed to account for, and to refund to consumers, surpluses to which they are entitled under state law. We further conclude that this practice is an unfair practice under Section 5 of the Federal Trade Commission Act.

### F. Section 5 and the Failure To Refund Surpluses

As Judge Parker concluded, and respondent does not contest, the failure to account for and refund surpluses is an unfair practice within the contemplation of Section 5 of the Federal Trade Commission Act. In *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), the Supreme Court recognized that the Commission, in carrying out its statutory authority to prevent "unfair methods of competition and *unfair* or deceptive *acts or practices*" may proscribe practices that are neither "deceptive" nor violative of the letter of the antitrust laws. 405 U.S. at 244. *See also Spiegel, Inc.* v. *FTC*, 540 F.2d 287, 292-95 (7th Cir. 1976); *Heater* v. *FTC*, 503 F.2d 321, 322-23 (9th Cir. 1974); *State* v. *Ralph Williams' Northwest Chrysler Plymouth, supra*, 553 P.2d at 440, n.19 (construing Washington's little FTC Act to prohibit failure of secured party to refund surplus contrary to requirements of Washington's version of UCC §9-504).

The criteria that the Commission has previously enunciated to guide its assessment of unfairness, and that have met with approval by the Court, are three:

> (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise — whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen). Statement of Basis and Purpose of Trade Regulation Rule 408 [Unfair or Deceptive Advertising and Labeling

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viewed as a cost of doing business that is figured into the profit that the seller makes on each sale. In the same fashion, complaint counsel argue, when the seller chooses to collect its debt by means of repossession and resale that should not be viewed as a new profit-generating activity.

of Cigarettes in Relation to the Health Hazards of Smoking]. 29 Fed. Reg. 8324, 8355 (1964), cited at 405 U.S. 244, n. 5.

While the Court recognized that all three elements need not necessarily be shown in order to demonstrate unfairness, all three are found in this case. The failure to account for and refund [13] surpluses (based upon the proceeds of a commercially reasonable resale of collateral by a secured party acting as a fiduciary for the debtor, endeavoring to obtain the best possible price, and deducting only reasonable out-of-pocket expenses attributable to the repossession) is contrary to public policy established by the uniform law of 49 states and the District of Columbia (*see* discussion at pp. 2-12 *supra*). No more certain source of public policy than state law can be imagined.

The failure to accord consumers their right to a refund is, as well, oppressive to consumers and a cause of substantial injury to them. The amount of injury in this case can be measured by the amount of money (in excess of $15,000) withheld without notice by Francis Ford in 1974-75 from consumers who were entitled to it by state law. A clearer form of oppression and consumer injury cannot be imagined.[12] For these reasons we hold that the failure to account for and refund surpluses by a party obliged under state law to do so is an unfair practice within the meaning of Section 5 of the Federal Trade Commission Act.

Our disposition on the issue of unfairness renders it unnecessary for us to consider complaint counsel's argument that the challenged practices are deceptive, as well. [14]

## G. Procedural Challenges

Francis Ford has raised a variety of procedural challenges to the validity of this proceeding, which we believe are without merit. Francis argues that the Commission should have proceeded by rulemaking rather than by adjudication, because in its view the purpose or the result of this proceeding has been to "impose a new and costly legal obligation" on all automobile dealers, that is in the nature of a rule as defined in the Administrative Procedure Act. (Francis Ford Appeal Brief, p. 12)

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[12] Judge Parker, in finding the challenged practice unfair, concluded that it contravened public policy and was "immoral, unethical and unscrupulous." (I.D. p. 38) He also recognized that Francis Ford's customers had been injured by not receiving what was lawfully owed to them (I.D. p. 38), but held that complaint counsel had not met their burden on the question of proving "substantial injury to defaulting consumers." (I.D. p. 39) The Judge's conclusion was apparently based upon testimony by experts from Francis Ford who argued that by crediting defaulting consumers with the retail resale value of their car, and not allowing the dealer to deduct an allowance for general company overhead and a profit upon the resale, defaulting consumers were being given a windfall. Thus, Judge Parker concluded that while the law clearly entitled consumers to a surplus calculated in the indicated fashion, depriving consumers of this surplus injured them only in a narrow legal sense, not in an "economic" or some broader moral sense.

We believe, however, that the distinction, in this context, is not a helpful one. How to divide the costs and proceeds of a repossession transaction between creditor and debtor is a matter that is determined by law, and the legal standard is, accordingly, the best measure of the injury that results from the failure of one party to adhere to its statutory obligations. To ask whether, in some broader economic or moral sense, a given consumer "deserves" the surplus to which the law entitles him or her (and is thereby injured if deprived of it) or whether a given creditor "deserves" the deficiency to which the law entitles it, is to raise an insoluble question.

We believe that Francis' argument somewhat misconstrues the theory of this case. This is apparent in Francis' discussion on the rulemaking-type issues that it believes are at issue here, *viz.*,

> . . . a determination whether the costs and expenses *presently borne by defaulting buyers* should instead be borne in the first instance, by automobile dealers, and inevitably, in the second instance, by all automobile purchasers. . . . Such important and far reaching legal, economic and social decisions cannot and should not be handled by adjudication where the scope of testimony is so limited and the dealer cannot afford to marshall the economic and social arguments necessary to place the issues in their proper national perspective. (Francis Ford Appeal Brief, p. 14, emphasis added.)

As we have made clear, it is in no measure the purpose of this proceeding to determine how repossessed collateral should be sold, and how the proceeds should be divided. That determination has already been made by the legislatures of the various states. It is only the Commission's purpose in this proceeding to ensure that defaulting debtors are accorded rights that are *already theirs* under state law. The $15,000 in surpluses wrongfully withheld by Francis Ford from its customers in 1974-75 may indeed be viewed as a cost "presently borne by defaulting buyers" but that is so only because Francis Ford has wrongfully decided to allocate the proceeds from its repossession sales in a fashion contrary to the requirements of state law.

If attorneys worked for free, the customers of Francis Ford upon whose automobiles surpluses were realized would be able to sue Francis Ford, obtain discovery of its records to determine the results of its resales of repossessed collateral, and recover their surpluses. In fact, of course, attorneys do not work for free, and most consumers have no realistic way to determine whether or not a surplus has been realized upon the resale of their car unless the automobile dealer voluntarily complies with applicable state law, or is in some fashion [15] forced to do so. *See Spiegel, Inc.*, 86 F.T.C. 425, 446, *aff'd in relevant part*, 540 F.2d 287 (7th Cir. 1976); *Barquis* v. *Merchants Collection Ass'n of Oakland, Inc.*, 7 C.3d 94, 101 Cal. Rptr. 745, 496 P.2d 817 (1972).

In this proceeding, the Commission has not attempted to determine which of various competing economic views as to how repossession proceeds should be allocated is superior. There is no attempt in this proceeding to announce a hitherto unarticulated concept of what is "unfair" within the meaning of Section 5 of the Federal Trade Commission Act. Our role, rather is simply to determine how *existing public policy* treats the rights of a defaulting purchaser in a repossession, and to ensure that the purchaser is not deprived of his rights by the actions of secured parties.

To be sure, the principles articulated herein may have application to others situated similarly to Francis Ford, to the extent that others may have committed similar violations of law. And, indeed, because violations with respect to surpluses were alleged to be widespread, parties other than Francis Ford have been sued as part of these proceedings. But any adjudication is likely to involve the articulation of a principle with potential applicability to others similarly situated, and as the courts have recognized, administrative agencies must be allowed discretion in determining whether to proceed by rulemaking or adjudication:

> .... any rigid requirement to that effect [requiring rulemaking] would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. *In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity. SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947) as quoted in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292–93 (1974).

Even where a genuinely new principle of law is involved, its announcement may properly be made in an adjudicative context:

> The views expressed in *Chenery II* and *Wyman-Gordon* make plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. *NLRB* v. *Bell Aerospace, supra,* 416 U.S. at 294.

[16] This case involves the conduct of a specific Ford dealership, determination of the acts and practices in which it has engaged, and determination of the applicable legal standard by which its conduct should be judged. Although both sides have attempted to bolster their positions by resort to expert witnesses trained in economics and accounting (a not uncommon occurrence in adjudications), resolution of this case does not require the sort of wide-ranging social and economic inquiry that is best suited to rulemaking. Moreover, this case involves the possibility that the Commission will eventually seek consumer redress for unlawfully withheld funds, pursuant to 15 U.S.C. 57b. That statutory provision allows the Commission to obtain

redress for consumers who have been injured by past unlawful practices with respect to which the Commission has issued an order to cease and desist. A rulemaking could not similarly provide a basis on which to seek consumer redress for past illegalities, and this is a further important reason why this matter is properly addressed in an adjudicative context.[13] [17]

Respondent observes that the Commission is currently conducting a Trade Regulation Rule Proceeding concerning Credit Practices, 16 CFR 444, which involves, *inter alia,* consideration of a rule governing the manner in which all creditors might be required to dispose of repossessed collateral. The rulemaking proceeding, however, concerns different issues from those here, and nothing that may be determined in that proceeding can alter the fact that Francis Ford's past failure to account for and refund surpluses in accordance with requirements of state law is an unfair and deceptive practice.

Francis also alleges that for the Commission to proceed against it after having accepted consent settlements from co-respondents Ford and Ford Motor Credit Corp. is an abuse of discretion. Francis argues that the proceeding should be dropped, or consolidated with parallel proceedings against Chrysler and General Motors respondents.

To the extent that Francis' position involves the claim that it has been impermissibly singled out, we cannot agree. While the Commission plainly does not have "unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry", *FTC* v. *Universal Rundle Corp.,* 387 U.S. 244, 251 (1967), it also "cannot be expected to bring simultaneous proceedings against all of those engaged in identical practices." *Marco Sales Company* v. *FTC,* 453 F.2d 1, 6 (2d Cir. 1971) quoted in *Ger-Ro-Mar, Inc.* v. *FTC* 518 F.2d 33, 35 (2d Cir. 1975). The action here in no way threatens Francis Ford's existence vis-a-vis other competitors not named in the complaint that may be engaged in similar practices. At worst, Francis stands in the position of the respondent in *Ger-Ro-Mar, Inc.* v. *FTC, supra,* whose position the Second Circuit clearly distinguished from that of the respondent in *Marco Sales Company* v. *FTC* *supra* (relied on by Francis) in the following fashion:

> The situation here is distinguishable. The Commission has not given its blessings to [respondent's] competitors while condemning [respondent]. It has not yet proceeded against others and an affirmance of this order might well trigger agency action against comparable selling plans. 518 F.2d at 35.

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[13] In suing Francis' co-respondents Ford Motor Co. and Ford Motor Credit Corp., the Commission gave notice to them as well that consumer redress might be sought, and the consent order signed by these parties provides that Ford-owned dealerships shall refund surpluses wrongfully withheld prior to the date of the order.

*See also Porter & Dietsch* v. *FTC;* Nos. 78-1324 and 78-1497, slip op. at 21-22 (7th Cir. Aug. 8, 1979).

Here, in fact, the Commission *has* proceeded against some other parties for allegedly engaging in similar practices. That it may not have proceeded against all such parties cannot be a bar to proceeding against some. And, without doubt, finality [18] of the Commission's order in this matter will facilitate its obtaining relief in other instances in which the practices involved here may have occurred or be occurring, by operation of Section 5(m)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. 45(m)(1)(B).[14]

Francis also suggests that the order entered against Ford Motor Co. and Ford Motor Credit Corp. obviates the need for separate relief against Francis, because under the consent order, the settlors are obliged to take steps to ensure that all Ford dealers adhere to UCC requirements regarding surpluses. In fact, however, the relief ordered here exceeds that involved in the consent order in several respects. Most importantly, under the consent order, the settlors will merely report to the Commission any instances in which non-Ford-owned dealers have not refunded surpluses. The order does not ensure prospective repayment. It would remain necessary, where non-payment is detected, for the Commission to take legal action against the dealer involved, of precisely the same sort as has been taken here.[15] [19] Moreover, the consent order would not require Francis Ford to notify customers of pre-order surpluses wrongfully withheld from them, or permit the Commission to seek consumer redress to ensure refund of those surpluses, pursuant to 15 U.S.C. §57b.

A second part of Francis' contention is that by leaving it to contest alone the legality of its practices, the Commission has proceeded arbitrarily. With this we cannot agree either. Francis Ford has had only the burden of defending its own practices, which it has done well and forcefully, though, in our view, without success. The issues here involve only the nature of Francis Ford's repossession practices, and their legality, issues that are fully suited to exploration in the context of this lawsuit. The complaint settled against Ford Motor Co. and Ford Motor Credit Co., and the complaints still outstanding against General Motors and Chrysler respondents, while they overlap the charges here to some degree, also involve far different issues from those adjudicated here, going to the liability of vehicle manufacturers and finance companies for alleged failures to refund surpluses. Consolidation of all these cases would not help Francis Ford to explain the manner in which it disposed of repossessed cars in 1974–75, detailed above, nor do we think that other counsel could do a materially better job of articulating the duties of a secured party with respect to the collateral than has been done by Francis' able lawyer. Of course, should any subsequent litigation that may ensue regarding similar issues result in the Commission's concluding that it has decided this case incorrectly, modification of our decision in this case would quickly follow.[16] [20]

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[14] This provision of law permits the Commission to seek civil penalties against a party who engages in a practice previously found by the Commission to be unlawful in an adjudicative proceeding "with actual knowledge that such act or practice is unfair or deceptive and is unlawful." In this Section Congress answered the frequent complaint of businesses that were sued for particular violations of law while their competitors were not, by making it possible for the Commission to obtain civil penalties against those competitors without the necessity of parallel adjudicatory actions.

[15] Of course, if a final order is entered in this matter, it will become easier to take legal action against competitors of Francis Ford who fail to refund surpluses, by operation of 15 U.S.C. 45(m)(1)(B). *See* n. 14 *supra*.

Francis also assigns as error various procedural rulings made by Judge Parker denying admission of documents of other Ford dealers, denying admission of the Presiding Officer's report in the Commission's Trade Regulation Rulemaking on Creditor's Remedies, and granting certain Requests for Admissions made by complaint counsel. We think that each of these rulings represented a proper exercise of the law judge's discretion, and Francis has not indicated how it was in any way injured or how our disposition of the case might be different assuming *arguendo* that the ALJ's rulings were in error.

Accordingly, Francis Ford's procedural challenges to this proceeding are rejected. [21]

### H. Order

Complaint counsel have argued that the ALJ's recommended order does not go far enough; respondent contends that no order should be entered for various reasons previously discussed and rejected.

Complaint counsel contend that the Commission should require Francis Ford to refund surpluses wrongfully withheld. Respondent contends that this would amount to requiring "restitution", which the Ninth Circuit Court of Appeals has said the Commission may not do. *Heater* v. *FTC, supra,* 503 F.2d at 327.

Requiring repayment of wrongfully withheld surpluses is sufficiently analogous to requiring restitution of other monies wrongfully withheld that it would probably be treated in similar fashion by a reviewing court. While the Commission has previously noted its respectful disagreement with the *Heater* decision in *Holiday Magic, et al.*, 84 F.T.C. 748, 1045 n. 11 (1974), *Heater* is the governing precedent in the circuit in which respondent does all or nearly all of its business. Accordingly, we believe that no purpose would be served by requiring in the order that we shall enter in this case that respondent refund wrongfully withheld surpluses.[17] The Commission does have available to it means to seek repayment of wrongfully withheld surpluses by means of a suit for consumer redress, pursuant to Section 19 of the FTC Act, 15 U.S.C. 57b. [22]

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[16] Interestingly, it appears that only *complaint counsel* sought consolidation of the Ford, Chrysler, and General Motors cases, while Francis remained mute. Presumably its present assignment of non-consolidation as fatal error results from the removal of the two Ford respondents. Francis also contends that the National Automobile Dealers Association should have been allowed to intervene. In fact, it was permitted to intervene in limited fashion, and Judge Parker indicated that he would "be favorably disposed toward a renewal of NADA's application to intervene on liability issues" were it later to emerge that the three Ford respondents would not adequately represent the interests of NADA members. NADA did not renew its petition when Ford Motor Co. and FMCC dropped out of the litigation and we do not see that Francis Ford may allege as error the failure to grant NADA what it did not even seek.

We agree with complaint counsel that the record of this case satisfies the statutory requirements of 15 U.S.C. §57b for consumer redress. At such time as the Commission's order in this case becomes final, the Commission will consider whether to seek consumer redress for surpluses previously withheld, in accord with the provisions of 15 U.S.C. §57b.

Complaint counsel also urge that the law judge's requirement that Francis Ford identify and notify customers of surpluses previously realized be expanded to cover all surpluses realized back to 1971 (4 years before the Commission's first investigatory contact with Francis). The law judge ordered that customers be notified of surpluses dating back to May 1, 1974, copying a provision in the consent order signed by respondent Ford Motor Co. requiring its company-owned dealers to notify customers of past surpluses.

Complaint counsel observe, correctly, that the consent order is not an inflexible measure of the standard that should be applied to Francis Ford, *e.g., SCM Corp.* v. *FTC*, 565 F.2d 807, 814 (2d Cir. 1977). On the other hand, the consent order imposes no obligation of prior notification upon non-Ford-owned Ford dealers, of which Francis is one, and so *any* requirement of prior notification will impose upon Francis an obligation not being concurrently imposed upon other Ford dealers that may have failed to refund surpluses. As noted before, in discussing Francis' objections that it has been "singled out", we do not think that this objection is determinative either. Concern must be shown, after all, for the *victims* of consumer abuses, even though it is not always possible to redress every individual occurrence in equal fashion.[18] [23] Weighing these competing equities, we believe that notification of consumers with respect to all surpluses realized from the date of the complaint in this matter (February 10, 1976) strikes an appropriate balance, and we shall so order.[19]

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[17] The *Heater* court drew a careful distinction between so-called prospective and retrospective relief, and disallowed only the ordering of restitution for violations of Section 5 occurring prior to entry of an order forbidding them. There is no question that the Commission may order a party to cease violations of the law and simultaneously require that where such *future* violations result in (or consist of) withholding of money from consumers, that money be repaid. *See Windsor Distributing Co., et al.*, 77 F.T.C. 204, 222 (1970), *aff'd. per curiam*, 437 F.2d 443 (3d Cir. 1971). Accordingly, our order requires respondent to remit all surpluses that are realized following the effective date of the order.

Complaint counsel also urge that the Commission require Francis Ford to include a notice in all consumer credit contracts informing customers of their surplus rights in the event of default and repossession. We do not believe it necessary to burden every one of Francis' contracts with such language in order to remedy the violations that have occurred here. The order obliges Francis, on pain of civil penalties, to compute and refund surpluses. Only if Francis disobeyed this order requirement would contractual notice to consumers be of any possible use, and then only if the notice prompted some defaulters to seek an accounting by Francis which might thereby lead to discovery of its failure to repay a surplus. At present it is the practice of Francis' finance companies to notify defaulters (*when repossession occurs*) of their right to a surplus (if one is subsequently realized). This notice is likely to do far more than that proposed by complaint counsel to induce consumers to protest if they believe they have not been treated fairly. Under the circumstances, we believe that the very slight, marginal protection that might be afforded by insertion of a clause in the contracts of those consumers who ultimately default does not justify imposing upon Francis the burden of placing this notice in each and every contract, in most of which it would serve no purpose germane to preventing violations of law.

Complaint counsel also urge that the Commission add a sentence to the law judge's order to emphasize that as a retail dealer, Francis Ford's resale of repossessed collateral will ordinarily occur at retail. We believe, however, that the law judge dealt adequately with this issue in his definition of "best possible price," which Francis is required by the UCC and the order entered herein to seek when it resells a repossessed car. [24]

Respondent objects to the ALJ's proposed order because it assertedly prohibits respondent from exercising rights available to it under Section 9-505 of the Uniform Commercial Code to retain collateral in satisfaction of the debt after obtaining a waiver from the debtor of the debtor's right to any surplus.

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[18] Again, as noted before, non-Ford-owned dealers, along with Ford-owned dealers, will be subject to the same prospective legal obligations as Francis Ford by virtue of the consent order signed by the settling parties, and by application of the holdings in this case to non-parties, pursuant to Section 5(m)(1)(B) of the FTC Act.

[19] This is, of course, without prejudice to the Commission's right pursuant to 15 U.S.C. 57b to seek redress for monies wrongfully withheld up to three years prior to the date of the complaint. We have modified the ALJ's proposed Letter of Notification (Attachment C to the Order) to omit references to a Commission order requiring respondent to repay surpluses, because we have entered no such order. To the extent that respondent may prefer to refund surpluses withheld in lieu of sending the Letter of Notification, the Commission will accept evidence of such direct refunds as compliance with Paragraph III(D).

Paragraph II(E) of the order entered by Judge Parker would prohibit Francis Ford from

> Taking any action to obtain or attempt to obtain or bring about a waiver of a customer's right to a refund of surplus, including such waivers as may arise from failure to object to a proposal to retain the vehicle.

In defense of this paragraph, complaint counsel observe that the wholesale use of waivers could eviscerate the rest of the order, by depriving consumers of their right to a surplus in all cases in which a surplus might arise. This, however, is hardly a complete defense of the ALJ's order. If complaint counsel's theory of the case is that respondent has engaged in unfair practices by disregarding public policy enshrined in state law, counsel cannot shrink from that theory in those instances in which state law is not as favorable to the rights of consumers as one might desire.

In response to this objection, complaint counsel argue further that the waiver provisions of Section 9-505 would so rarely (if ever) be applicable to the circumstances of Francis Ford's repossessions that a flat prohibition upon any use of waivers is the clearest way to resolve the question, and does no violence to Francis Ford's existing rights under Oregon law. In particular, counsel observe that Section 9-505 by its terms refers to proposals to *retain* the collateral, something that Francis Ford is unlikely to wish to do.

While we can find no relevant case law defining the scope of Section 9-505 as it relates to automobile repossessions, the official draftsmen's comments lend considerable support to complaint counsel's position. Comment 1 to Section 9-505 states:

> 1. Experience has shown that the parties are frequently better off *without a resale* of the collateral; hence this section sanctions an alternative arrangement. In *lieu of resale* or other disposition, the secured party may propose under subsection (2) that he *keep the collateral as his own,* thus discharging the obligation and abandoning any claim for a deficiency. [emphasis added]

[25] In the Draftsmen's Statement of Reasons for 1972 Changes in Official Text, the Draftsmen summarized the purpose of Section 9-505 as follows:

> Under subsection (2) [9-505(2)] of this section the secured party may in lieu of sale give notice to the debtor and certain other persons that he proposes to retain the collateral in lieu of sale.

The foregoing language strongly suggests that waiver of surplus and deficiency rights under 9-505 is appropriate only when prompt resale of repossessed collateral in the ordinary course of business is not contemplated by the creditor. Where collateral is subject to pronounced fluctuations in its market value, it may well transpire that both creditor and debtor will be better off without a prompt resale. For example, where stocks are pledged as security for a debt, and their price is depressed at the time of default, a creditor might well prefer to retain the stocks indefinitely in hopes of significant appreciation rather than reselling at once. The debtor can hardly complain, because the immediate resale to which the debtor is entitled would only yield a deficiency. The creditor, in turn, may be willing to forego this deficiency in the hope of realizing a substantial profit at some indefinite future time. The same considerations may apply to a going business that is repossessed. The creditor may be better off running the business for an indefinite period than he would be selling it immediately and suing the debtor for a deficiency. In cases such as these, Section 9-505's waiver provisions are clearly appropriate.

It is less clear that waivers would ever serve the purpose contemplated by the drafters of the UCC in the context of automobile repossessions. Automobiles generally depreciate steadily over time, and so it would be most unlikely that an automobile dealer would wish to retain an automobile in inventory in the hope that by doing so its value would increase. That being so, use of Section 9-505 by an automobile dealer, particularly one not disposed to pursue deficiency judgments, would appear calculated solely to extinguish surplus rights of consumers, which we do not believe was the intended purpose of Section 9-505. *See also* 2 Gilmore, *supra*, §44.3 at 1226-27.

The foregoing caveats notwithstanding, the record of this case does not allow us to conclude that in every imaginable instance it would be contrary to the provisions of Section 9-505 for a car dealer to seek to obtain a waiver of a debtor's right to a surplus. Conceivably, a dealer might wish to retain a particular car for its own use, in which case it should be [26] allowed to propose to do so. Accordingly, we shall modify Paragraph II(E) of the ALJ's order so as to allow Francis Ford to take advantage of such rights as it may have under Section 9-505. To prevent abuse of this proviso, however, the order provides as §9-505 contemplates, that a waiver may not be sought unless the creditor intends to retain the collateral for its own use for the immediately foreseeable future, rather than to resell the collateral in the ordinary course of business. The order also specifies that if it does seek a waiver, Francis may not imply that it will be foregoing its right to a deficiency judgment unless, in fact, it is Francis' practice to pursue deficiency judgments. To induce the renunciation of a debtor's right to a possible surplus in return for the creditor's illusory renunciation of rights that it never asserts would be a misleading practice in violation of Section 5.

Respondent's principal objection to the order (other than that no order is justified on the facts) is that it will allegedly raise the cost of credit or the cost of used cars, by increasing the repossession expenses of car dealers, which expenses must be passed on to consumers.

To be sure, if Francis Ford is now retaining an average of $15,000 every two years that it is obliged under state law to repay to defaulting consumers, and if it is forbidden in the future from retaining those monies, then in order to maintain its profits at the same level Francis Ford will either have to reduce its costs of doing business or else raise the price of each car it sells by two or three dollars to recoup the loss of illegally-retained revenue. This will not result in a net loss to consumers, but it will result in a transfer of funds from all consumers to a smaller group of consumers—those entitled to surpluses under state law, Section 5 of the FTC Act, and the Commission's order. [27]

We see nothing wrong in the foregoing result. If the consequence of Francis Ford's adherence to the law is a transfer of resources from itself and its consumers to one sub-group of its consumers, that is because of a clear public policy decision made by state legislatures when they adopted a formula (the UCC), designed to allocate the costs of default between creditor and debtor.

The same arguments made by Francis Ford about costs could be used to justify disregard of any commercial obligation, *e.g.,* refusal to do warranty repairs (they cost money, which must be recouped from all car buyers), the use of fraudulent sales practices to sell cars for more than they are worth (the money realized because of the fraud allows other cars to be sold for less) and so forth. Public policy prescribes, however, that warranties should be honored (to protect purchasers of inferior merchandise), that fraud should not be used to induce sales (to protect innocent victims from oppression), and that defaulting debtors are entitled to recover their equity in collateral in the amount by which the resale price of their car exceeds the amount they owe plus direct, out-of-pocket costs of repossession. Many debtors default for reasons beyond their control. Recognition of this fact, among others, underlies a historical trend that has seen the stocks and jail replaced by progressively more humane (albeit marginally less effective) collection techniques. In similar recognition of the varied rights and responsibilities of creditor and debtor, the law imposes upon the debtor liability for all direct, out of pocket costs of repossession (an obligation likely to deter those defaults that are preventable) but provides for preservation of the debtor's equity in repossessed collateral by imposition of a duty on the creditor to resell in a commercially reasonable manner, attempt to obtain the best price, and not charge the debtor a second time for the creditor's overhead or profit. That these conscious policy decisions may have the effect (as do most policy decisions) of allocating costs in certain ways does not justify their disregard.

With the changes noted above, and minor technical modifications, we have entered the order proposed by the administrative law judge as our own, and denied the cross-appeals of the parties.[30] In addition, we have appended a synopsis summarizing our holding in this matter, so as to facilitate application of the principles articulated herein to any party that may engage in similar practices, as contemplated by 15 U.S.C. 5(m)(1)(B). [28]

## APPENDIX A

### Interrelationship of ORS §§ 83.830 and 83.840 and ORS §79.5040

ORS §§ 83.830 and 83.840 provide that where the amount of a borrower's unpaid loan obligation at the time of default in the repayment of a retail installment contract (§83.830) or a loan agreement (§83.840) exceeds $1250, the seller (or lender) may recover from the buyer or borrower "any deficiency that results from deducting the fair market value of the goods or motor vehicles from the amount of the unpaid loan obligation." [ORS §83.830(b); ORS §83.840(b)] Respondent argues that this provision entitles it to determine the amount of deficiencies and the existence (or non-existence) of surpluses, by crediting the customer with an estimate of the "fair market wholesale value" of his car at the time it is repossessed, notwithstanding that an actual sale at retail (or wholesale) might yield a better price.

Several observations are pertinent. The first is that ORS §§83.830 and 83.840 were plainly not intended to repeal the protections already afforded defaulting purchasers by the Uniform Commercial Code in effect in Oregon. ORS §71.1040 entitled "Construction against implicit repeal" states:

> "The Uniform Commercial Code being a general law intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided."

Further indication that the Oregon legislature does not consider that Oregon code provisions pertaining to debtor's surplus rights were in any way affected by ORS §§ 83.830 and 83.840 comes from the fact that in 1973, two years following the passage of ORS §§83.830 and 83.840, the Oregon legislature expressly modified ORS §79.5040

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[30] On our own motion we have deleted Paragraph IV(C) of the ALJ's proposed order, regarding retention of records. Other order provisions should be sufficient to permit effective monitoring of compliance by the Commission.

(the part of the Oregon Code corresponding to §9-504 of the UCC) in respects not material to this litigation, and *re-enacted* the entire section, without modifying those parts of ORS §79.5040 that could be argued to have been repealed or otherwise affected by ORS §§83.830 and 83.840. In similar fashion, Oregon courts have decided at least two cases involving surpluses calculated under ORS §79.5040 subsequent to the enactment of ORS §§83.830 and 83.840 (although the cases involved transactions occurring prior to enactment) without making any reference whatsoever to the alleged intervening repeal of the governing provision of law. *Chaney* v. *Fields Chevrolet Co.*, 264 Or. 21, 503 P.2d 1239, 11 UCC Rep. Serv. 997 (1972); *Webster* v. *G.M.A.C.*, 267 Or. 304, 516 P.2d 1275 (1973).

It seems thus apparent that ORS §§83.830 and 83.840 must be construed in a fashion that is harmonious with pre-existing Oregon law governing surplus rights of debtors. That is further apparent inasmuch as ORS §§83.830 and 83.840 on their face are intended to confer added protections upon defaulting buyers, and it would be perverse to construe them in a fashion that would, in effect, diminish those protections.

ORS §§83.830 and 83.840 can plainly not be harmonized with pre-existing Oregon law if the term "fair market value" is construed, as respondent would construe it, to mean in all cases "*estimated* fair market *wholesale* value." The effect of such an interpretation would be to deprive the defaulting car buyer of his right under other provisions of the Oregon Code to have the proceeds from his repossessed vehicle determined by a commercially reasonable arm's length market transaction, by a secured party obliged to act as a fiduciary and to make reasonable efforts to resell the collateral for the best possible price. Moreover, the effect of this reading in particular instances could be to yield a surplus and deficiency in the same transaction. For example, a car dealer might repossess an automobile and assess a deficiency based on his estimate of fair market wholesale value. When the car was later resold at retail by the dealer, however, the sale might give rise to a surplus under ORS §79.5040.

It thus seems apparent to us that if ORS §§83.830 and 83.840 are to be read in harmony with other provisions of Oregon law the term "fair market value" must be construed to mean, as Judge Parker also concluded, "fair market retail value," at least in those circumstances in which other provisions of Oregon law would result in resale at retail of the repossessed collateral. Where the UCC would permit wholesale disposition of collateral, "fair market value" may be construed as "fair market wholesale value" and acts as a check upon the actual wholesale disposition to ensure that a deficiency cannot be based upon a wholesale disposition that fails to yield "fair market value."

While the Uniform Commercial Code requires that resale of repossessed collateral be made in a "commercially reasonable" fashion, and courts have construed the Code to impose upon the secured party an obligation to seek to obtain the best possible price for the debtor's account (*supra* at 4; I.D. pp. 33-35) the price actually realized is not made the definitive test of the reasonableness of the procedures employed, UCC §9-507(2); e.g., *James Talcott, Inc.* v. *Reynolds* 165 Mont. 404, 529 P.2d 352, 354, (1974). As a result, it is conceivable that a transaction satisfying the UCC's requirements of "commercial reasonableness" could yield less than fair market wholesale or fair market retail value. Moreover, the term "commercially reasonable" is itself open to considerable variation in interpretation, and commentators have remarked upon the fact that wholesale auctions of automobiles are sometimes undertaken in a manner that may not yield a fair market return, however defined. *See, e.g.*, Schuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 Stan. L. Rev. 20 (1969). Under these circumstances, it appears to us that ORS §§83.830 and 83.840 were designed simply to ensure against the possibility of defaulting consumers being pursued for deficiencies based upon resale of collateral that yielded less than "fair market value." The term "fair market value" was intended simply to act as a check upon the results of an actual wholesale or retail disposition,[1] and was not intended to *deprive* the consumer of the benefits of such an actual marketplace disposition, which, after all, should *ordinarily* be the best measure of what fair market value is.[2]

## APPENDIX B

### Wholesale vs. Retail Disposition of Repossessed Collateral and the Definition of "Reasonable Costs" of Repossession

The following discussion is intended to address the thoughtful submissions of both sides with respect to the underlying economic rationale for the legal requirements imposed upon a secured party in possession of repossessed goods. We have included this discussion in an appendix because we do not believe that it is relevant, strictly speaking, to the outcome of this case. Even were we to conclude that the policy considerations underlying the UCC's treatment of repossession proceeds were infirm, this would not alter respondent's legal obligations. In fact, we believe that there are strong policy bases underlying the UCC's requirements and while strong arguments can be marshalled in support of a contrary view, these cannot be a reason for allowing disregard of the law.

Respondent has presented expert testimony in support of its view that an automobile dealer should be able to include an allowance for general overhead and dealership profit as part of the allowable expenses incident to the resale at retail of repossessed collateral. Alternatively, respondent suggests that the "proceeds" from a repossession should be measured simply by some estimate of the wholesale value of repossessed collateral at the time of repossession, even though no resale of the collateral may be undertaken except at retail.

Respondent's position is that the true value of repossessed collateral is most fairly measured by its wholesale value at the time of repossession. If the repurchase automobile dealer resells the collateral at retail, that dealer incurs both direct costs, such as out-of-pocket expenses of reconditioning and repair (for which the dealer can charge under the UCC), and indirect costs, such as a prorated share of general dealership expenses, advertising, lot rental, and the like. These indirect costs, just as much as the direct ones, contribute to the increase in value realized upon a car when it is sold at retail as compared to what it might fetch if sold at wholesale immediately after repossession. Accordingly, respondent argues, the dealer should be allowed to deduct an allowance for such indirect costs prior to crediting the consumer with any surplus. As for profit on the resale, respondent argues that the sale of a repossessed car imposes an opportunity cost upon the dealership, because sale of a repossessed vehicle takes the place of sale of another used car on which the dealer could realize a profit. Accordingly, argues respondent, the dealer should be entitled to realize a profit when it resells repossessed collateral.

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[1] Under the Uniform Commercial Code, a court upon finding that a sale of collateral has been conducted in a commercially unreasonable manner, or otherwise in violation of the Code, may nevertheless award the creditor a deficiency based on the actual fair market value of the collateral rather than its resale price. *See Levers v. Rio King Land & Inv. Co.*, ——— Nev. ———, 560 P.2d 917, 920 (1977), but this presumes an initial showing of creditor malfeasance.

[2] Complaint counsel contend that the only purpose of ORS §§83.830 and 83.840 was to impose a 90 day deadline for filing deficiency suits. While this was plainly one purpose of the provisions, we cannot agree that it was the only one, since that purpose could have been accomplished without all the language that is at issue in this proceeding. We do agree with complaint counsel, however, that the Code provisions in question were not intended to detract from existing rights of the defaulting debtor to receive back a surplus where one results from commercially reasonable resale of the collateral.

Complaint counsel respond to this that the resale of repossessed collateral is nothing more than a debt collection activity. When a car is sold for the first time, the sales price includes a profit for the dealer, and this profit includes within it some allowance for the possibility that the debtor may default. When default occurs, resale of the repossessed collateral allows the dealer to realize his original profit, through recovery of the entire contract balance. Since the dealer's profit on each sale should already include an allowance for all costs incident to the sale (including debt collection costs) it would be unfair to permit the dealer to recover an additional profit, or share of the overhead, upon the repossession sale. No one, in complaint counsel's view, would suggest that when a finance company sues to collect an unpaid debt, or when an automobile dealer sues to collect an unpaid debt, the plaintiffs are entitled to charge the debtor for a ratable share of company overhead attributable to the time required by company employees to prepare for the lawsuit. Nor would it be suggested that the finance company or car dealer should be entitled to make a *profit* upon a suit for an unpaid debt, above and beyond the profit already included within the sales price or finance charge. The confusion in the case of the repossession transaction, in complaint counsel's view, results because the debt collection activity (i.e. the repossession sale) takes the same form as the principal line of business of the secured party (i.e. selling cars) and this induces people to analyze the repossession transaction as being simply another sales transaction by the dealer, rather than one means of collecting a debt.

Deciding between these two positions depends very much upon one's view of what the goals of secured transactions law should be, the relative importance to be attributed to each of these goals, and how these goals can best be achieved.

Among the principal goals that have been suggested in this proceeding are the following:

(1) Establishment of a clear, readily administered mechanism for preserving the debtor's equity in repossessed collateral; and

(2) Deterring defaults.

Preservation of the debtor's equity in repossessed collateral is clearly a goal of Article 9. The law seeks to achieve this by requiring the secured party to act as a fiduciary for the debtor, to seek to obtain the best possible price for the collateral at a commercially reasonable sale, and to account to the debtor for any surplus.

Respondent argues that in pursuing this goal the law has gone too far, because when disposition occurs at retail, the debtor receives a windfall. This occurs because the value of his automobile is augmented by being resold by a dealer, but the amount of this augmentation cannot be entirely recovered. While the law does allow all recovery of out-of-pocket expenses, as well as direct sales commissions, it does not allow for recovery of such overhead items as general firm advertising, plant maintenance, and the like, all of which go into establishing a dealer's image and reputation and determine the price that it can charge for its cars. Giving the defaulting consumer a windfall, argues respondent, does more than is necessary to preserve his equity, and at the same time, disserves the goal of discouraging defaults, by creating an *incentive* for the debtor to default, rather than resell the car himself, if he desires or is forced to be rid of it.

This argument is certainly correct up to a point. That is, it seems quite plausible that in many cases, taking a given car, in a given state of repair, Francis Ford will be able to realize a higher price on that car than could the individual owner if he sought to sell it for himself, even allowing for the salesman's commission. The higher price may result in part from Francis Ford's reputation and good will, which an individual consumer would not have.[1]

This observation, however, does not end the argument, for in any individual case it may be true that a car's value is not augmented by dealership good will, and, even where it is so augmented, the amount of the augmentation must be measurable, in fairness to the debtor. The position of respondent's experts appears to be that any increase in value of collateral beyond its "wholesale value" should be attributed to the dealer's efforts, and so should be recoverable by the dealer. (*E.g.*, Tr. 1645) *By definition* this position would eliminate the possibility of any surplus resulting from a retail resale, in obvious mockery of both the law and the facts.[2]

If one attempts actually to calculate properly attributable overhead, the extreme difficulty of the task becomes apparent. If the burden is placed on the consumer to disprove the validity of allocations for overhead, the opportunity for creditor overreaching is extreme. If the burden is placed upon the creditor to justify his overhead allocations, the practical effect is likely to be that the creditor finds it is cheaper to pay a surplus.[3]

For these reasons then, the rule disallowing recovery by the creditor of general overhead may be the most *practical* way to assure preservation of the debtor's equity. Though it may under some circumstances overstate that equity, it also ensures that that equity will be preserved against the encroachments that would result if essentially non-measurable costs could be charged against the debtor.

Without necessarily questioning that this view has some validity, respondent suggests that it results in a gross anomaly, because debtors whose cars are repossessed by a finance company not party to a recourse financing agreement receive only the benefits of a wholesale disposition of the collateral, while customers of Francis Ford and other dealers that engage in recourse financing receive the benefits of retail disposition. Francis then points to testimony of witnesses to the effect that the surpluses on wholesaled collateral appear with the frequency of Halley's Comet to show the incongruity.

The comparison with wholesale disposition may, however, be more a reflection upon the insufficiency of that method of resale than it is upon the excessive generosity of retail disposal of repossessed collateral. One study, for example, found that wholesale dispositions of repossessed cars yielded on average prices that were only 51% of retail *Redbook* value, and only 71% of *wholesale Redbook* value (compared to

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[1] We have not included the dealer's warranty as a source of price because the law would not require the secured party to count as part of the proceeds from a repossession resale the price of any warranty separately extended by the dealer on the car. However, to the extent that an implied warranty might arise upon the resale of a used car, the greater likelihood that it would be enforceable against a dealer as opposed to an individual consumer-seller might result in the dealer's ability to command a higher price.

[2] As we note in the text, when Francis Ford did attempt to compute surpluses by charging for various overhead expenses, it still realized surpluses. (P. 5, n.5) And as respondent's experts acknowledge, a consumer could resell his car for retail book value. (Tr. 1609) Respondent suggests that most debtors do attempt to resell their automobiles before repossession, giving them up only if they are unable to achieve a price in excess of the debt. The record suggests that this is true for some debtors, untrue for others. Several considerations suggest that a debtor's own pre-repossession efforts should not be made the sole test of whether or not he is entitled to a surplus, among them being the ignorance of some debtors as to what their car may be worth and imperfections in the wasted market for used cars that may preclude even a knowledgeable debtor from realizing fair market value.

[3] Proper attribution of overhead expenses so as to preserve debtor's equity requires allocation to each repossessed vehicle of only those items of overhead that contribute to the increase in value of the collateral. In this regard, it is unclear how such fixed expenses as rent, lights, water, heat, telephone, general firm advertising, and the like should fairly be divided. Should the division be proportionate to the size of the car, or its selling price? Should the division be proportionate to the length of time the car spends on the lot? Does a car's value bear any relationship to the time it spends on the dealership lot, or is the relationship an inverse one? Failure to resolve these and other questions would inevitably result in some debtors being deprived of equity.

93% of wholesale *Redbook* value obtained on a different group of unrepossessed used cars sold at wholesale auctions). Schuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 Stan. L. Rev. 20, 31 (1969).

In the case before us, the Kelley Bluebook *wholesale* value of a number of the cars repossessed by Francis Ford's lenders exceeded the amount of the payoff. Presumably, Francis Ford, which claims to have determined repossessions by comparing wholesale price with payoff, did not pay surpluses on any of these cars because its used car manager concluded that they were in sufficiently poor condition so as not to be worth guide book values. This, indeed, reflects the view of some witnesses in this proceeding, to the effect that repossessed vehicles are generally in poorer condition than other used cars, and any car owner who surrenders his car does so because he knows that he could not resell it himself for the contract balance. (*See* p. 3, n.2, *supra*)[4]

In any event, while there is no doubt that the law creates certain disparities among debtors, because some receive the benefit of wholesale and some of retail dispositions of their cars, it does not follow that this disparity results in a windfall for the beneficiaries of retail disposition. It may rather be that such debtors receive roughly what they should, while beneficiaries of wholesale disposition are regularly deprived of equity because of imperfections in the wholesale market, or in the types of wholesale disposition regularly employed.

Finally, we may return to the goal of default deterrence, which should underlie any scheme for regulating relations of debtors and creditors. We have observed that a strong argument for disallowing generalized overhead expenses is that it provides a precise way of measuring debtor's equity, and avoids its unfair extinguishment by means of unjustified allocations of overhead. Does this, however, encourage defaults, or fail to discourage defaults, by sparing debtors certain costs associated with the failure to pay?

One cardinal rule of cost allocation is that costs should be borne by the parties best able to avoid them. In the credit context, however, the application of this formula is unclear, because a great many defaults cannot be prevented by the defaulters. Some debtors are deadbeats, or become voluntarily and unjustifiably overextended, leading to default. Many others, however, default for reasons essentially beyond their control, in particular, illness, divorce, or loss of employment. Bending over backwards to ensure that these debtors bear every conceivable cost associated with their defaults is, therefore, unlikely to contribute substantially to deterring them.

The foregoing is not to say that debtors should not be made to pay the readily measurable costs associated with default, and indeed, this is the precise effect of the law, which allows the creditor to recover all out-of-pocket expenses, including towing, reconditioning costs, and the like. This alone is likely to act as a substantial deterrent to default (to the extent it is deterrable) because as soon as the car is repossessed the debtor's equity in it is immediately reduced by all costs directly related to the repossession (such as towing) which could have been avoided if default had not occurred. The question is simply how certain unmeasurable costs (i.e. overhead) should be divided. Should the law bend over backwards to ensure that no windfall is given to the debtor, so as to discourage defaults, even at the risk that the debtor may be deprived of his equity in the collateral? Or should the law bend over backwards to ensure that no extinction of the debtor's equity occurs, so as not to further penalize the debtor for an occurrence that in many cases he is powerless to prevent, even though this may mean that the debtor is given a slight windfall?[8]

---

[4] A great many rationalizations of this sort have been presented by witnesses in this proceeding to show why, notwithstanding the elaborate provisions made for them in Article 9, surpluses will rarely or never result. There are, of course, other reasons why surpluses might now occur more frequently than they have in the past, for example, sustained high inflation and major changes in the availability of gasoline and the design of automobiles, which have had the cumulative effect of maintaining the value of at least some kinds of used cars.

The allocation made by the Uniform Commercial Code is certainly one eminently reasonable way of striking a balance between two important policy goals. Defaults must be deterred, but debtors who do default should not be deprived of the built-up value of the collateral. No formula can do this perfectly in the real world, but the one recited in the text of this opinion, and required by the Uniform Commercial Code, does so in a sound, if not unchallengeable, fashion.

## SYNOPSIS OF DETERMINATIONS FOR 15 U.S.C. 45(m)(1)(B) FORD MOTOR COMPANY, ET AL., DKT. 9073

It is unfair and unlawful under Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for a party to engage in the following practices:

(A) Failing to account for and pay a defaulting customer within a reasonable time after repossession and resale (or lease) of the collateral, any surplus to which the customer is entitled under state law, and which the party is obliged to pay the customer under state law.

(B) Failing to credit to the defaulting customer, for purposes of determining any surplus or deficiency:

1. The full amount of unearned finance charges, including the proportionate shares of the dealer and the financing institution;
2. The full amount of any unearned insurance premiums, including but not limited to the dealer's (sales commission) share of premiums attributable to the remaining term of the insurance.
3. The full amount of proceeds received from or credited by an insurance firm or other source as compensation for damage to the repossessed collateral, except where such proceeds are offset by actual repair of that damage.
4. The full amount of proceeds realized upon an actual sale (or lease) of the repossessed collateral to an independent third party, in good faith, for the best possible price.
5. The underallowance realized on any property taken in trade upon the sale (or lease) of the repossessed collateral; i.e., the amount by which the established wholesale value of such trade-in property exceeds the trade-in allowance given therefor.

(C) Failing to exclude, for purposes of calculating the amount of any surplus or deficiency:

1. All amounts for repair and reconditioning above and beyond the direct (out-of-pocket) expense incurred by a secured party in or for performance of such repair or

---

[8] We have not discussed this situation from the standpoint of the *creditor's* equities because, within the parameters of the problem being discussed (whether to allow him to charge overhead) the creditor can be somewhat indifferent. Thus, if repossession is regarded as debt collection, the creditor can budget for it in the price of his cars, as he would for any other debt collection activities or similar costs of doing business. The real tradeoffs in cost come between defaulters and all other customers of the seller. Thus, allowing the creditor to recover for general overhead ensures that all costs of default are borne by the debtor, at the expense of depriving the debtor of some equity. Disallowing overhead may mean that some costs of default are borne by all customers of the seller, to ensure that defaulters do not suffer the misfortune of being deprived of their equity.

It should also be recognized that from the standpoint of imposing costs on the parties best able to avoid them, *dividing* costs of default between creditor and debtor may be sound policy, by giving creditors as well an incentive to screen credit risks carefully. Of course, we recognize that the costs involved here (i.e. overhead allocable to repossessions) are quite small compared to other costs of default imposed on creditors — i.e. uncollectible contract balances or deficiencies.

reconditioning of the particular repossessed collateral in preparing it for sale (or lease).

2. All amounts paid upon the sale (or lease) of the repossessed collateral as commissions for the sale of insurance and financing, and all amounts paid to supervisorial and administrative/support personnel without regard to whether they participated directly in the process of promoting that particular sale (or lease).

3. All amounts for advertising other than a proportionate share of expenditures for advertisements which specifically mention the particular collateral.

4. All indirect or fixed expenses (overhead), including but not limited to costs of real property, rent, depreciation, capital, supervision, administration, insurance and other expenses which are not directly increased as a result of the repossession, storing, reconditioning or reselling (or leasing) of the particular collateral.

5. All costs and expenses other than unreimbursed out-of-pocket expenses actually incurred as a direct result of the repossession, storing or sale (or lease) of the particular collateral, or of preparing it for such sale or lease.

6. Any amount of overallowance greater than the lawful excess of trade-in allowance given upon the sale (or lease) of the repossessed collateral, over the established wholesale value of property taken in trade thereon.

(D) Taking any action to obtain or to attempt to obtain or bring about a waiver of a customer's right to a refund of surplus, except in the precise manner and under the precise circumstances contemplated by the applicable state law version of Section 9-505 of the Uniform Commercial Code. Under Section 9-505 a waiver of a customer's right to a surplus may not be sought unless the secured party intends to retain the collateral for its own use for the immediate future rather than to resell the collateral in the ordinary course of business.

## FINAL ORDER

This matter has been heard by the Commission upon the cross-appeals of complaint counsel and respondent's counsel from the initial decision and upon briefs and oral argument in support of and in opposition to each appeal. The Commission, for the reasons stated in the accompanying Opinion, has for the most part, denied the appeals of both sides. Therefore,

*It is ordered,* That the initial decision of the administrative law judge, pages 1-45, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except for:

Finding No. 72, first sentence; Finding No. 73, first 18 words; Page 38, paragraph 4, second sentence; Page 38, paragraph 5; Page 38, Paragraph 6, last 25 words; Page 39; Page 40 through first full paragraph; Page 40, numbered paragraph "7".

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

*It is further ordered,* That the following order to cease and desist be entered: [2]

## ORDER

I. *It is ordered,* That for purposes of this Order the following definitions shall apply:

A. "Respondent" means Francis Ford, Inc., a corporation, and its successors and assigns. It does not include Ford Motor Company or Ford Motor Credit Company.

B. "Vehicle" means an automobile or truck and any and all parts, accessories, and appurtenances repossessed therewith. A van is deemed a "truck."

C. "Adjusted balance" means the unpaid balance as of the date of repossession (1) less applicable finance charge and insurance premium rebates, (2) less all amounts received for collision insurance claim payments except those for which the corresponding vehicle damage is repaired, and (3) plus other charges authorized by contract or law and actually assessed prior to repossession.

D. "Proceeds" means whatever is received by respondent upon its disposition of a repossessed vehicle, excluding finance charges, sales taxes, separately priced warranties and service contracts insofar as the charges therefor are itemized in documents provided at that time to the party to whom disposition is made. Any underallowance realized on the disposition shall be included. The amount of any lawful overallowance given on such a disposition may be deducted if (1) the amount so deducted was determined at the time of the disposition and is no greater than the excess of the trade-in allowance over the wholesale value of the vehicle taken in trade on the repossessed vehicle as that value is shown in a current recognized guidebook used in the area, (2) overallowances are given and contemporaneously recorded in the normal course of respondent's sales or leases of nonrepossessed vehicles, and (3) correctly determined underallowances are included in the proceeds of other repossessed vehicle dispositions wherever applicable.

E. "Allowable expenses" means actual out-of-pocket expenses incurred by respondent as a direct result of a repossession. The expenses must be reasonable and result directly from the repossessing, holding, preparing for sale or reselling of the vehicle, and be not otherwise reimbursed to respondent nor prohibited by contract. They are limited to the following charges (insofar as permitted by state law) and no others: [3]

1. amounts paid to persons who are not employees of respondent nor of a financing institution which financed the prior sale, for repossessing, towing or transporting the vehicle;

2. filing fees, court costs, cost of bonds, fees and expenses paid to

a sheriff or similar officer, and fees and expenses paid to an attorney who is not an employee of respondent nor of the financing institution, for obtaining possession of or title to the vehicle;

3. fees paid to others to register or obtain title to or legally required inspection of the vehicle;

4. amounts paid to others for storage (excluding charges for storage at facilities owned or operated by respondent);

5. labor and associated parts and supplies furnished by respondent for the repair or reconditioning of the vehicle in preparation for resale, computed at the following cost rates:

a. The cost rate for labor of mechanical technicians employed in respondent's retail repair shop (for mechanical work) or for body-paint technicians employed in respondent's retail body shop (for body work) shall be based on actual time spent on the vehicle and may not exceed the greater of:

(i) the sum of respondent's average hourly base rate for that category of technicians (mechanical, body-paint, or heavy truck) plus 20 percent of that average hourly base rate to cover fringe benefits, provided that such data is reflected in a file identifiable with that vehicle, or

(ii) the sum of the average hourly base rate for that category of technicians plus the average annual hourly cost for voluntary and legislated fringe benefits for that category of technicians computed in accordance with the "long form" [4] Warranty Labor Rate Request (Ford Form FCS 9716, April 1978) (Attachment A hereto), provided that such data is reflected in a file identifiable with that vehicle;

b. The cost rate for labor for other reconditioning, clean-up and preparation work performed by employees of respondent shall be based on actual time spent on the vehicle and may not exceed the base hourly wage rate for the employees involved plus 20 percent of their base hourly wage rate to cover fringe benefits, provided that such data is reflected in a file identifiable with that vehicle;

c. The cost rate for parts shall not exceed respondent's cost for the parts used as listed in the current manufacturer's catalogue.

*Provided, however,* that if the amount of respondent's payoff to the financing institution is reduced because of insured collision damage, or if respondent receives any payment for collision damage or warranty work, then the corresponding vehicle work performed shall not be an allowable expense, but if a payoff adjustment is for uninsured collision damage, the corresponding vehicle work performed shall be deemed an allowable expense.

6. amounts paid to others for labor and associated parts and supplies purchased for the repair or reconditioning of the vehicle in preparation for resale;

7. sales commissions paid for actual participation in the sale of the particular vehicle, computed at a rate no higher than for a similar, non-repossessed vehicle, but excluding all portions of commissions attributable to the selling of service contracts, warranties, financing or insurance;

8. a proportionate share of expenditures for advertisements which specifically mention the particular vehicle; [5]

9. fees and expenses paid to others for auctioning the vehicle;

10. expenses for telephone calls and postage incurred in arranging for the repossession, holding, transportation, reconditioning or resale of the vehicle; and

11. amounts respondent was contractually required to pay and did pay to reimburse the financing institution to which payoff was made, for expenses such as repossession of the vehicle or allowance for uninsured collision damage, if such expenses were not included in the payoff.

F. "Surplus" means the excess of (1) the proceeds plus any applicable rebates or credits not deducted by the financing institution, over (2) the adjusted balance, allowable expenses, and amounts paid to discharge any other security interest provided for by law. A negative (minus) amount produced by such calculation is referred to herein as a "deficiency."

G. "Diligent efforts" means that in any case where the full surplus or disclosure is not actually received by the defaulting customer within the specified time frame, respondent's efforts to effectuate such payment and/or disclosure shall meet at least the following criteria: The payment and/or disclosure are to be sent by regular mail within the specified time frame to the customer's last residence address known to respondent or available from the financing institution, with the face of the envelope (1) showing respondent's name and return address and (2) indicating that it is to be forwarded and that if there is no forwarding address it is to be returned to the sender. If the envelope is returned undelivered, the payment and/or disclosure are to be sent to the most recent of the following known addresses: the last employment address known to respondent or available from the financing institution; the address provided by the military locator service (if applicable); or the address of a co-signer, relative or other person through whom the customer may be reached. If an insurance rebate or other credit is received after a surplus payment has been sent, a further payment in the additional amount is to be sent in the same manner within 45 days of respondent's disposition of the vehicle or within 10 days of receiving the rebate, whichever [6] is later. If such a rebate is received after a prior computation had indicated there was no surplus, a second computation is to be made and any surplus sent in the same manner and within the same time limit.

H. "Best possible price" means that respondent will exercise every reasonable effort to market the vehicle for the highest possible net return for the debtor's account (in terms of proceeds less allowable expenses). For each disposition of a repossessed vehicle by respondent other than by retail sale, respondent shall retain contemporaneous documentation showing with specificity that such manner of disposition could reasonably be expected to produce a greater net return for the debtor's account than would retail sale.

II. *It is further ordered,* That respondent and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension and enforcement of motor vehicle retail credit obligations, and in connection with the disposition of repossessed motor vehicles, in or affecting commerce (as "commerce" is defined in the Federal Trade Commission Act, as amended), do forthwith cease and desist from:

A. Failing to determine the following information and to disclose or make diligent efforts to disclose such information to the defaulting customer in substantially the manner indicated on Attachment B hereto, "Resale of a Repossessed Vehicle," within forty-five (45) days of respondent's disposition of a repossessed vehicle:

1. the date, place and manner of disposition;
2. the adjusted balance, itemized to reflect the unpaid balance and all rebates and other adjustments thereto;
3. the proceeds and allowable expenses, itemized and excluding all expenses other than allowable expenses;
4. the amount of surplus or deficiency.

Provided that such disclosures need not be made where respondent can establish that no surplus resulted from the disposition, unless an attempt is made to collect a deficiency from the defaulting customer or from his or her successors or assigns. [7]

B. Failing to pay or make diligent efforts to pay each surplus in full to the defaulting customer or to his or her successors or assigns, accompanied by disclosures as required by Paragraph II A above, within forty-five (45) days of respondent's disposition of the vehicle.

C. Failing to dispose of any repossessed vehicle in a manner designed to obtain the best possible price.

D. Failing to apply promptly for any rebate or credit owing to the defaulting customer's account.

E. Taking any action to obtain or to attempt to obtain or bring about a waiver of a customer's right to a refund of surplus, except in the precise manner and under the precise circumstances contemplated by the applicable state law version of Section 9-505 of the Uniform Commercial Code. Under Section 9-505 a waiver of a customer's right to a surplus may not be sought unless respondent intends to retain the collateral for its own use for the immediate future rather than to resell the collateral in the ordinary course of business. If a waiver is sought, respondent shall not represent that by proposing the waiver it proposes to forego its right to a deficiency judgment, unless it intends to seek such a judgment should the waiver not be given.

F. Collecting or attempting to collect from a defaulting customer or from his or her successors or assigns, by any means, a deficiency in excess of either (1) the amount permissible under applicable state or federal law, or (2) the amount determined in accordance with the definitions set forth in Part I of this order,

*Provided*, that no customer's waiver of rights or failure to object to any secured party's proposal to retain the repossessed vehicle, unless procured in exact conformity with Paragraph II E, shall limit respondent's obligations under this order to account for and pay any surplus.

III. *It is further ordered*, That respondent:

A. Proceed immediately to identify, back to February 10, 1976, the existence and amount of each unpaid surplus arising from respondent's dispositions of repossessed vehicles in which respondent held or acquired a security interest or the rights or duties of a secured party at or after default. This identification shall be completed within ninety (90) days of the effective date of this order.

B. For each defaulting customer entitled to a surplus identified under Paragraph III A above but previously reported to a credit reporting agency by respondent or a representative of respondent as owing a deficiency, advise the credit reporting agency of the correct facts within 120 days of the effective date of this order. [8]

C. Endeavor in good faith, through contacts with credit reporting agencies, state licensing and employment offices, and other reasonably accessible research sources and records (including published directories), to locate each defaulting customer entitled to a surplus identified under Paragraph III A above, or the successors or assigns of such customers with respect to their surplus rights.

D. Disclose or make diligent efforts to disclose in writing to each defaulting customer, successor or assign located pursuant to Paragraph III C above, within 150 days of the effective date of this Order: (1) the same items of information specified in Paragraph II A of this order, and (2) in clear lay language, in substantially the form indicated on Attachment C hereto, "Notification Letter," the rights and remedies of such customer, successor or assign under applicable state law and under this order.

IV. *It is further ordered,* That respondent maintain the following records relating to each repossessed vehicle returned to respondent:

A. Records of payment and of efforts to disclose and pay surpluses and locate defaulting customers entitled thereto under Parts II and III of this order, including but not limited to canceled checks, returned envelopes and copies of disclosures and other communications (showing dates and manner of mailing).

B. Business records underlying each item specified in Paragraph II A of this Order, including but not limited to payroll records and warranty labor rate forms pertinent to determinations of "cost rates" of labor under Paragraph I E 5 of this order. Each such record shall be retained by respondent for at least three years and shall be available for inspection and copying by authorized representatives of the Commission.

V. *It is further ordered,* That respondent shall forthwith deliver a copy of this Order to each of its operating departments, divisions and related business enterprises, and applicable provisions thereof to all present and future personnel of [9] respondent engaged in the sale or offering for sale of motor vehicles and/or in the consummation of any extension of consumer credit or in bookkeeping, accounting or recordkeeping for respondent; and that respondent secure from each such person a signed statement acknowledging receipt of the order or provisions.

VI. *It is further ordered,* That:

A. Respondent shall, within sixty (60) days after the effective date of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

B. Respondent shall, within one hundred eighty (180) days after the effective date of this order, submit to the Commission a report demonstrating respondent's compliance with Part III of this order, including the number of repossessions and surpluses identified, together with a detailed description of respondent's manner of identifying and attempting to disclose such surpluses and of locating and attempting to locate defaulting customers entitled thereto.

C. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation and dissolution of subsidiaries, or any other corporate change which may affect compliance obligations arising out of this order.

## ATTACHMENT A

# Warranty Labor Rate Request – Standard Form

Page 1

**WARRANTY LABOR RATE POLICY**

100% of the dealer's hourly cost for the following fringe benefits for those productive technicians.

- Paid Vacations
- Pay in Lieu of Vacation
- Holiday Pay
- Sick Pay

Dealer's Portion of
- Hospital/Dental Ins.
- Retirement/Pension Plan
- Uniforms and Laundry
- Group Life Insurance

- F.I.C.A. (Social Security)
- Federal Unemployment Compensation
- State Unemployment Compensation
- Worker's Compensation Insurance
- Other Special Legislated Benefits

- Fringe benefits that are union negotiated and part of a dealer's local union contract, except fringe benefits relating to established flat rate times issued by Ford

Items not recognized as allowable fringe benefits include technician training expense and any dealer incentive program for service personnel

## INSTRUCTIONS FOR COMPLETING WAGE DATA AND FRINGE BENEFIT WORK SHEETS – Pages 2 and 3

ENTER THE FOLLOWING

COLUMN A – General job classification of each technician using appropriate code (M-Mechanical, BP-Body-Paint and HT-Heavy Truck). If calculating separate rates for each group, leave at least two lines between each group for group totals

COLUMN B – Productive line technicians including new car conditioning employees. Do not include supervision, service writers, apprentices, dispatchers, porters, lube or wash rack employees

COLUMN C – Technicians' Social Security Number

COLUMN D – Date technician employed at your dealership

COLUMN E – Technicians' hourly base pay rate. If paid on a percentage pay plan, enter his hourly rate based on the percentage split of your stated retail customer labor rate

COLUMN F – Technicians' pay plan (S-Salary, H-Hourly, FRH-Flat Rate Hourly, 50/50 Percentage Split, O-Other – Explain)

COLUMN G – Technicians' "Gross Earnings" during the last three calendar months

COLUMN H – Actual hours the technician worked during the last three calender months

COLUMN I – Technicians' normal attendance hours in a work week

COLUMN J – Number of days and the annual cost of vacation obligations your dealership incurs for the technicians. Include any pay in lieu of vacation

COLUMN K – Number of days and annual cost to your dealership of those holidays recognized by your dealership

COLUMN L – Number of sick days and the annual cost which your dealership pays to each technician. If covered by an insurance policy, show cost of insurance premium. If obligation is variable and based on actual sick days, use previous twelve months expense

COLUMN M – Annual dealership cost of hospital and dental insurance premiums extended to each technician

COLUMN N – Annual dealership cost of any life insurance program extended to each technician

COLUMN O – Annual dealership cost of retirement/pension benefits extended to each technician. Include Profit Sharing Plans only if payable upon retirement and administered by a trustee

COLUMN P – Annual dealership costs of uniforms or laundry service furnished each technician

COLUMN Q – Annual dealership costs of any other applicable union contract or voluntary fringe benefits not previously listed. Attach supporting documents for any such costs.

COLUMN R – Total voluntary fringe benefit costs for each technician (Column J through Q)

COLUMN S – Annual dealership costs of F.I.C.A. (social security) paid for each technician. This is the dealership cost portion of U.S. Government Form 941 "Employer's Quarterly Federal Tax Return"

COLUMN T – Annual dealership costs of federal unemployment compensation paid for each technician as reported on U.S. Government Form 940, "Employer's Annual Federal Unemployment Tax Return".

COLUMN U – Annual dealership costs of state unemployment compensation paid for each technician as reported on the applicable state reporting form

COLUMN V – Annual dealership costs of Workman's Compensation Insurance paid for each technician

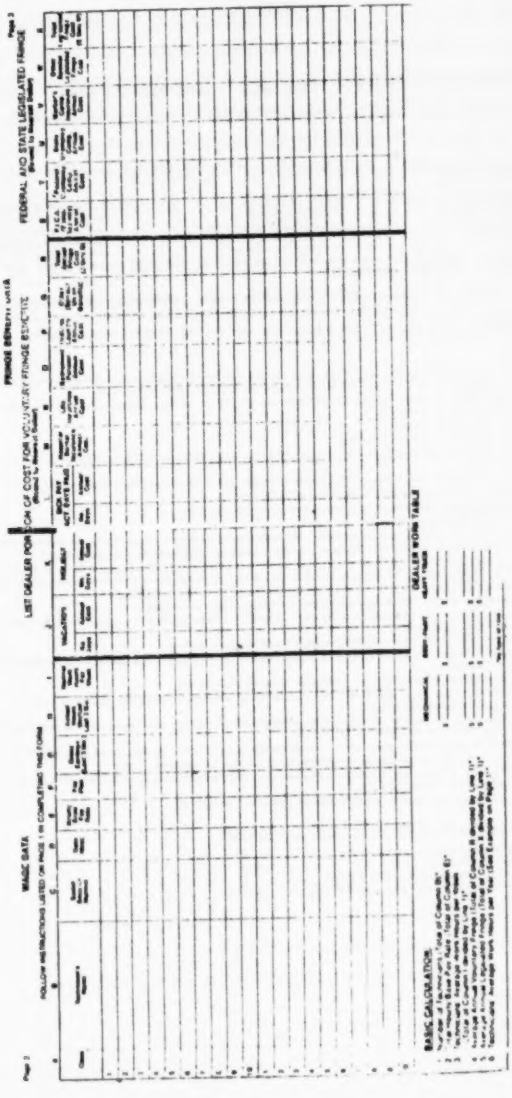
COLUMN W – Annual dealership costs of any other legislated fringe benefits paid for each technician that results in direct costs to your dealership (i.e., state disability tax is applicable in selected states)

COLUMN X – Total legislated fringe benefit costs for each technician (Column S through W)

**EXAMPLE COMPUTATION FOR LINE 6 OF BASIC CALCULATION**

| | |
|---|---|
| Average Normal Work Hours Per Week | 40 |
| Multiplied by 52 Weeks | 2080 |
| Less Legal Holidays Multiplied by 8 Hours | 48 |
| Equals Average Normal Work Hours Per Year | 2032 |

FCS 9716



Page 2

WAGE DATA

FOLLOW INSTRUCTIONS LISTED ON PAGE 1 IN COMPLETING THIS FORM

FRINGE BENEFIT DATA

LIST DEALER PORTION OF COST FOR VOLUNTARY FRINGE BENEFITS
(Round to Nearest Dollar)

FEDERAL AND STATE LEGISLATED FRINGE
(Round to Nearest Dollar)

Page 3

VACATION

HOLIDAY

SICK PAY ACT DAYS PAID

DEALER WORK TABLE

BASIC CALCULATION

| | | MECHANICAL | BODY PAINT | HEAVY TRUCK |
|---|---|---|---|---|
| 1 | Number of Technicians (Total of Column B)* | | | |
| 2 | Total Hours Base Pay Rate (Total of Column E)* | $ | $ | $ |
| 3 | Technicians' Average Work Hours per Week (Total of Column I divided by Line 1)* | | | |
| 4 | Average Annual Voluntary Fringe (Total of Column R divided by Line 1)* | $ | $ | $ |
| 5 | Average Annual Legislated Fringe (Total of Column X divided by Line 1)* | $ | $ | $ |
| 6 | Technicians' Average Work Hours per Year (See Example on Page 1)* | | | |

### ATTACHMENT B

### RESALE OF A REPOSSESSED VEHICLE

**ORIGINAL CUSTOMER**

Name: ____________________
Address: ____________________
Zip ________

Second address (if available): ________
City/state ____________________
________ Zip ________

**RESALE CUSTOMER**

Name: ____________________
Address: ____________________
City/State: ____________________
________ Zip ________
Date resold: ____________________
Place of sale: ____________________
Manner of sale: ____________________

**FINANCING INSTITUTION DATA**

Name: ____________________
Location: ____________________

**LOAN PAY-OFF**

Amount: $ ________ Check No. ________

**SURPLUS OR (DEFICIENCY) ON RESALE OF A REPOSSESSED VEHICLE**

| | | Amount | Amount |
|---|---|---|---|
| 1. Selling Price | Selling Price | $ | |
| | Trade-in adjustment: Overallowance | $( ) | |
| | Underallowance | $ | $ |
| 2. Loan Pay-Off | Loan Pay-Off to Financial Institution | $ | |
| | Less: Insurance Premium Rebates Received | $( ) | |
| | Less: Collision Insurance Claim Pmt. Rcv'd | $( ) | $ |

3. Item 1, Less Item 2 - No further calculation is required if this figure is negative unless a deficiency is sought. $____

4. Allowable Expenses

a. Dealer repo exp. $ ____
b. Legal costs $ ____
c. Title & reg. fees $ ____
d. Storage $ ____
e. Reconditioning (By Dealer)
Rate ___ Hours __ $ ____
Rate ___ Hours __ $ ____
Rate ___ Hours __ $ ____
Parts $ ____

f. Reconditioning (By others) $ ____
g. Sales Comm. $ ____
h. Advertising $ ____
i. Auction fees & expenses $ ____
j. Postage/Tel. $ ____
Total $ ____ $____

5. Item 3 less Item 4 - No further calculation is required if this figure is negative unless a deficiency is sought. $____

6. Less Reimbursement to Financing Institution for Repossession Expenses $

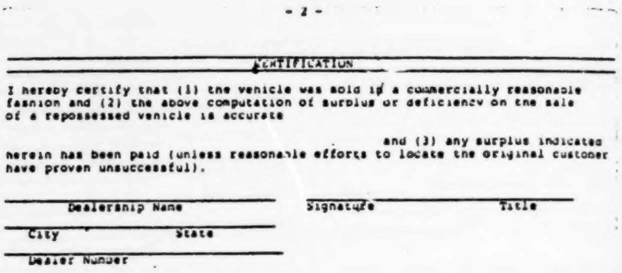
7. Less Other Liens $

8. Surplus owing to original customer - TO BE REFUNDED $

CUSTOMER REFUND Amt. $ Ck. No. Date

Vehicle Description ________ Year ________ Make ________ Model ________ Stock No. ________ Serial No.

☐ No expenses other than allowable expenses have been deducted in computing a surplus or deficiency.



- 2 -

CERTIFICATION

I hereby certify that (1) the vehicle was sold in a commercially reasonable fashion and (2) the above computation of surplus or deficiency on the sale of a repossessed vehicle is accurate and (3) any surplus indicated herein has been paid (unless reasonable efforts to locate the original customer have proven unsuccessful).

| | |
|---|---|
| Dealership Name | Signature Title |
| City State | |
| Dealer Number | |

## ATTACHMENT C

### Notification Letter

Dear ________________:

On (*insert date of resale*) we resold the (*insert year/make/model of vehicle*) that was repossessed from you on or about (*insert date of repossession*).

The resale price of your vehicle minus the amount of your debt and our expenses left a balance of (*insert amount of surplus*). The enclosed form shows how we calcuated it. WE OWE THIS MONEY TO YOU. STATE LAW AND AN ORDER OF THE FEDERAL TRADE COMMISSION REQUIRE THAT WE PAY THIS MONEY TO YOU. ALL YOU NEED TO DO IS ASK FOR IT.

If you want us to send this money to you, please say so on the enclosed carbon copy of this letter. Also, tell us where we should send the money. Please return this information in the enclosed stamped and self-addressed envelope. We will then send the money to you.

Because we are late in advising you of this money we owe you, you may have a right to sue us under state law for penalties.

SIGNED

________________________________

(Francis Ford, Inc.)

Please send the money you owe me.

________________________________

Customer

________________________________

Customer's Address

## IN THE MATTER OF

# AMERICAN CONSUMER, INC., ET AL.

## CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2991. Complaint, Sept. 24, 1979 — Decision, Sept. 24, 1979*

This consent order, among other things, requires two Philadelphia, Pa. firms engaged in the advertising, sale and distribution of a product known, among other names, as the G.R. Valve, to cease representing, without reliable substantiation, that installing the G.R. Valve or any other air-bleed automobile retrofit device in a motor vehicle will result in fuel economy improvement. Respondents are also barred from using any endorsement or testimonial which has not been properly authorized; and prohibited from misrepresenting a product endorser's expertise in a field of knowledge and the conclusions of tests or surveys pertaining to energy consumption or energy saving characteristics of automobile retrofit devices. Additionally, the order requires that product advertising disclose any material connection that may exist between respondents and a product endorser.

## *Appearances*

For the Commission: *Laurence M. Kahn.*

For the respondents: *Bruce Lev,* Westport, Conn.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Panacolor, Inc., a corporation, and American Consumer, Inc., a corporation, hereinafter referred to as "respondents," having violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Panacolor, Inc. is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Caroline and Charter Roads, Philadelphia, Pennsylvania. Respondent American Consumer, Inc. is a corporation organized and doing business under the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at Caroline and Charter Roads, Philadelphia, Pennsylvania. American Consumer, Inc. is a wholly-owned subsidiary of Panacolor, Inc. and respondent Panacolor, Inc. dominates and controls, furnishes the means, instrumentalities, services, and facilities for, condones and approves, and accepts all the pecuniary and other benefits flowing from the acts, practices and policies of respondent American Consumer, Inc. and its employees.

Both of said respondents have cooperated and acted together in the performance of the acts and practices hereinafter alleged.

PAR. 2. Respondents have been and are now engaged in the marketing and advertising of a product variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names (hereinafter "product"), which product is advertised to be a means of improving fuel economy in automobiles. Said product is an automobile retrofit device as "automobile retrofit device" is defined in § 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011. Respondents, in connection with the marketing of said product, have disseminated, published and distributed and now disseminate, publish and distribute advertisements and promotional material for the purpose of promoting the sale of said product.

PAR. 3. One of the means respondents have used to market and advertise said product has been to use a celebrity endorsement. Gordon Cooper has aided the promotion of said product by providing such endorsement. This endorsement appeared in disseminated advertisements and other sales promotional materials for said product. In return for his role in the marketing of said product, Gordon Cooper has received remuneration from the manufacturer and distributor of the product. The amount of such remuneration was and is dependent upon the number of products sold.

PAR. 4. In the course and conduct of their said businesses, the respondents have disseminated and caused the dissemination of certain advertisements for said product through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, the insertion of advertisements in magazines and newspapers with national circulations; and have disseminated and caused the dissemination of advertisements for said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce.

PAR. 5. Among the advertisements and other sales promotional materials are the materials identified as Exhibits A-G which are attached hereto.

PAR. 6. Through the use of advertisements referred to in Paragraph Five and other advertisements and sales promotional materials, respondents represented and now represent, directly or by implication, that

a. the G.R. Valve when installed in a typical automobile will significantly improve fuel economy;

b. a typical driver can ordinarily obtain, under normal driving conditions, a fuel economy improvement which will approximate or equal seven miles per gallon when the G.R. Valve is installed in his/her automobile;

c. competent scientific tests for fuel economy of automobiles in which the G.R. Valve has been installed prove the fuel economy claims made for the G.R. Valve;

d. Gordon Cooper bears only the relationship of endorser to the marketing of said product;

e. Gordon Cooper has the education, training, and knowledge necessary to qualify him as an expert in the field of automotive engineering;

f. results of consumer usage, as evidenced by consumer testimonials, prove that the G.R. Valve significantly improves fuel economy.

PAR. 7. At the time respondents made the representations alleged in Paragraph Six of the complaint, they did not possess and rely upon a reasonable basis for such representations. Therefore, said advertisements are deceptive, misleading, or unfair.

PAR. 8. In truth and in fact, contrary to respondents' representations in Paragraph Six:

a. the G.R. Valve when installed in a typical automobile will not significantly improve fuel economy;

b. a typical driver cannot ordinarily obtain under normal driving conditions a fuel economy improvement which will approximate or equal seven miles per gallon when the G.R. Valve is installed in his/her automobile;

c. no competent scientific tests for fuel economy of automobiles in which the G.R. Valve has been installed prove the fuel economy claims made for the G.R. Valve;

d. Gordon Cooper bears not only the relationship of endorser to the marketing of said product, but also bears the relationship of principal to the marketing of said product which fact is not disclosed and is material;

e. Gordon Cooper does not have the education, training, and knowledge to qualify him as an expert in the field of automotive engineering;

f. results of consumer usage, as evidenced by consumer testimonials, do not prove that the G.R. Valve significantly improves fuel economy.

Therefore, said advertisement is deceptive, misleading, or unfair.

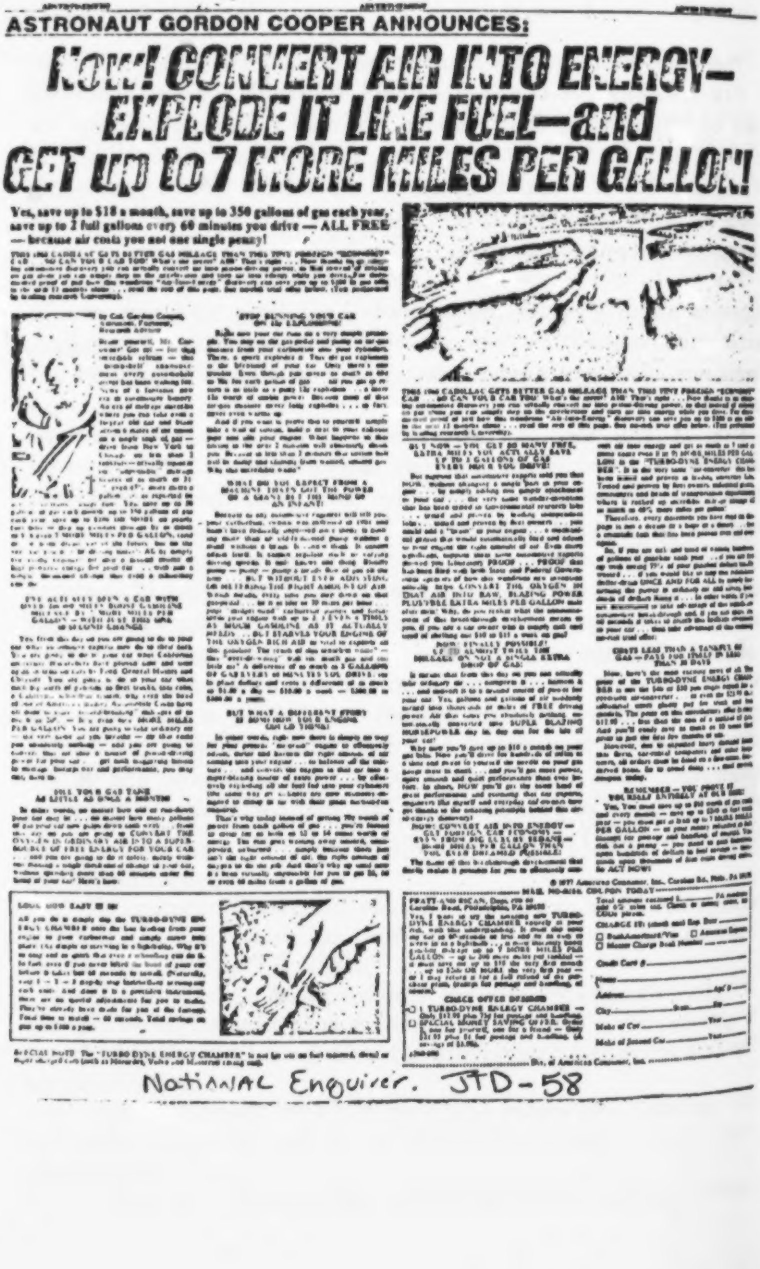
PAR. 9. Exhibits A-G and other advertisements represent, directly and by implication, that respondents had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph Six. In truth and in fact, respondents had no reasonable basis for such representations. Therefore, said advertisements are deceptive, misleading, or unfair.

PAR. 10. In the course and conduct of their businesses, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of automobile retrofit devices.

PAR. 11. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of products sold by respondents by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, including the dissemination of the aforesaid false advertisement, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

Ex. A

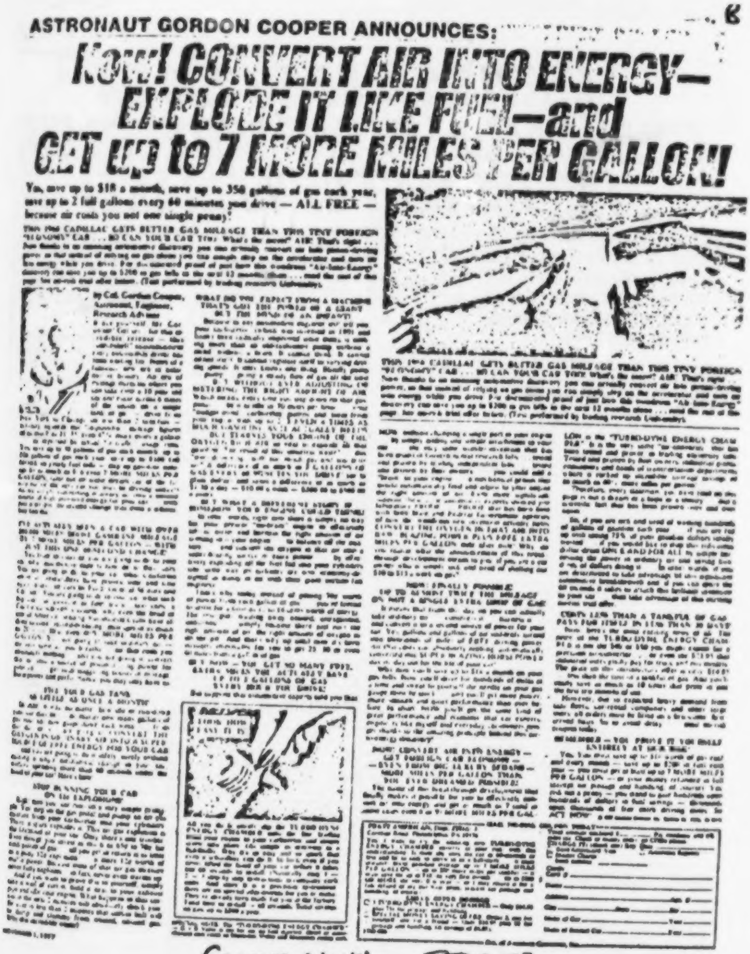


ASTRONAUT GORDON COOPER ANNOUNCES:

Now! CONVERT AIR INTO ENERGY—EXPLODE IT LIKE FUEL—and GET up to 7 MORE MILES PER GALLON!

Yes, save up to $18 a month, save up to 350 gallons of gas each year, save up to 2 full gallons every 60 minutes you drive — ALL FREE — because air costs you not one single penny!

National Enquirer. JTD-58



6

ASTRONAUT GORDON COOPER ANNOUNCES:

Now! CONVERT AIR INTO ENERGY—EXPLODE IT LIKE FUEL—and GET up to 7 MORE MILES PER GALLON!

Yes, save up to $18 a month, save up to 350 gallons of gas each year, save up to 2 full gallons every 60 minutes you drive — ALL FREE — because air costs you not one single penny!

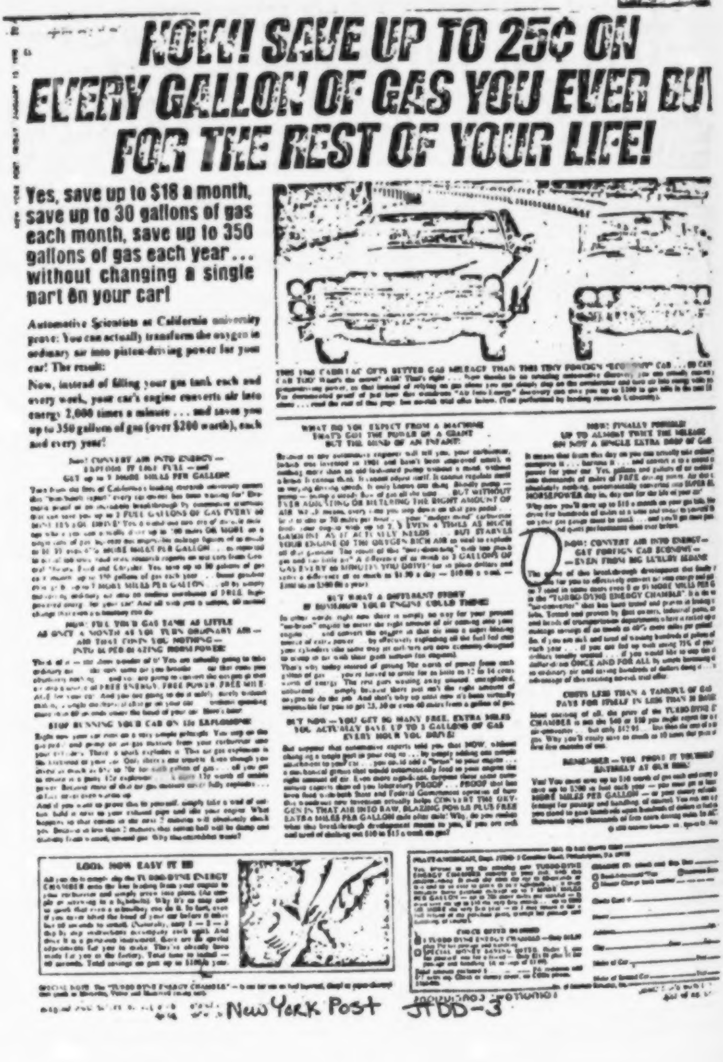
THIS 1966 CADILLAC GETS BETTER GAS MILEAGE THAN THIS TINY FOREIGN "ECONOMY" CAR ... SO CAN YOUR CAR TOO. What's the secret? AIR! That's right ...

by Col. Gordon Cooper, Astronaut, Engineer, Research Advisor

WHAT DO YOU EXPECT FROM A MACHINE THAT'S GOT THE POWER OF A GIANT BUT THE MIND OF AN INFANT?

Cappers Weekly JTDA-3

Ex. C



NOW! SAVE UP TO 25¢ ON
EVERY GALLON OF GAS YOU EVER BU
FOR THE REST OF YOUR LIFE!

**Yes, save up to $18 a month, save up to 30 gallons of gas each month, save up to 350 gallons of gas each year . . . without changing a single part on your car!**

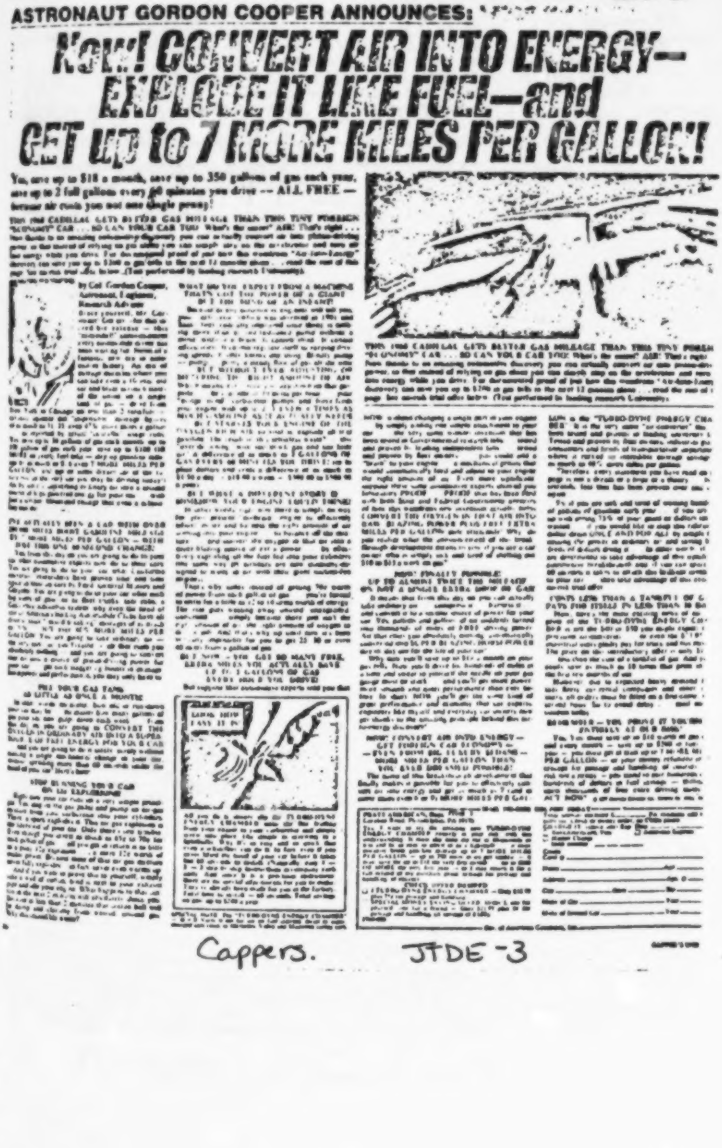
Automotive Scientists at California university prove: You can actually transform the oxygen in ordinary air into piston-driving power for your car! The result:

Now, instead of filling your gas tank each and every week, your car's engine converts air into energy 2,000 times a minute . . . and saves you up to 350 gallons of gas (over $200 worth), each and every year!

LOOK HOW EASY IT IS

New York Post JTDD-3

Ex. D



ASTRONAUT GORDON COOPER ANNOUNCES:

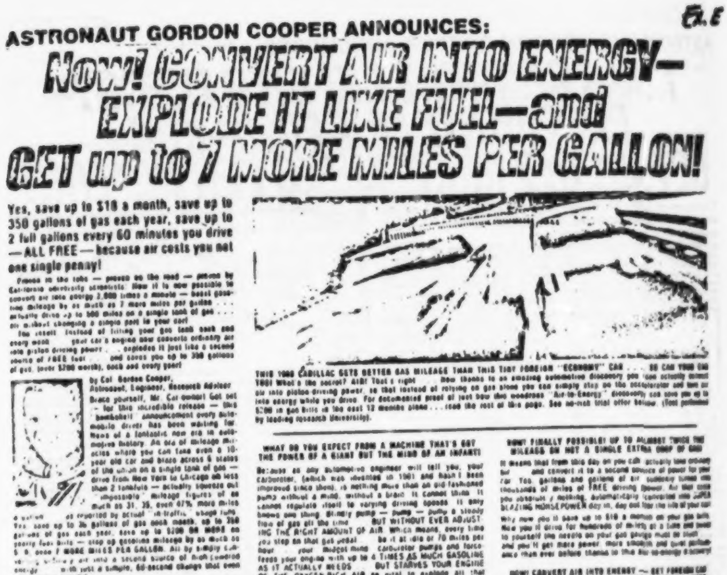
Now! CONVERT AIR INTO ENERGY— EXPLODE IT LIKE FUEL—and GET up to 7 MORE MILES PER GALLON!

Yes, save up to $18 a month, save up to 350 gallons of gas each year, save up to 2 full gallons every 60 minutes you drive — ALL FREE — because air costs you not one single penny!

by Col. Gordon Cooper, Astronaut, Engineer, Research Advisor

Cappers. JTDE -3

Ex. E



ASTRONAUT GORDON COOPER ANNOUNCES:

Now! CONVERT AIR INTO ENERGY— EXPLODE IT LIKE FUEL—and GET up to 7 MORE MILES PER GALLON!

Yes, save up to $18 a month, save up to 350 gallons of gas each year, save up to 2 full gallons every 60 minutes you drive —ALL FREE—because air costs you not one single penny!

by Col. Gordon Cooper,
Astronaut, Engineer, Research Advisor

WHAT DO YOU EXPECT FROM A MACHINE THAT'S GOT THE POWER OF A GIANT BUT THE MIND OF AN INFANT!

BUT WHAT A DIFFERENT STORY IF SOMEHOW YOUR ENGINE COULD THINK!

BUT NOW — YOU GET SO MANY FREE, EXTRA MILES YOU CAN ACTUALLY SAVE UP TO 2 GALLONS OF GAS EVERY HOUR YOU DRIVE!

COSTS LESS THAN A TANKFUL OF GAS — PAYS FOR ITSELF IN LESS THAN 30 DAYS!

REMEMBER — YOU PROVE IT YOURSELF ENTIRELY AT OUR RISK!

LOOK HOW EASY IT IS!

© 1977 American Consumer, Inc., Caroline Road, Phila., PA 19176

PRATT AMERICAN, Dept. JTDF-19
Caroline Road, Philadelphia, PA 19176

CHECK OFFER DESIRED

☐ 1 TURBO-DYNE ENERGY CHAMBER — Only $12.95 plus 75¢ for postage and handling.

☐ SPECIAL MONEY SAVING OFFER.

Amount enclosed $______

☐ BankAmericard/Visa ☐ American Express

☐ Master Charge Bank Number ______

Credit Card # ______

Name ______

Address ______ Apt. # ______

City ______ State ______ Zip ______

Make of Car ______ Year ______

Make of Second Car ______ Year ______

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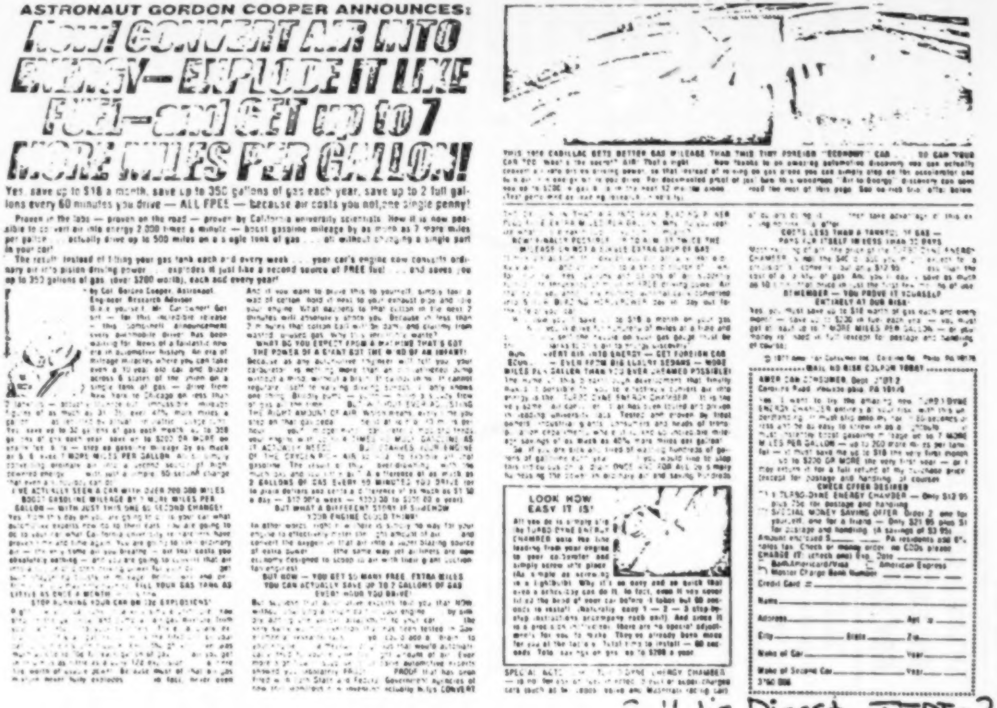
THE ELKS MAGAZINE FEBRUARY 1978

Elks Magazine JTDF-19

E. F



ASTRONAUT GORDON COOPER ANNOUNCES:

NOW! CONVERT AIR INTO ENERGY—EXPLODE IT LIKE FUEL—and GET up to 7 MORE MILES PER GALLON!

Yes, save up to $18 a month, save up to 350 gallons of gas each year, save up to 2 full gallons every 60 minutes you drive — ALL FREE — because air costs you not one single penny!

Proven in the labs — proven on the road — proven by California university scientists. Now it is now possible to convert air into energy 2,000 times a minute — boost gasoline mileage by as much as 7 more miles per gallon . . . actually drive up to 500 miles on a single tank of gas . . . all without changing a single part in your car!

The result: Instead of filling your gas tank each and every week . . . your car's engine now converts ordinary air into piston driving power . . . explodes it just like a second source of FREE fuel . . . and saves you up to 350 gallons of gas (over $200 worth), each and every year!

by Col. Gordon Cooper, Astronaut, Engineer, Research Advisor

And if you want to prove this to yourself, simply take a wad of cotton, hold it next to your exhaust pipe and idle your engine. What happens to that cotton in the next 2 minutes will absolutely shock you. Because in less than 2 minutes that cotton ball will be damp and clammy from wasted, unused gas. Why this incredible waste?

WHAT DO YOU EXPECT FROM A MACHINE THAT'S GOT THE POWER OF A GIANT BUT THE MIND OF AN INFANT!

I'VE ACTUALLY SEEN A CAR WITH OVER 200,000 MILES BOOST GASOLINE MILEAGE BY 7 MORE MILES PER GALLON — WITH JUST THIS ONE 60 SECOND CHANGE!

BUT WHAT A DIFFERENT STORY IF SOMEHOW YOUR ENGINE COULD THINK!

STOP BURNING YOUR CAR ON 1/2 EXPLOSIONS!

BUT NOW — YOU GET SO MANY FREE, EXTRA MILES YOU CAN ACTUALLY SAVE UP TO 2 GALLONS OF GAS EVERY HOUR YOU DRIVE!

THIS 1978 CADILLAC GETS BETTER GAS MILEAGE THAN THIS TINY FOREIGN "ECONOMY" CAR . . . SO CAN YOUR CAR . . .

CONVERT AIR INTO ENERGY — GET FOREIGN CAR ECONOMY — EVEN FROM BIG LUXURY SEDANS — MORE MILES PER GALLON THAN YOU EVER DREAMED POSSIBLE!

LOOK HOW EASY IT IS!

SPECIAL NOTE: THE TURBO-DYNE ENERGY CHAMBER

COSTS LESS THAN A TANKFUL OF GAS — PAYS FOR ITSELF IN LESS THAN 30 DAYS

REMEMBER — YOU PROVE IT YOURSELF ENTIRELY AT OUR RISK

Yes, you must save up to $18 worth of gas each and every month — save up to $200 in fuel each year — you must get at least up to 7 MORE MILES PER GALLON — or your money refunded in full (except for postage and handling, of course).

© 1977 American Consumer Inc., Caroline Rd., Phila. Pa 19176

MAIL NO RISK COUPON TODAY

AMERICAN CONSUMER, Dept. JT012
Caroline Road, Philadelphia, PA 19176

Yes, I want to try the amazing new TURBO-DYNE ENERGY CHAMBER entirely at your risk, with this understanding: it must slip onto my car in 60 seconds or less and be as easy to screw in as a lightbulb . . . it must instantly boost gasoline mileage up to 7 MORE MILES PER GALLON — up to 200 more miles per tankful — it must save me up to $18 the very first month . . . up to $200 OR MORE the very first year — or I may return it for a full refund of my purchase price (except for postage and handling, of course).

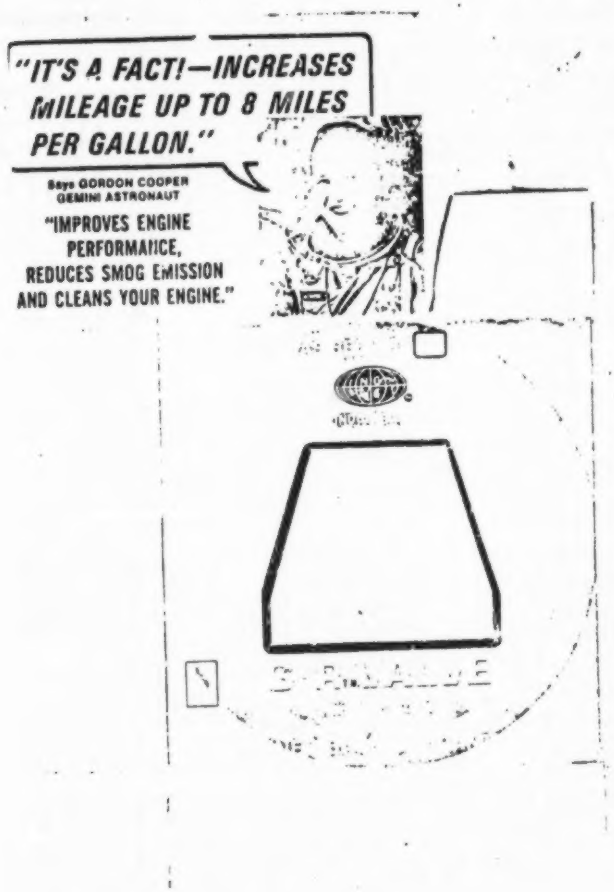
CHECK OFFER DESIRED

☐ 1 TURBO-DYNE ENERGY CHAMBER — Only $12.95 plus 75¢ for postage and handling.
☐ SPECIAL MONEY SAVING OFFER: Order 2, one for yourself, one for a friend — Only $21.95 plus $1 for postage and handling. (A savings of $3.95)

Amount enclosed $______ PA residents add 6% sales tax. Check or money order, no CODs please.
CHARGE IT: (check one) Exp. Date ______
☐ BankAmericard/Visa ☐ American Express
☐ Master Charge Bank Number ______
Credit Card # ______
Name ______
Address ______ Apt. # ______
City ______ State ______ Zip ______
Make of Car ______ Year ______
Make of Second Car ______ Year ______
3190 006

Digest . JTDT-2

Ex G



"IT'S A FACT!—INCREASES MILEAGE UP TO 8 MILES PER GALLON."

Says GORDON COOPER
GEMINI ASTRONAUT

"IMPROVES ENGINE PERFORMANCE,
REDUCES SMOG EMISSION
AND CLEANS YOUR ENGINE."

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent American Consumer, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business at Caroline and Charter Roads, Philadelphia, Pennsylvania. Respondent Panacolor, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Caroline and Charter Roads, Philadelphia, Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### PART I

*It is ordered*, That respondents Panacolor, Inc., a corporation, and American Consumer, Inc., a corporation, their successors and assigns, either jointly or individually, and their officers, agents, representatives and employees directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale and distribution of the automobile retrofit device, variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names, or of any other air-bleed automobile retrofit device, as "automobile retrofit device" is defined in §301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that the automobile retrofit device variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names, or any other air-bleed automobile retrofit device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle. For purposes of Part I of this order, an "air-bleed automobile retrofit device" shall be defined as an automobile retrofit device which, in its operation, admits additional air into the engine intake system either at or downstream of the fuel metering system of the vehicle's engine.

## PART II

*It is further ordered*, That respondents, their successors and assigns, either jointly or individually, and the respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile retrofit device as "automobile retrofit device" is defined in §301 of the Energy Policy and Conservation Act of 1975, U.S.C. 2011, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle unless (1) such representation is true, and (2) at the time of making such representation, respondents possess and rely upon written results of dynamometer testing of such device according to the then current urban and highway driving test cycles established by the Environmental Protection Agency and these results substantiate such representation, and (3) where the representation of the fuel economy improvement is expressed in miles per gallon or percentage, all advertising and other sales promotional materials which contain the representation expressed in such a way must also contain, in a way that clearly and conspicuously discloses it, the following disclaimer: "REMINDER: Your actual fuel saving may be less. It depends on the kind of driving you do, how you drive and the condition of your car."

## PART III

*It is further ordered,* That respondents, their successors and assigns, either jointly or individually, and their employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. representing, directly or by implication, that an endorser of such product has expertise in a field of knowledge unless the endorser has the education, training, and knowledge necessary to be qualified as an expert in that field;

b. using, publishing, or referring to any testimonial or endorsement from any person or organization for such product unless, within the twelve (12) months immediately preceding any such use, publication, or reference, respondents have obtained from that person or organization an express written and dated authorization for such use, publication, or reference;

c. failing to disclose a material connection, where one exists, between an endorser of such product and any of the respondents. A "material" connection shall mean, for purposes of this order, any direct or indirect economic interest in the sale of the product which is the subject of this endorsement other than (1) a fixed sum payment for the endorsement, all of which is paid before any advertisement containing the endorsement is disseminated, or (2) payment for the endorsement which is directly related to the extent of the dissemination of advertising containing it;

d. misrepresenting, in any manner the purpose, content, or conclusion of any test or survey pertaining to such product;

e. misrepresenting, in any manner and for any product, either consumer preference for such product or the results obtained by consumer usage of such product;

f. misrepresenting in any manner the performance, efficacy, capacity, or usefulness of such product;

g. representing, directly or by implication, any performance characteristic of such product unless at the time of making the representation respondents possessed and reasonably relied upon competent and reliable scientific evidence which substantiates such representation.

## PART IV

*It is further ordered,* That respondents, their successors and assigns, either jointly or individually, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records which may be inspected by Commission staff members upon reasonable notice: copies of and dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials; documents authorizing use, publication or reference to testimonials or endorsements; records of the number of pieces of direct mail advertising sent in each direct mail advertisement dissemination; documents which substantiate or which contradict any claim which is a part of the advertising, sales promotional material, or post-purchase materials disseminated by respondents directly or through any business entity. Such documentation shall be retained by respondents for a period of three (3) years from the last date any such advertising, sales promotional, or post-purchase materials were disseminated.

## PART V

*It is further ordered,* That respondents shall forthwith distribute a copy of this order to each of their operating divisions and to each of their officers, agents, representatives, or employees who are engaged in the preparation and placement of advertisements.

## PART VI

*It is further ordered,* That respondents notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondents such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

## PART VII

*It is further ordered,* That the respondents shall, within sixty (60) days after service upon them of this order, and also annually thereafter for three (3) years, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## IN THE MATTER OF

# ADMARKETING, INC.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2992. Complaint, Sept. 25, 1979 — Decision, Sept. 25, 1979*

This consent order, among other things, requires a Beverly Hills, Calif. advertising agency engaged in the advertising and sale of a product known, among other names, as the G.R. Valve to cease from representing, without reliable substantiation, that installing the G.R. Valve or any substantially similar automobile retrofit device in a motor vehicle will result in fuel economy improvement. The firm is further prohibited from misrepresenting the performance, efficacy or usefulness of any energy consumption or energy saving characteristic of an automobile retrofit device; or the purpose, contents or conclusions of tests or surveys relating to such characteristic. The order additionally requires respondent to identify and present to its client, in writing, every representation contained in each advertisement which pertains to an energy consumption or energy saving characteristic of the advertised product.

## *Appearances*

For the Commission: *Laurence M. Kahn.*

For the respondent: *Ronald J. Mandell,* Los Angeles, Calif.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Admarketing, Inc. a corporation, hereinafter referred to as "respondent," having violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Admarketing, Inc. is a corporation organized and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 8383 Wilshire Boulevard, Beverly Hills, California.

PAR. 2. Respondent, as advertising agency for C.I. Energy Development, Inc., has been engaged in the advertising of a product variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names, (hereinafter "product") which product is advertised to be a means of improving fuel economy in automobiles

Said product is an automobile retrofit device as "automobile retrofit device" is defined in § 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011. Respondent, in connection with the advertising of said product has disseminated, published and distributed advertisements and promotional material for the purpose of promoting the sale of said product.

PAR. 3. In the course and conduct of its said business, respondent has disseminated and caused the dissemination of a certain advertisement for said product by means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including placement of this advertisement through television stations with sufficient power to broadcast across state lines and into the District of Columbia; and has disseminated and caused the dissemination of this advertisement for said product in the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce.

PAR. 4. Respondent's advertisement is identified as Exhibit A and attached hereto.

PAR. 5. Through the use of the advertisement referred to in Paragraph four, respondent represented directly or by implication that

a. the G.R. Valve when installed in a typical automobile will significantly improve fuel economy;

b. a typical driver can ordinarily obtain, under normal driving conditions, a fuel economy improvement which will approximate or equal twenty-eight per cent when the G.R. Valve is installed in his/her automobile;

c. competent scientific tests for fuel economy of automobiles in which the G.R. Valve has been installed prove the fuel economy claims made for the G.R. Valve;

PAR. 6. At the time respondent made the representations alleged in Paragraph five of the complaint, it did not possess and rely upon a reasonable basis for such representations. Therefore, said advertisement is deceptive, misleading, or unfair.

PAR. 7. In truth and in fact, contrary to respondent's representations in Paragraph five:

a. the G.R. Valve when installed in a typical automobile will not significantly improve fuel economy;

b. a typical driver cannot ordinarily obtain under normal driving conditions a fuel economy improvement which will approximate or equal twenty-eight per cent when the G.R. Valve is installed in his/her automobile;

c. no competent scientific tests for fuel economy of automobiles in which the G.R. Valve has been installed prove the fuel economy claims made for the G.R. Valve;

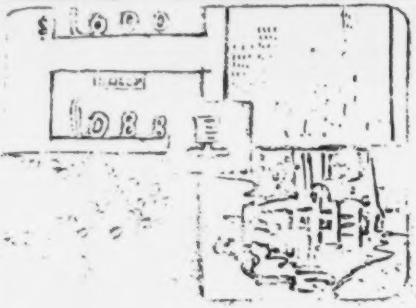
Therefore, said advertisement is deceptive, misleading, or unfair.

PAR. 8. Exhibit A represents, directly and by implication, that respondent had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph five. In truth and in fact, respondent had no reasonable basis for such representations. Therefore, said advertisement is deceptive, misleading, or unfair.

PAR. 9. In the course and conduct of its business, and at all times mentioned herein, respondent has been and now is, in substantial competition in or affecting commerce with other advertising agencies.

PAR. 10. The use by respondent of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisement has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of products advertised by respondent and sold by C.I. Energy Development, Inc. by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondent, as herein alleged, including the dissemination of the aforesaid false advertisement, were and are all to the prejudice and injury of the public and of respondent's competitors; and constituted and now constitute unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

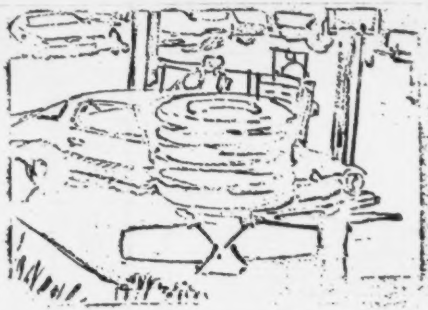


IN THESE DAYS OF RISING GAS PRICES

AND REDUCED AUTOMOTIVE PERFORMANCE,

WE INTRODUCE THE G.R. VALVE.

1 A/B



TO PUT THE GRRRRRR IN YOUR CAR. CARS

TESTED WITH G.R. VALVES IMPROVE THEIR

GAS MILEAGE

2 A/B

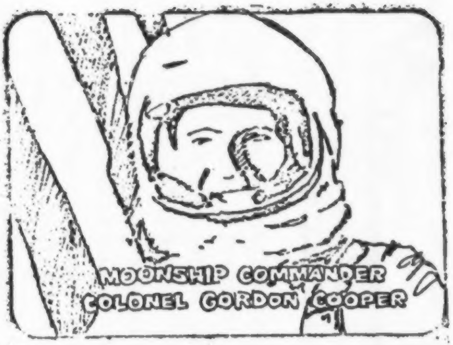
A/

Ex. A

(frame "B only)

SPEC 2

4


MOONSHIP COMMANDER
COLONEL GORDON COOPER

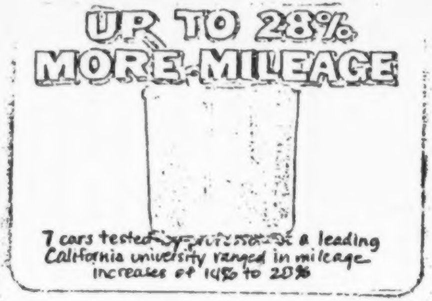
AND IT'S A FACT. THE G.R. VALVE IS A GO SYSTEM.

4A

UP TO 28%

5 A (B)

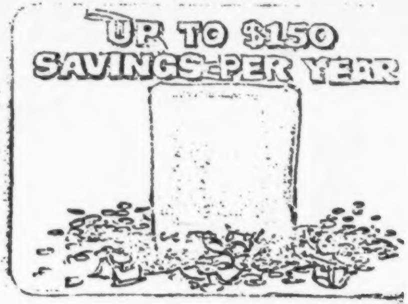
SPEC 2
10


UP TO 28%
MORE MILEAGE
7 cars tested by professors at a leading California university ranged in mileage increases of 14% to 28%

THAT'S RIGHT. GET UP TO 28% MORE

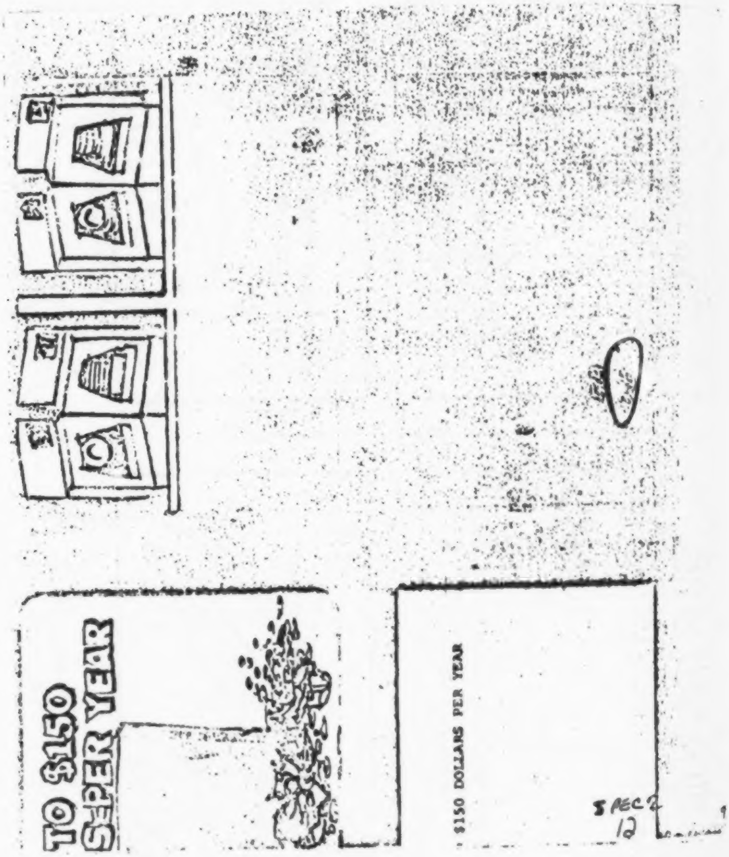
MILEAGE

4B


UP TO $150
SAVINGS PER YEAR

AND SAVE UP TO $150 DOLLARS PER YEAR

5B


TO $150
S PER YEAR
$150 DOLLARS PER YEAR

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Admarketing, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 8383 Wilshire Boulevard, Beverly Hills, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

### PART I

*It is ordered,* That respondent Admarketing, Inc., a corporation, its successors and assigns, either jointly or individually, and its officers, agents, representatives and employees directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of the automobile retrofit device, variously known as the G.R. Valve, the Turbo-

Dyne Energy Chamber, and by other names, or of any other automobile retrofit device, as "automobile retrofit device" is defined in § 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, having substantially similar properties, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that the automobile retrofit device variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names, or any other automobile retrofit device having substantially similar properties, will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle.

## PART II

*It is further ordered,* That respondent, its successors and assigns, either jointly or individually, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. representing, directly or by implication, any energy consumption or energy saving characteristic of such product unless, at the time of making the representation, respondent has exercised due care to assure itself that competent scientific evidence substantiates the representation;

b. misrepresenting in any manner the purpose, content, or conclusion of any test or survey pertaining to any energy consumption or energy saving characteristic of such product;

c. misrepresenting in any manner the performance, efficacy, capacity, or usefulness of any energy consumption or energy saving characteristic of such product;

d. failing to identify in writing and to present to its client, for each advertisement, any direct and any implied representations contained therein pertaining to any energy consumption or energy saving characteristic of such product.

## PART III

*It is further ordered,* That respondent, its successors and assigns, either jointly or individually, and its officers, agents, representatives and employees directly or through any connection with the advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records which may be inspected by Commission staff members upon fifteen (15) days' notice: copies of and dissemination schedules for all advertisements, sales promotional materials and post-purchase materials; documents demonstrating compliance with Part II(d) of this order; documents which substantiate or which contradict any claim, made directly or by implication concerning any energy consumption or energy saving characteristic of such product, which is a part of the advertising, sales promotional material, or post-purchase materials disseminated by respondent directly or through any business entity. Such records shall be retained by respondent for a period of three (3) years from the last date any such advertising, sales promotional or post-purchase materials were disseminated.

## PART IV

*It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees who are engaged in the preparation and placement of advertisements.

## PART V

*It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

## PART VI

*It is further ordered,* That the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

## IN THE MATTER OF

## LEROY GORDON COOPER, JR. a/k/a GORDON COOPER

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2993. Complaint, Sept. 25, 1979 — Decision, Sept. 25, 1979*

This consent order, among other things, requires an individual from Encino, Calif. engaged in advertising, selling and endorsing a product known, among other names, as the G.R. Valve, to cease representing, without substantiation, that installing the G.R. Valve or any substantially similar automobile retrofit device in a motor vehicle will result in fuel economy improvement. The order further prohibits respondent from using or providing any endorsement or testimonial which has not been properly authorized or which contains unsubstantiated representations; and bars him from misrepresenting an endorser's expertise in a field of knowledge, and the conclusions of tests or surveys relating to the performance of a product or service. Additionally, the order requires that advertising disclose any material economic interest in the sale of a product or service that may exist between endorser and marketer of such product or service.

### *Appearances*

For the Commission: *Laurence M. Kahn.*

For the respondent: *Murray Lertzman,* Beverly Hills, Calif.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Gordon Cooper, an individual, hereinafter referred to as "respondent," having violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Gordon Cooper is an individual whose address is 5011 Woodley Ave., Encino, California and is a former N.A.S.A. astronaut.

PAR. 2. Respondent, in conjunction with Dan Mar Products, Inc., a California corporation, RR International, Inc., a Delaware corporation, C.I. Energy Development, Inc., a California corporation, and American Consumer, Inc., a Pennsylvania corporation, has been and is now engaged in the marketing and advertising of a product variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names, (hereinafter "product") which product is advertised to be a means of improving fuel economy in automobiles. Said product is an automobile retrofit device as "automobile retrofit device" is defined in § 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011. Respondent, in conjunction with the other above-named parties and in connection with the marketing of said product, has disseminated, published and distributed and now disseminates, publishes and distributes advertisements and promotional material for the purpose of promoting the sale of said product.

PAR. 3. One of the means that has been used to market and advertise said product has been to use a celebrity endorsement of said product. Respondent has aided the promotion of said product by providing such endorsement. This endorsement appeared in disseminated advertisements and other sales promotional materials for said product. In return for his role in the marketing of said product, respondent has received remuneration from the manufacturer and distributor of the product. The amount of such remuneration was and is dependent upon the number of products sold.

PAR. 4. In the course and conduct of his said business in conjunction with the other parties named in Paragraph Two, respondent has disseminated and caused the dissemination of certain advertisements for said product through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, the insertion of advertisements in magazines and newspapers with national circulations and the placement of advertisements through television stations with sufficient power to broadcast across state lines and into the District of Columbia; and has disseminated and caused the dissemination of advertisements for said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce.

PAR. 5. Among the advertisements and other sales promotional materials are the materials identified as Exhibits A-H which are attached hereto.

PAR. 6. Through the use of advertisements referred to in Paragraph Five and other advertisements and sales promotional materials, respondent, in conjunction with the other parties named in Paragraph Two, represented and now represents, directly or by implication, that

a. the G.R. Valve when installed in a typical automobile will significantly improve fuel economy;

b. a typical driver can ordinarily obtain, under normal driving conditions, a fuel economy improvement which will approximate or equal seven miles per gallon when the G.R. Valve is installed in his/her automobile;

c. competent scientific tests for fuel economy of automobiles in which the G.R. Valve has been installed prove the fuel economy claims made for the G.R. Valve;

d. Gordon Cooper bears only the relationship of endorser to the marketing of said product;

e. Gordon Cooper has the education, training, and knowledge necessary to qualify him as an expert in the field of automotive engineering;

f. results of consumer usage, as evidenced by consumer testimonials, prove that the G.R. Valve significantly improves fuel economy.

PAR. 7. At the time respondent, in conjunction with the other parties named in Paragraph Two, made the representations alleged in Paragraph Six of the complaint, he did not possess and rely upon a reasonable basis for such representations. Therefore, said advertisements are deceptive, misleading, or unfair.

PAR. 8. In truth and in fact, contrary to the representations in Paragraph Six:

a. the G.R. Valve when installed in a typical automobile will not significantly improve fuel economy;

b. a typical driver cannot ordinarily obtain under normal driving conditions a fuel economy improvement which will approximate or equal seven miles per gallon when the G.R. Valve is installed in his/her automobile;

c. no competent scientific tests for fuel economy of automobiles in which the G.R. Valve has been installed prove the fuel economy claims made for the G.R. Valve;

d. Gordon Cooper bears not only the relationship of endorser to the marketing of said product, but also bears the relationship of principal to the marketing of said product which fact is not disclosed and is material;

e. Gordon Cooper does not have the education, training, and knowledge to qualify him as an expert in the field of automotive engineering;

f. results of consumer usage, as evidenced by consumer testimonials, do not prove that the G.R. Valve significantly improves fuel economy.

Therefore, said advertisements are deceptive, misleading, or unfair.

Par. 9. Exhibits A–H and other advertisements represent, directly and by implication, that respondent had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph Six. In truth and in fact, respondent had no reasonable basis for such representations. Therefore, said advertisements are deceptive, misleading, or unfair.

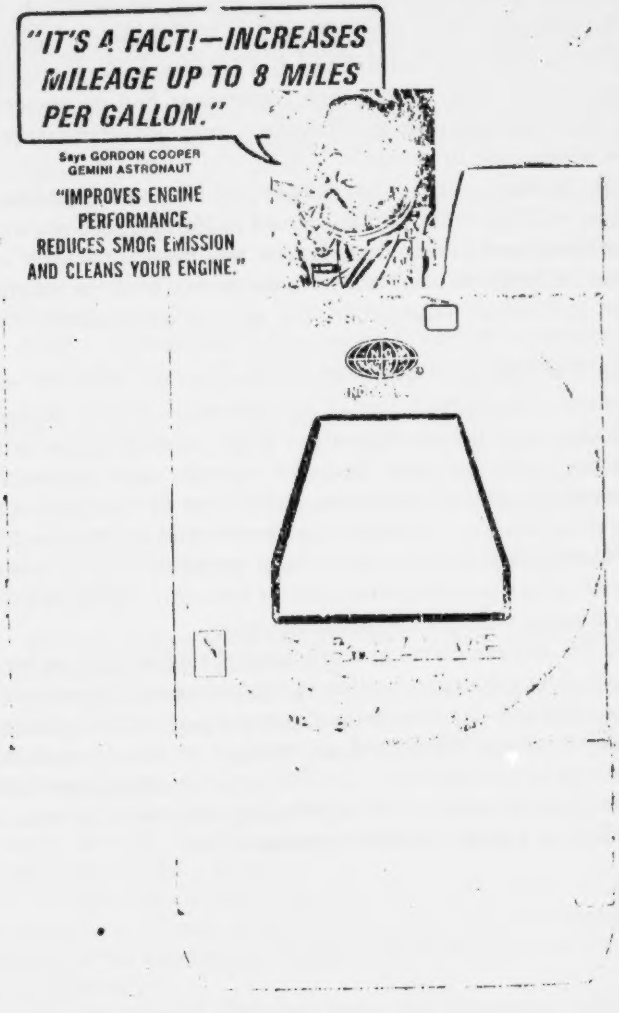
Par. 10. In the course and conduct of his said business, in conjunction with the other parties named in Paragraph Two, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of automobile retrofit devices.

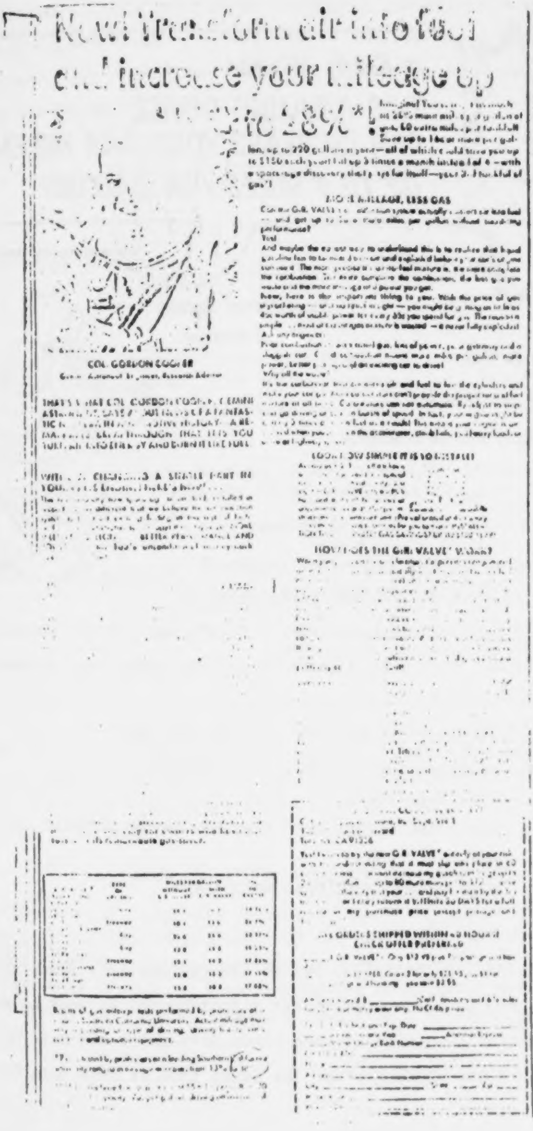
Par. 11. The use by respondent, in conjunction with the other parties named in Paragraph Two, of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of products sold by respondent, in conjunction with the other parties named in Paragraph Two, by reason of said erroneous and mistaken belief.

Par. 12. The aforesaid acts and practices of respondent, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

best copy available

Ex. A


"IT'S A FACT!—INCREASES MILEAGE UP TO 8 MILES PER GALLON."
Says GORDON COOPER GEMINI ASTRONAUT
"IMPROVES ENGINE PERFORMANCE, REDUCES SMOG EMISSION AND CLEANS YOUR ENGINE."



# New! Transform air into fuel and increase your mileage up to 28%*!

COL. GORDON COOPER

## MORE MILEAGE, LESS GAS

## LOOK HOW SIMPLE IT IS TO INSTALL

## HOW DOES THE G.R. VALVE* WORK?

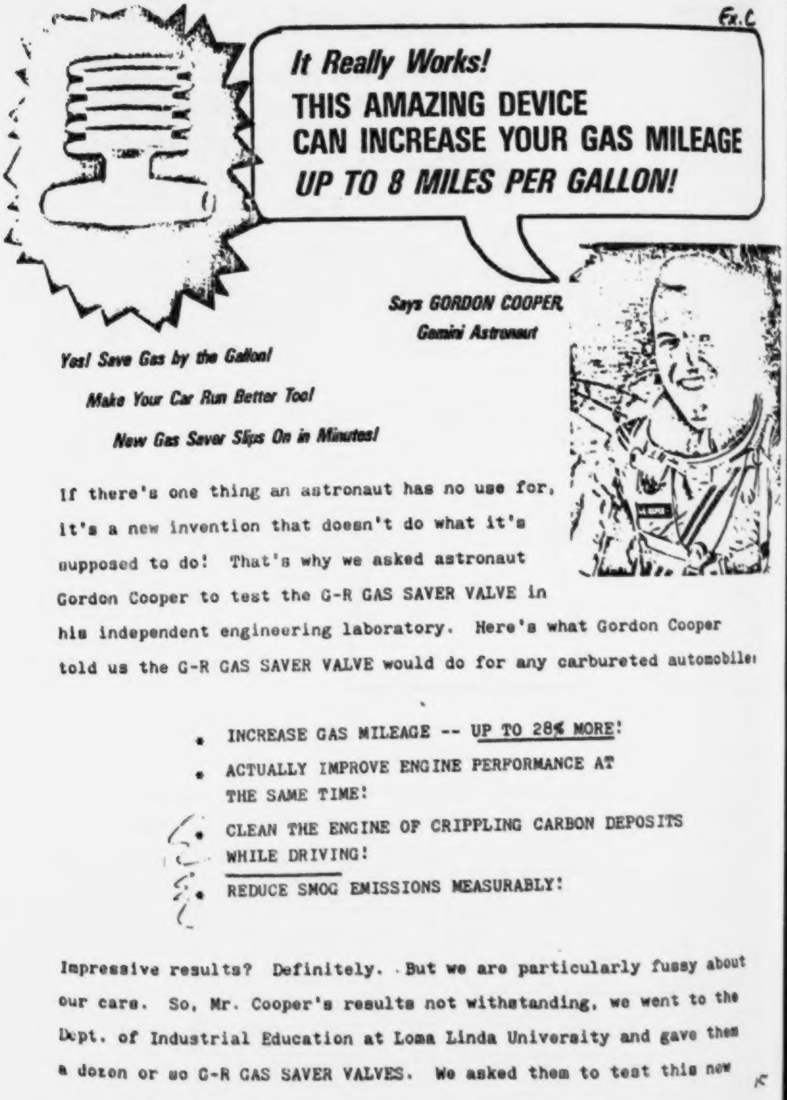
Ex. B

Copy of ad
published
3/17/78
Valley News

SPEC 2

14

Ex. C



*It Really Works!*

THIS AMAZING DEVICE
CAN INCREASE YOUR GAS MILEAGE
*UP TO 8 MILES PER GALLON!*

*Says GORDON COOPER,*
*Gemini Astronaut*

*Yes! Save Gas by the Gallon!*

*Make Your Car Run Better Too!*

*New Gas Saver Slips On in Minutes!*

If there's one thing an astronaut has no use for, it's a new invention that doesn't do what it's supposed to do! That's why we asked astronaut Gordon Cooper to test the G-R GAS SAVER VALVE in his independent engineering laboratory. Here's what Gordon Cooper told us the G-R GAS SAVER VALVE would do for any carbureted automobile:

- INCREASE GAS MILEAGE -- UP TO 28% MORE!
- ACTUALLY IMPROVE ENGINE PERFORMANCE AT THE SAME TIME!
- CLEAN THE ENGINE OF CRIPPLING CARBON DEPOSITS WHILE DRIVING!
- REDUCE SMOG EMISSIONS MEASURABLY!

Impressive results? Definitely. But we are particularly fussy about our cars. So, Mr. Cooper's results not withstanding, we went to the Dept. of Industrial Education at Loma Linda University and gave them a dozen or so G-R GAS SAVER VALVES. We asked them to test this new

invention in city and highway driving -- use it on different kinds of cars, big and small -- even trucks -- and report the conclusions, good or bad. Here's what the Loma Linda University tests confirmed about the G-R GAS SAVER VALVE:

- It Cuts Gas Consumption in Every Car Tested -- Up to 28%!
- It Makes the Engine Run More Efficiently!
- It Reduces Polluting Exhaust Emissions as Much as 50%!

Then reports came back from our own "seat of the pants" test. That's where ordinary drivers like you and me pop a G-R GAS SAVER VALVE into their car and record the results for themselves.
For example:

> "...on my Pontiac Le Mans...mileage increased from 10 to 27.2...the improvement is phenomenal."
>
> -Mr. F. v. S.
> Newbury Park, Calif.
>
> "...on my Volkswagen Bus, it's mileage increased from 18 to 23 miles per gallon...also have better start in the morning."
>
> -Mr. Otto Geller,
> President, Volkswagen Club of America
> Ventura, Calif.

We found that a 1966 GMC 66-passenger school bus got 40% better gas mileage! A pickup truck with camper got 38.2% better mileage! A 1973 Ford got 28.7% better mileage! And so it went. Everybody we heard from reported a significant increase in gas mileage and often a noticeable improvement in performance the moment they snapped the G-R GAS SAVER VALVE on their car!

## SLIP IT IN PLACE YOURSELF...IN SECONDS!

By now we were thoroughly convinced that there really was an exciting and easy way to save big money at the gas pump. We wanted a G-R GAS SAVER VALVE on every company car as fast as possible! But we still wondered if installing this fascinating money saver was as simple as it was cracked up to be. Instead of going to a mechanic we handed the

device and its simple instructions to three people:

1. A young lady who is so mechanically minded she really needed help opening the hood.
2. A self-admitted fumble-fingers copy chief who shies away from a pair of pliers.
3. A guy who spends his weekends tinkering with the innards of his imported English sports car.

Care to guess the outcome of the race?

> Frankly, it was a dead heat! (Subtracting the time it took the young lady to get the hood open). Mechanical skill just isn't required! Nearly everybody can follow the one-two-three step instructions and be saving gas by the gallon in minutes! (Susan Cooper, Gordon's lovely wife, popped a G-R GAS SAVER VALVE into her '74 Vega in a mere 30 seconds!)

## *BUY THOSE SPECIAL THINGS YOU WANT WITH WHAT YOU SAVE ON GAS!*

Now, instead of spiraling gasoline prices stealing money from your pocket (even on short trips), you'll put the brakes to this money drain! You'll do it effortlessly in minutes -- and your insatiably thirsty carburetor will be under control at last! Certainly we all have plenty of things to do with our hard-earned money and pouring it into the gas tank isn't one of them!

## *FEEL YOUR ENGINE RUN BETTER–AND CLEAN ITSELF TOO!*

The G-R GAS SAVER VALVE makes your carburetor work with optimum efficiency AT ALL SPEEDS. (Most carburetors are really efficient only at about 35 mph.) It makes your carburetor breathe freely, perfectly mixing, with almost computer accuracy, the precise ratio of gas and air needed at any given split second. Not a drop more gas than necessary -- just all you really need and no more. Better yet, the G-R GAS SAVER VALVE

Complaint

makes your engine run so right that many exhaust fumes which used to pollute the air around your car are now re-burned as valuable fuel!

**ORDER NOW ON OUR UNCONDITIONAL MONEY-BACK GUARANTEE!**

We want you to put a G-R GAS SAVER VALVE on your car right away -- before you spend another unnecessary dollar for gas your car is now consuming ravenously.

We want to prove that Gordon Cooper's laboratory results, the special investigation by the staff at Loma Linda University and our own results are everything we say they are. Use the order form below...and if for any reason you don't agree -- enthusiastically, wholeheartedly -- that the G-R GAS SAVER VALVE is the best idea you've ever seen for your car, send it back for refund, no questions asked. Try it for two weeks; then if you're not convinced return it. The G-R GAS SAVER VALVE costs $15.95. You'll be amazed how fast it will pay for itself -- and start putting money back into your pocket!

**HAPPY CUSTOMERS WRITE...**

"I have a 1977 Malibu Classic Station Wagon which I use for work. I was getting an average of 11.9 miles per gallon . . . since the installation of the G-R Valve I am getting an average of 15.4 miles per gallon . . . I am a very cautious man about pushing or praising any item before I know from my own personal use that it works. I must say that I would advise everyone. . . to use the new G R Valve, plus I feel my car's performance has increased."

Mr. T. M.
Compton, Calif.

"In my capacity as Sales Manager I drive several hundred miles per week. My work car is a 1968 Ford Galaxy. Last May I installed a G R Valve, increasing the mileage from 15.2 to 19.8 m.p.g."

Mr. W. S.
Santa Monica, Calif.

"I installed one of your gas savers on my '74 Continental Mark IV in December. Since that time I have averaged at least 2½ miles per gallon more than before."

Mr. D. A.
Tarzana, Calif.

**ORDER FOR EVERY CAR IN YOUR FAMILY!**

**ORDER FORM**

C. I. ENERGY DEVELOPMENT, INC.
18345 VENTURA BOULEVARD
TARZANA, CALIFORNIA 91356

Gentlemen: Send me ___ G-R GAS SAVER VALVES @ $15.95 each. I enclose $______ in ( ) Cash ( ) Check ( ) M.O. in full payment.

( ) Send my order COD. I enclose 20% deposit. ( Sorry, no COD's outside the Continental USA).

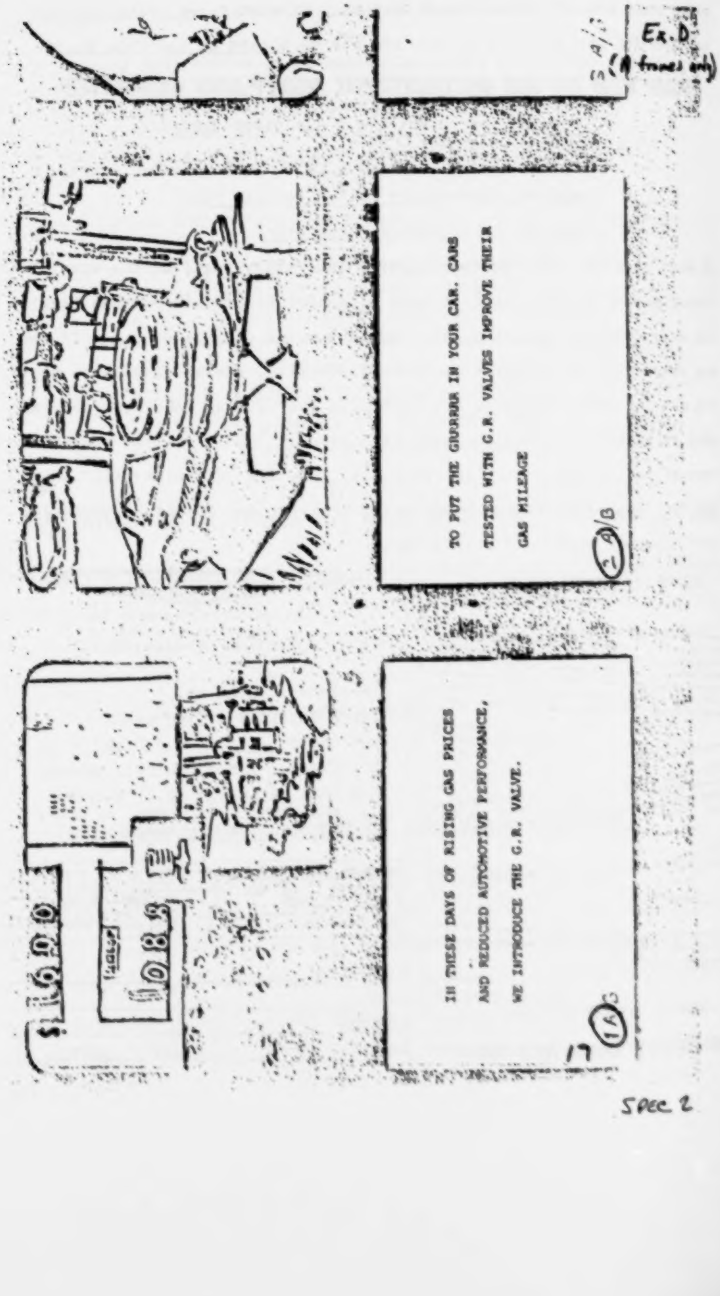
ACCT. NO. ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

INTERBANK NO. Mastercharge Only ☐☐☐☐
(The number over your Name)

Exp. Date: Mo.☐☐ Yr.☐☐

SIGNATURE ______________________
NAME ______________________
ADDRESS ______________________
CITY ____________ STATE _____ ZIP _____

18



Ex. D
(A frames only)

17 1A

IN THESE DAYS OF RISING GAS PRICES
AND REDUCED AUTOMOTIVE PERFORMANCE,
WE INTRODUCE THE G.R. VALVE.

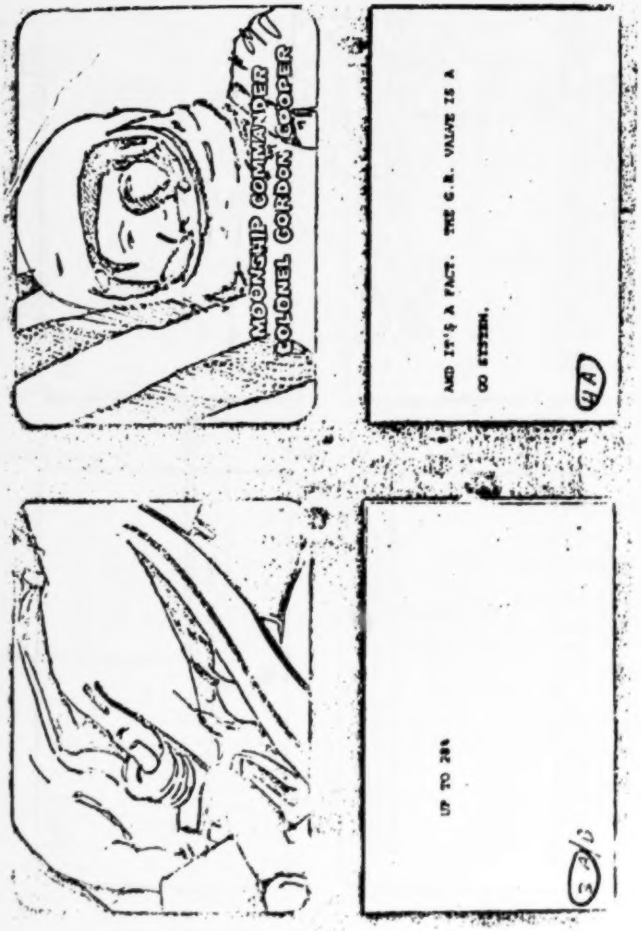
2 A/B

TO PUT THE GRRRRR IN YOUR CAR. CARS
TESTED WITH G.R. VALVES IMPROVE THEIR
GAS MILEAGE

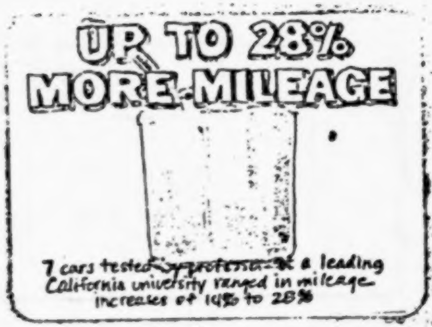
3 A/

Spec 2

Complaint


MOONSHIP COMMANDER
COLONEL GORDON COOPER
AND IT'S A FACT. THE G.R. VALVE IS A GO SYSTEM.
4A
UP TO 28%
3A/D

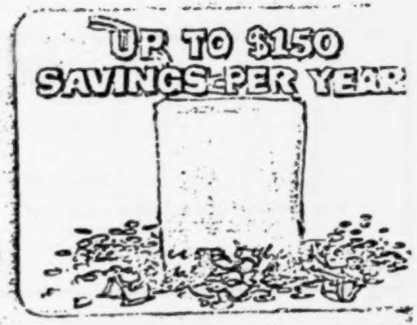
SPEC 2
2d


UP TO 28%
MORE MILEAGE
7 cars tested by professors at a leading California university ranged in mileage increases of 14% to 28%

THAT'S RIGHT. GET UP TO 28% MORE

MILEAGE

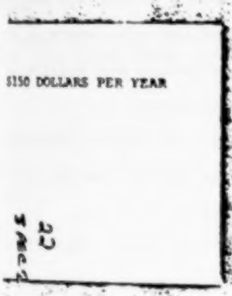
4B

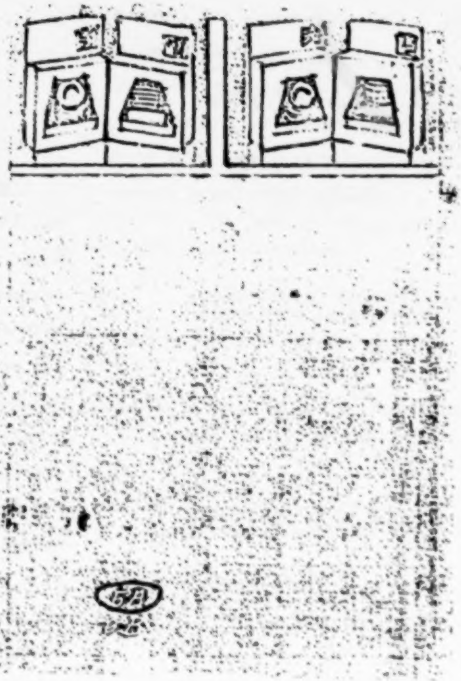

UP TO $150
SAVINGS PER YEAR

AND SAVE UP TO $150 DOLLARS PER YEAR

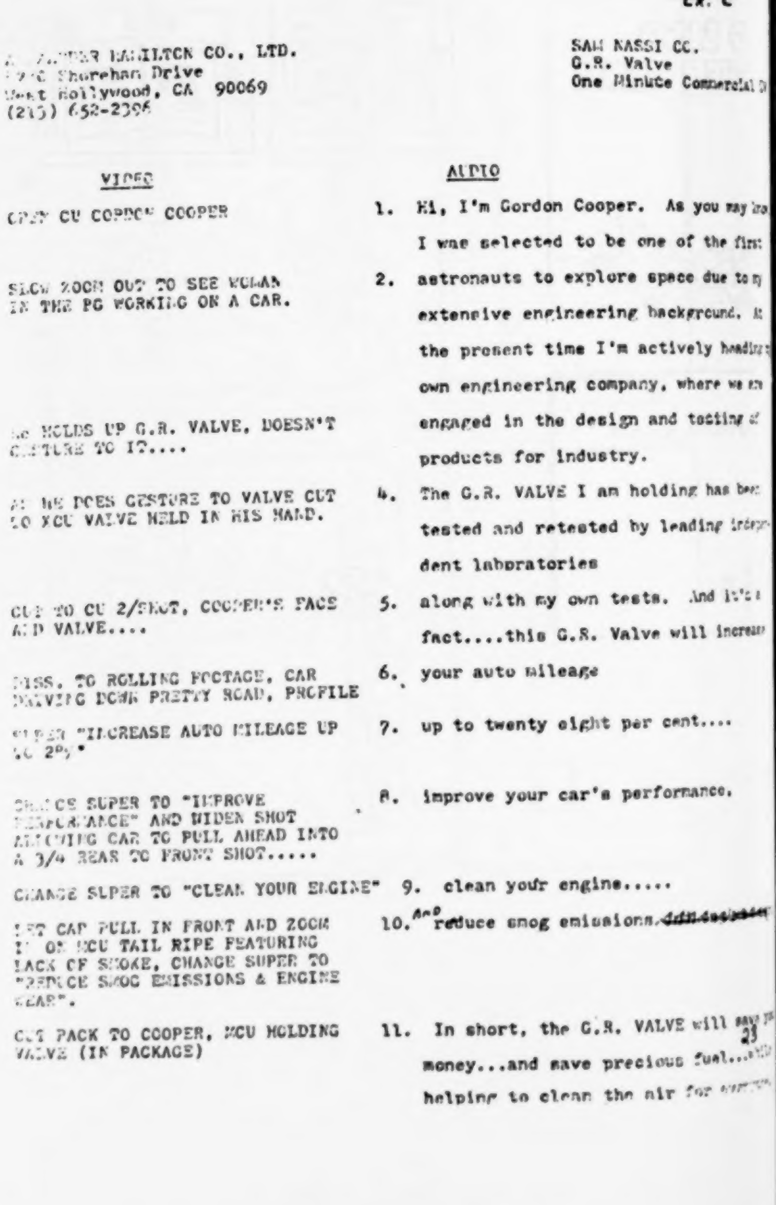
5B

O $150
PER YEAR


$150 DOLLARS PER YEAR



Ex. E



[illegible] HAMILTON CO., LTD.
[illegible] Shoreham Drive
West Hollywood, CA 90069
(213) 652-2396

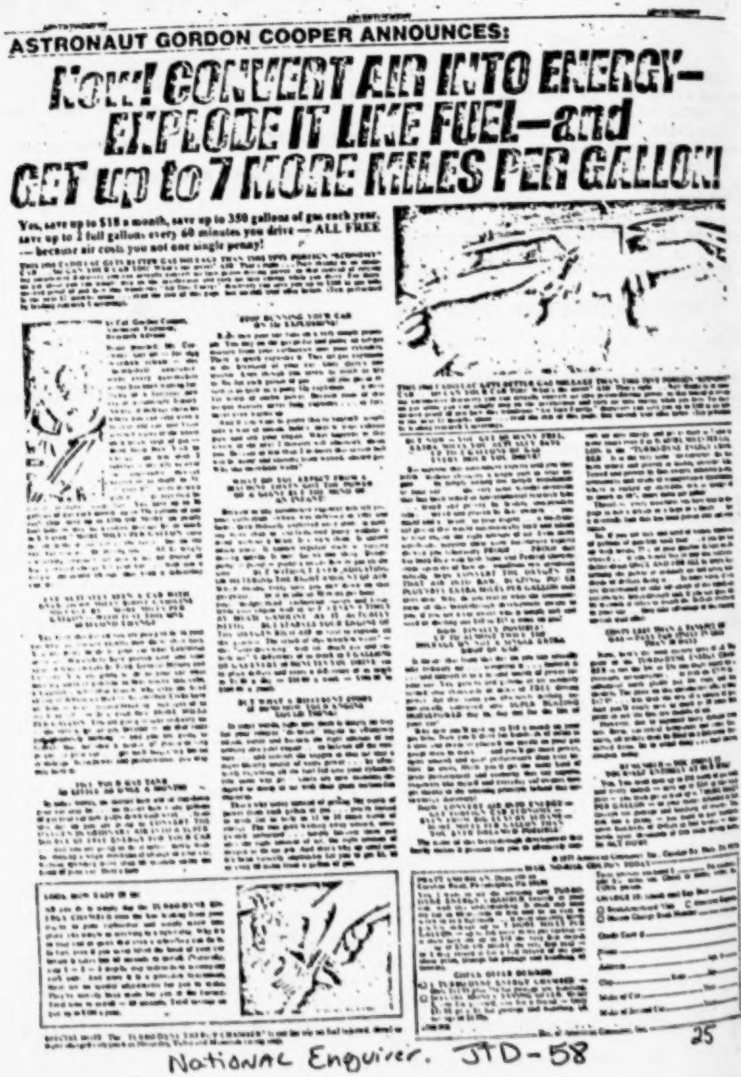
SAM NASSI CO.
G.R. Valve
One Minute Commercial

| VIDEO | AUDIO |
|---|---|
| OPEN CU GORDON COOPER | 1. Hi, I'm Gordon Cooper. As you may<br>I was selected to be one of the fir |
| SLOW ZOOM OUT TO SEE WOMAN IN THE BG WORKING ON A CAR. | 2. astronauts to explore space due to<br>extensive engineering background.<br>the present time I'm actively<br>own engineering company, where we<br>engaged in the design and testing<br>products for industry. |
| HE HOLDS UP G.R. VALVE, DOESN'T GESTURE TO IT.... | |
| AS HE DOES GESTURE TO VALVE CUT TO ECU VALVE HELD IN HIS HAND. | 4. The G.R. VALVE I am holding has bee<br>tested and retested by leading<br>dent laboratories |
| CUT TO CU 2/SHOT, COOPER'S FACE AND VALVE.... | 5. along with my own tests. And it's<br>fact....this G.R. Valve will |
| DISS. TO ROLLING FOOTAGE, CAR DRIVING DOWN PRETTY ROAD, PROFILE | 6. your auto mileage |
| SUPER "INCREASE AUTO MILEAGE UP TO 28%" | 7. up to twenty eight per cent.... |
| CHANGE SUPER TO "IMPROVE PERFORMANCE" AND WIDEN SHOT ALLOWING CAR TO PULL AHEAD INTO A 3/4 REAR TO FRONT SHOT..... | 8. improve your car's performance. |
| CHANGE SUPER TO "CLEAN YOUR ENGINE" | 9. clean your engine..... |
| LET CAR PULL IN FRONT AND ZOOM IN ON ECU TAIL PIPE FEATURING LACK OF SMOKE, CHANGE SUPER TO "REDUCE SMOG EMISSIONS & ENGINE WEAR". | 10. And reduce smog emissions. |
| CUT BACK TO COOPER, ECU HOLDING VALVE (IN PACKAGE) | 11. In short, the G.R. VALVE will<br>money...and save precious fuel...<br>helping to clean the air for |

23

| | |
|---|---|
| SLOW ZOOM TO CU COOPER | 12. Before I say a system is "go" I check it and recheck it...and the G.R. VALVE is a "go" system. |
| COOPER STEPS OUT OF SHOT. RACK FOCUS TO MLS SUSAN COOPER JUST CLOSING THE HOOD ON HER CAR, SHE TURNS TOWARD CAMERA & SMILES A SELF SATISFIED SMILE AS WE ZOOM MCU...... | 13. In the time I've taken to tell you ~~abo~~ about this important technological breakthrough, ~~XXXNIXXXSXXXX~~ |
| COOPER WALKS INTO SHOT, PUT ARM AROUND WIFE....PUTS C.R. VALVE PACKAGE ON HOOD OF CAR....~~ZEEX XXXXXXXXXXE~~ | 14. My wife Susan installed |
| CUT TO ACU PACKAGE ON HOOD OF CA [illegible] | 15. the G.R. VALVE on her car. |
| HOLD ON END SHOT, EXCU PACKAGE PLUS LIVE SLIDE SUPER AT STATION | 16. STATION ANNCR., VO.: TAG FOR LOCAL X STORES. |

Ex. F



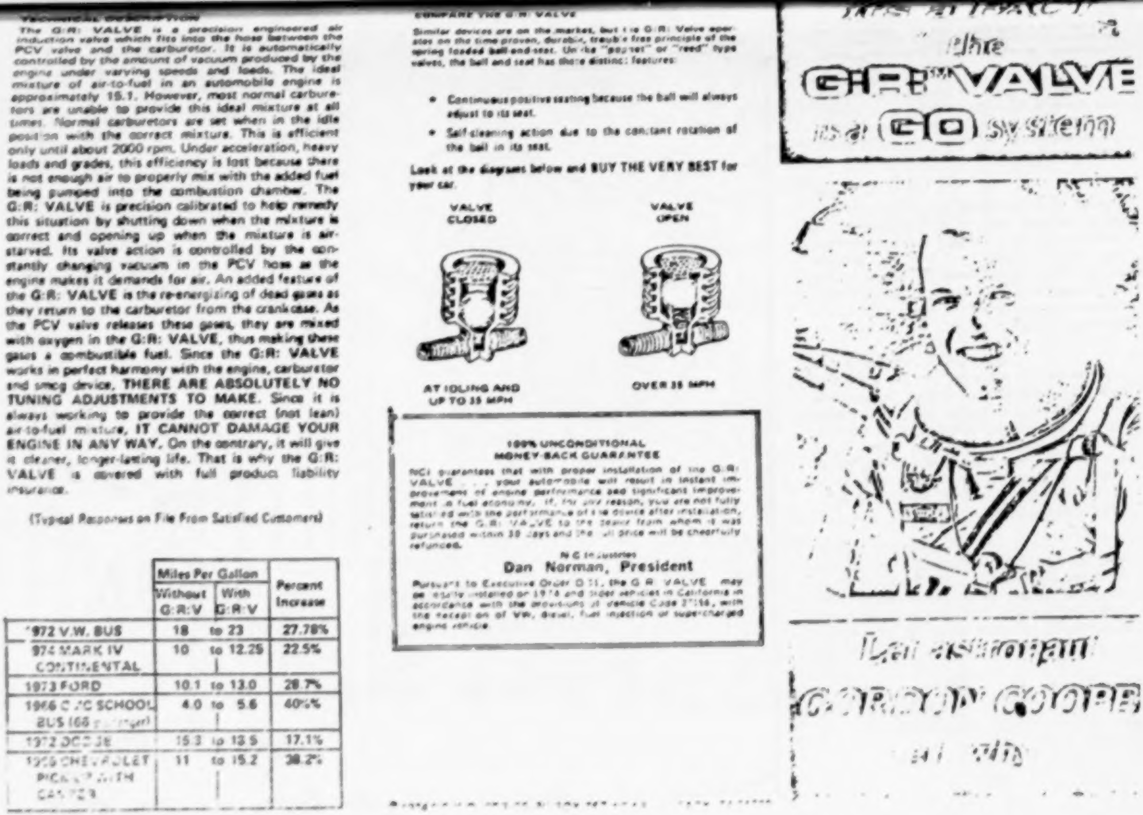
ASTRONAUT GORDON COOPER ANNOUNCES:

# Now! CONVERT AIR INTO ENERGY—EXPLODE IT LIKE FUEL—and GET up to 7 MORE MILES PER GALLON!

**Yes, save up to $18 a month, save up to 350 gallons of gas each year, save up to 2 full gallons every 60 minutes you drive — ALL FREE — because air costs you not one single penny!**

25

National Enquirer. JTD-58


the
G:R:™ VALVE
its a GO system
VALVE CLOSED
AT IDLING AND UP TO 35 MPH
VALVE OPEN
OVER 35 MPH
Let astronaut
GORDON COOPER
[illegible]

TECHNICAL DESCRIPTION

The G:R: VALVE is a precision engineered air induction valve which fits into the hose between the PCV valve and the carburetor. It is automatically controlled by the amount of vacuum produced by the engine under varying speeds and loads. The ideal mixture of air-to-fuel in an automobile engine is approximately 15.1. However, most normal carburetors are unable to provide this ideal mixture at all times. Normal carburetors are set when in the idle position with the correct mixture. This is efficient only until about 2000 rpm. Under acceleration, heavy loads and grades, this efficiency is lost because there is not enough air to properly mix with the added fuel being pumped into the combustion chamber. The G:R: VALVE is precision calibrated to help remedy this situation by shutting down when the mixture is correct and opening up when the mixture is air-starved. Its valve action is controlled by the constantly changing vacuum in the PCV hose as the engine makes it demands for air. An added feature of the G:R: VALVE is the re-energizing of dead gases as they return to the carburetor from the crankcase. As the PCV valve releases these gases, they are mixed with oxygen in the G:R: VALVE, thus making these gases a combustible fuel. Since the G:R: VALVE works in perfect harmony with the engine, carburetor and smog device, **THERE ARE ABSOLUTELY NO TUNING ADJUSTMENTS TO MAKE.** Since it is always working to provide the correct (not lean) air-to-fuel mixture, **IT CANNOT DAMAGE YOUR ENGINE IN ANY WAY.** On the contrary, it will give it cleaner, longer-lasting life. That is why the G:R: VALVE is covered with full product liability insurance.

(Typical Responses on File From Satisfied Customers)

| | Miles Per Gallon | | Percent Increase |
|---|---|---|---|
| | Without G:R:V | With G:R:V | |
| 1972 V.W. BUS | 18 | to 23 | 27.78% |
| 1974 MARK IV CONTINENTAL | 10 | to 12.25 | 22.5% |
| 1973 FORD | 10.1 | to 13.0 | 28.7% |
| 1966 C.J.C SCHOOL BUS (66 passenger) | 4.0 | to 5.6 | 40% |
| 1972 DODGE | 15.3 | to 13.5 | 17.1% |
| 1968 CHEVROLET PICKUP WITH CAMPER | 11 | to 15.2 | 38.2% |

COMPARE THE G:R: VALVE

Similar devices are on the market, but the G:R: Valve operates on the time proven, durable, trouble free principle of the spring loaded ball-and-seat. Unlike "poppet" or "reed" type valves, the ball and seat has these distinct features:

- Continuous positive seating because the ball will always adjust to its seat.
- Self-cleaning action due to the constant rotation of the ball in its seat.

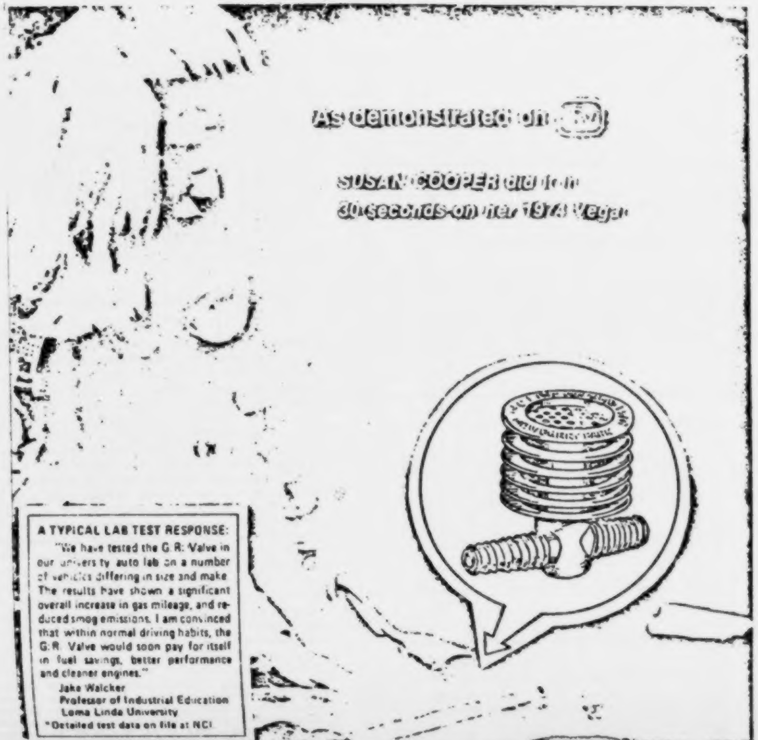
Look at the diagrams below and **BUY THE VERY BEST for your car.**

**100% UNCONDITIONAL MONEY-BACK GUARANTEE**

NCI guarantees that with proper installation of the G:R: VALVE . . . your automobile will result in instant improvement of engine performance and significant improvement in fuel economy. If, for any reason, you are not fully satisfied with the performance of the device after installation, return the G:R: VALVE to the dealer from whom it was purchased within 30 days and the full price will be cheerfully refunded.

N C Industries
**Dan Norman, President**

Pursuant to Executive Order D-11, the G:R: VALVE may be legally installed on 1974 and older vehicles in California in accordance with the provisions of Vehicle Code 27156, with the exception of VW, diesel, fuel injection or supercharged engine vehicle.



**A TYPICAL LAB TEST RESPONSE:**

"We have tested the G:R: Valve in our university auto lab on a number of vehicles differing in size and make. The results have shown a significant overall increase in gas mileage, and reduced smog emissions. I am convinced that within normal driving habits, the G:R: Valve would soon pay for itself in fuel savings, better performance and cleaner engines."

Jake Walcker
Professor of Industrial Education
Loma Linda University

*Detailed test data on file at NCI

The unconditional money back guarantee offered by G:R: Valve distributors is positive proof of their confidence in these

YOU TOO can install the G:R: Valve in minutes without special tools or mechanical ability. Just follow the

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# the facts are...

1. **THE G:R: VALVE SAVES MONEY** by giving your car, boat, truck, or motor home up to 8 more miles per gallon. That could mean a savings of up to 30¢ per gallon of gasoline. In a year this could amount to several hundred dollars, depending on how much you drive.

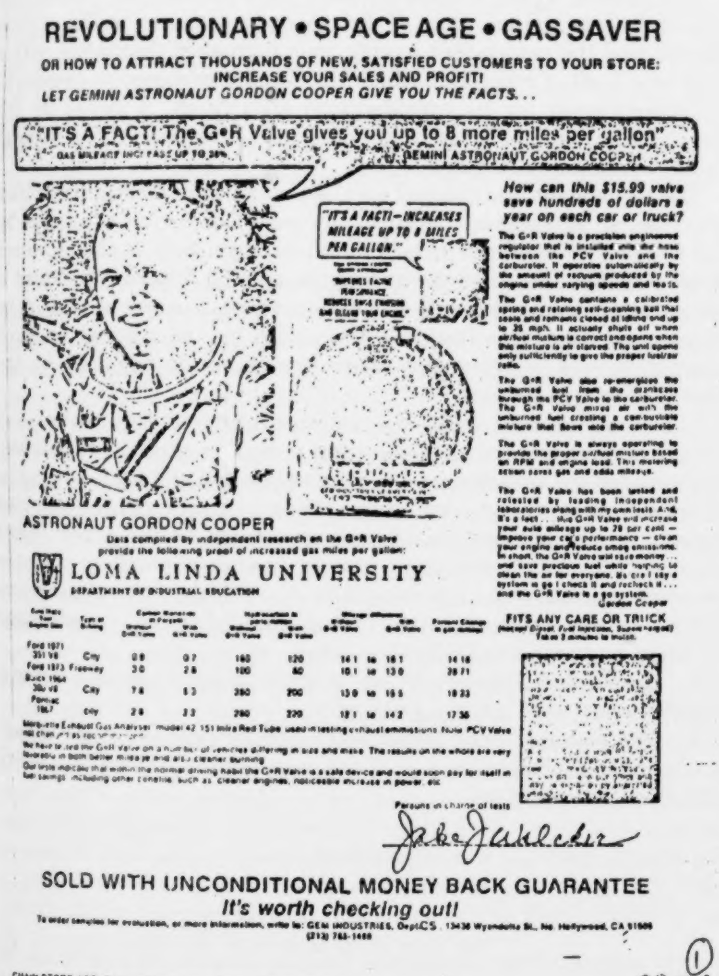
2. **THE G:R: VALVE IMPROVES PERFORMANCE** by allowing additional air to reach your engine only when it is needed. Most normal carburetors cannot meet the entire range of engine demands for air, so they are set for idle and speeds under 35 mph. This means your engine is air-starved when accelerating, climbing hills and pulling loads, but your car can reach its full horsepower every time you "step-on-it."

3. **THE G:R: VALVE FIGHTS POLLUTION** by insuring a more complete combustion of gasoline elements. It also re-energizes particles from the smog device so they can be burned. We call this process "Gas Re-energizing" (G:R:). Smog tests* have shown you can expect up to 50% decrease in air pollutants with this device on your present car.

4. **THE G:R: VALVE INCREASES ENGINE LIFE** by reducing the amount of carbon build up on valves and pistons. When gasoline burns more efficiently, it leaves less harmful by-products to clog and wear out your engine.

*Tests conducted at Loma Linda University at engine idle utilitizing Marquette Exhaust Gas Analyzer: 42-151 Infra Red tube, used in testing exhaust emissions.

Ex. H


"IT'S A FACT! The G•R Valve gives you up to 8 more miles per gallon"
GAS MILEAGE INCREASE UP TO 28%
GEMINI ASTRONAUT GORDON COOPER
"IT'S A FACT!—INCREASES MILEAGE UP TO 8 MILES PER GALLON."
IMPROVES ENGINE PERFORMANCE, REDUCES SMOG EMISSIONS AND CLEANS YOUR ENGINE.

## REVOLUTIONARY • SPACE AGE • GAS SAVER

**OR HOW TO ATTRACT THOUSANDS OF NEW, SATISFIED CUSTOMERS TO YOUR STORE: INCREASE YOUR SALES AND PROFIT!**

*LET GEMINI ASTRONAUT GORDON COOPER GIVE YOU THE FACTS . . .*

**ASTRONAUT GORDON COOPER**

Data compiled by independent research on the G•R Valve provide the following proof of increased gas miles per gallon:

**LOMA LINDA UNIVERSITY**
DEPARTMENT OF INDUSTRIAL EDUCATION

| Car Make Year Engine Size | Type of Driving | Carbon Monoxide in Percent |  | Hydrocarbons in parts million |  | Mileage differences |  |  | Percent Change in gas mileage |
|---|---|---|---|---|---|---|---|---|---|
|  |  | Without G•R Valve | With G•R Valve | Without G•R Valve | With G•R Valve | Without G•R Valve |  | With G•R Valve |  |
| Ford 1971 351 V8 | City | 0.9 | 0.7 | 160 | 120 | 16.1 | to | 18.1 | 14.16 |
| Ford 1973 | Freeway | 3.0 | 2.6 | 100 | 80 | 10.1 | to | 13.0 | 28.71 |
| Buick 1964 300 V8 | City | 7.6 | 5.3 | 280 | 200 | 13.9 | to | 16.5 | 18.23 |
| Pontiac 1967 | City | 2.6 | 3.3 | 280 | 220 | 12.1 | to | 14.2 | 17.36 |

Marquette Exhaust Gas Analyser model 42 151 Infra Red Tube used in testing exhaust emmissions. Note: PCV Valve not changed as recommended.

We have tested the G•R Valve on a number of vehicles differing in size and make. The results on the whole are very favorable in both better mileage and also cleaner burning.

Our tests indicate that within the normal driving habit the G•R Valve is a safe device and would soon pay for itself in fuel savings, including other benefits such as cleaner engines, noticeable increase in power, etc.

Persons in charge of tests

### *How can this $15.99 valve save hundreds of dollars a year on each car or truck?*

The G•R Valve is a precision engineered regulator that is installed into the hose between the PCV Valve and the carburetor. It operates automatically by the amount of vacuum produced by the engine under varying speeds and loads.

The G•R Valve contains a calibrated spring and rotating self-cleaning ball that seals and remains closed at idling and up to 25 mph. It actually shuts off when air/fuel mixture is correct and opens when this mixture is air starved. The unit opens only sufficiently to give the proper fuel/air ratio.

The G•R Valve also re-energizes the unburned fuel from the crankcase through the PCV Valve to the carburetor. The G•R Valve mixes air with the unburned fuel creating a combustible mixture that flows into the carburetor.

The G•R Valve is always operating to provide the proper air/fuel mixture based on RPM and engine load. This metering action saves gas and adds mileage.

The G•R Valve has been tested and retested by leading independent laboratories along with my own tests. And, it's a fact . . . the G•R Valve will increase your auto mileage up to 28 per cent — improve your car's performance — clean your engine and reduce smog emissions. In short, the G•R Valve will save money . . . and save precious fuel while helping to clean the air for everyone. As I say a system is go I check it and recheck it . . . and the G•R Valve is a go system.

Gordon Cooper

**FITS ANY CAR OR TRUCK**
(except Diesel, Fuel Injection, Supercharged)
Takes 3 minutes to install.

## SOLD WITH UNCONDITIONAL MONEY BACK GUARANTEE

### *It's worth checking out!*

To order samples for evaluation, or more information, write to: GEM INDUSTRIES, Dept.CS , 13436 Wyandotte St., No. Hollywood, CA 91605
(213) 765-1460

CHAIN STORE AGE, General Merchandise Edition, September 1977

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## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Gordon Cooper is an individual whose address is 5011 Woodley Ave., Encino, California.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

### PART I

*It is ordered*, That respondent Gordon Cooper, an individual, his agents, representatives, employees, successors and assigns, either jointly or individually, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of the automobile retrofit device, variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names, or of any other automobile retrofit device, as "automobile retrofit device" is defined in §301 of the

Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, having substantially similar properties, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that the automobile retrofit device variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names, or any other automobile retrofit device having substantially similar properties, will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle.

## PART II

*It is further ordered,* That respondent, his agents, representatives, employees, successors and assigns, either jointly or individually, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile retrofit device as "automobile retrofit device" is defined in §301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle unless (1) such representation is true, and (2) at the time of making such representation, respondent possesses and relies upon written results of dynamometer testing of such device according to the then current urban and highway driving test cycles established by an agency or department of the United States government and these results substantiate such representation, and (3) where the representation of the fuel economy improvement is expressed in miles per gallon or percentage, all advertising and other sales promotional materials which contain the representation expressed in such a way must also contain, in a way that clearly and conspicuously discloses it, the following disclaimer: "REMINDER: Your actual fuel saving may be less. It depends on the kind of driving you do, how you drive and the condition of your car."

## PART III

*It is further ordered,* That respondent, his agents, representatives, employees, successors and assigns, either jointly or individually, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product or service in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. representing, directly or by implication, that an endorser of such product or service has expertise in a field of knowledge unless the endorser has the education, training, and knowledge necessary to be qualified as an expert in that field;

b. using, publishing, or referring to any testimonial or endorsement from any person or organization for such product or service unless, within the twelve (12) months immediately preceding any such use, publication or reference, respondent has obtained from that person or organization an express written and dated authorization for such use, publication, or reference;

c. failing to disclose a material connection, where one exists, between an endorser of such product or service and respondent. A "material" connection shall mean, for purposes of this order, any direct or indirect economic interest in the sale of the product or service which is the subject of this endorsement other than (1) a fixed sum payment for the endorsement, all of which is paid before any advertisement containing the endorsement is disseminated, or (2) payment for the endorsement which is directly related to the extent of the dissemination of advertising containing it;

d. representing, directly or by implication, any performance characteristic of such product or service unless (1) at the time of making the representation, respondent possessed and relied upon competent and reliable scientific tests substantiating the representation, and (2) respondent possesses a written test report which describes both test procedures and test results. A competent and reliable "scientific test" is one in which one or more persons, qualified by professional training, education and experience, formulate and conduct a test and evaluate its results in an objective manner using testing procedures which are generally accepted in the profession to attain valid and reliable results. The test may be conducted or approved by (a) a reputable and reliable organization which conducts such tests as one of its principal functions, (b) an agency or department of the government of the United States, or (c) persons employed or retained by respondent if they are qualified (as defined above in this paragraph) and conduct and evaluate the test in an objective manner;

e. misrepresenting in any manner the purpose, content, or conclusion of any test or survey pertaining to such product or service;

f. misrepresenting in any manner either consumer preference for such product or service or the results obtained by consumer usage of such product or service;

g. misrepresenting in any manner the performance, efficacy, capacity, or usefulness of such product or service.

## PART IV

*It is further ordered,* That respondent, his agents, representatives, employees, successors and assigns, either jointly or individually, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, distribution or sale of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Providing an endorsement which relates directly or by implication to the performance or efficacy of such product or service, or which refers to any characteristic, property, use, or result of use of such product or service, unless:

a. when respondent's endorsement pertains to subject matter falling within respondent's area of expertise, at the time of the first dissemination of such endorsement, respondent possesses and relies upon competent and reliable scientific evidence to substantiate any representation made directly or by implication in the endorsement, or

b. in all other cases, at the time of the first dissemination of such endorsement, respondent has made a reasonable inquiry into the truthfulness of his endorsement, and possesses and relies upon information resulting from such inquiry which substantiates any representation made directly or by implication in the endorsement. "Reasonable inquiry" shall be defined as follows:

(1) obtaining information from at least two competent and reliable sources independent of the advertiser and any other party with an economic interest in the sale of the product or service which is the subject of the endorsement; or

(2) obtaining information from the advertiser or from other parties with an economic interest in the product or service which is the subject of the endorsement and having such information independently evaluated by at least two competent and reliable sources.

2. Failing to disclose a material connection, where one exists, between an endorser of such product or service and its advertiser(s). A "material" connection shall mean, for purposes of this order, any direct or indirect economic interest in the sale of the product or

service which is the subject of this endorsement other than (1) a fixed sum payment for the endorsement all of which is paid before any advertisement containing the endorsement is disseminated, or (2) payment for the endorsement which is directly related to the extent of the dissemination of advertising containing it.

## PART V

*It is further ordered,* That respondent, his agents, representatives, employees, successors and assigns, either jointly or individually, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records which may be inspected by Commission staff members upon fifteen (15) days' notice: copies of and dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials; documents authorizing use, publication, or reference to testimonials or endorsements; documents which substantiate or which contradict any claim which is a part of the advertising, sales promotional material, or post-purchase materials disseminated by respondent directly or through any business entity. Such records shall be retained by respondent for a period of three (3) years from the last date any such advertising, sales promotional, or post-purchase materials were disseminated.

## PART VI

*It is further ordered,* That respondent promptly notify the Commission of the discontinuance of his present business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment where he is responsible, directly or, by his delegation, through any employee or agent, for the dissemination or approval of any advertising claim relating to any product or service. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The terms of this paragraph shall not affect any other obligation arising under this order.

## PART VII

*It is further ordered,* That the respondent shall within sixty (60) days after service upon him of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

## IN THE MATTER OF

# HASTINGS MANUFACTURING COMPANY

*Docket 4437. Interlocutory Order, Oct. 12, 1979*

## ORDER DENYING RESPONDENT'S MOTION FOR PRODUCTION OF DOCUMENTS

On September 6, 1979, the Commission ordered respondent Hastings Manufacturing Company and the Bureau of Competition to rebrief certain issues relating to Hastings' petition to reopen this proceeding. On September 24, 1979, Hastings filed a motion for an order directing the Commission to produce certain documents purportedly bearing on the subject matter of the petition. The Commission's Rules of Practice do not authorize compulsory discovery in connection with the Commission's determination of whether to reopen a proceeding.[1] Rules of Practice Section 2.51, 44 F.R. 40635, 40637 (July 12, 1979).[2] Moreover, the Commission has concluded that the discovery requested here by Hastings would only delay, without materially assisting, the Commission's determination of whether to reopen this proceeding.

Respondent's arguments regarding its access rights under the Freedom of Information Act (5 U.S.C. 552) are not properly presented to the Commission through the instant motion. However, the Commission notes that its General Counsel will be ruling shortly on respondent's separate Freedom of Information Act appeal in accordance with Rule 4.11(a)(2) of the Commission's Rules of Practice (16 CFR 4.11(a)(2)).

*It is ordered* That respondent Hastings Manufacturing Company's motion for discovery be denied.

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[1] If the Commission decides to reopen the instant proceeding, it will conduct any necessary evidentiary hearing in accordance with Rule 3.72(b)(2) of its Rules of Practice. 44 F.R. 40635, 40637 (July 12, 1979).

[2] Compulsory discovery was likewise not contemplated by the predecessor rule, 16 CFR 3.72(b)(2)(1979), prior to a Commission decision to conduct a new evidentiary hearing.

## IN THE MATTER OF

# THE AMERICAN MEDICAL ASSOCIATION, ET AL.

### FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9064. Complaint, Dec. 19, 1975 — Final Order, Oct. 12, 1979*

This order, among other things, requires a Chicago, Ill. medical association to cease engaging in any action that would restrict its members' solicitation of patients by advertising, submission of bids, or otherwise; interfere with the amount or form of compensation exchanged for a member's professional services; characterize as unethical the use of close panel or other health care delivery plans that limit patient's choice of a physician; or characterize as unethical the participation by non-physicians in the ownership or management of health care organizations that provide physical services. The American Medical Association ("AMA") is further required to mail to each of its members a letter setting forth the terms of the order; amend its *Principles of Medical Ethics* and the Judicial Council's *Opinions and Reports* to conform with those terms; and publish the revised documents in specified medical journals. Additionally, AMA is required to terminate, for one year, all ties with any medical society that engages in prohibited conduct.

## *Appearances*

For the Commission: *L. Barry Costilo, George J. Wright, Daniel R. Barney, Arthur N. Lerner* and *Ann Malester.*

For the respondents: *Newton N. Minow, Jack R. Bierig* and *Robert E. Youle, Sidley & Austin,* Chicago, Ill. for respondent The American Medical Association, *Bernard D. Hirsh* and *B.J. Anderson,* Chicago, Ill., Of Counsel, American Medical Association and *Grant N. Nickerson, William J. Doyle* and *Linda L. Randell, Wiggin & Dana,* New Haven, Conn. for respondents The Connecticut State Medical Society and The New Haven County Medical Association, Inc.

## COMPLAINT

The Federal Trade Commission, having reason to believe that respondents The American Medical Association, The Connecticut State Medical Society, and The New Haven County Medical Association, ("AMA", "CSMS", and "NHCMA", respectively), have violated and are violating Section 5 of the Federal Trade Commission Act, and that this proceeding is in the public interest, issues this complaint.

PARAGRAPH 1. Respondent American Medical Association ("AMA") is a non-profit Illinois corporation with its principal place of business at 535 North Dearborn St., Chicago, Illinois. Its membership consists of approximately 170,000 individual medical doctors, most of whom are members of state and local medical societies, including CSMS and NHCMA. AMA's affairs, including those complained of, are directed by delegates from state medical societies, including CSMS.

PAR. 2. Respondent Connecticut State Medical Society ("CSMS") is a non-profit Connecticut corporation with its principal place of business at 160 St. Ronan St., New Haven, Connecticut. CSMS is a constituent society of AMA. Delegates from CSMS participate in directing the activities of AMA, including those complained of. CSMS has approximately 4400 medical doctor members. [2]

PAR. 3. Respondent New Haven County Medical Association, Inc. ("NHCMA") is a non-profit Connecticut corporation with its principal place of business at 362 Whitney Ave., New Haven, Connecticut. NHCMA is a component society of CSMS. Delegates from NHCMA participate in directing the affairs of CSMS, including those complained of. NHCMA has approximately 1200 medical doctor members, which members direct the affairs of NHCMA, including those complained of.

PAR. 4. Most members of respondents are engaged in the business of providing medical care for a fee. In 1974, the fees earned by such physicians exceeded one billion dollars.

PAR. 5. Members of AMA are located in every state. In the conduct of their business, members of AMA and members of CSMS and NHCMA:

(A) Receive and treat patients from other states and countries;

(B) Receive substantial sums of money from the federal government and from private insurers for rendering medical services, which money flows across state lines;

(C) Prescribe medicines which are shipped in interstate commerce;

(D) Act in continuing association and cooperation with state and county medical associations, and with individual doctors, in every state, in furthering the agreements described below, in the course of which association and co-operation they use the mails and other media of interstate commerce;

As a result of which conduct, the acts and practices of respondents complained of are in or affect interstate commerce, within the meaning of the Federal Trade Commission Act.

PAR. 6. Respondents and others have agreed to prevent or hinder competition between medical doctors. This agreement has included agreements to prevent or hinder their members from:

(A) Soliciting business, by advertising or otherwise; [3]
(B) Engaging in price competition; and
(C) Otherwise engaging in competitive practices.

PAR. 7. Respondents and others have:

(A) Caused the agreements described above to be published and circulated in a publication called the *Principles of Medical Ethics;*
(B) Abided by the restrictions contained in the *Principles of Medical Ethics;* and
(C) Enforced, and have the power to enforce, adherence to the restrictions contained in the *Principles of Medical Ethics.*

PAR. 8. As a result of the acts and practices alleged above:

(A) Prices of physician services have been stabilized, fixed, or otherwise interfered with;
(B) Competition between medical doctors in the provision of such services has been hindered, restrained, foreclosed and frustrated; and
(C) Consumers have been deprived of information pertinent to the selection of a physician and of the benefits of competition.

PAR. 9. The acts, practices and methods of competition described above are unfair and constitute violations of Section 5(a) of the Federal Trade Commission Act.

## MEMORANDUM OF CHAIRMAN PERTSCHUK IN RESPONSE TO MOTIONS FOR HIS RECUSAL IN THIS PROCEEDING

APRIL 18, 1979

Respondents American Medical Association, Connecticut State Medical Society, and New Haven County Medical Association have filed motions asking that I withdraw from this proceeding, or that the Commission disqualify me from further participation. For the reasons stated below, I believe my participation in this case is proper and decline to recuse myself.

The ground for disqualification asserted by respondents is that in three specified instances—testimony to Congress and speeches before the American Enterprise Institute and the Consumer Assembly—my remarks reflected prejudgment of "key issues in the case," or gave the appearance of such prejudgment. In [2] fact, I have not, in advance of an appropriate consideration of the record, reached any determination on the specific issues involved in this case, nor do

I believe that my public statements created an appearance of such prejudgment.

In each instance in which a court has disqualified an agency decisionmaker, that action has been based on comments showing what would appear to a disinterested observer as a viewpoint on specific controverted factual issues (*e.g., American Cyanamid Co.* v. *FTC*, 363 F.2d 757, 767 (6th Cir. 1966)), or the ultimate issue of liability (*e.g., Texaco, Inc.* v. *FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965); *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583, 590 (D.C. Cir. 1970)) in a pending adjudicative matter.[1] My comments, when considered in context (*see, e.g., Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67, 80 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974)), demonstrate that no such appearance has been created here. [3]

The speeches and congressional statements cited by respondents can only be read as reflecting an underlying philosophy concerning broad policy issues such as the role of professionals and professional licensing in our society, competition in the health care sector of the economy, and the problem of rising health care costs. These are subjects currently of great interest to the public, and I believe that open expression of my views to Congress and the public is an entirely proper and essential part of my duties as Chairman. Cf. *FTC* v. *Cement Institute*, 333 U.S. 683, 701 (1948); 15 U.S.C. 46(f). The expression of views on such issues of policy which are, at most, only generally related to the specific factual and legal issues involved in a proceeding is not ground for disqualification. *See, e.g., Hortonville Joint School Dist. 1* v. *Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976); *Laird* v. *Tatum*, 409 U.S. 824, 831 (1972) (memorandum of Rehnquist, J.); *United States* v. *Morgan*, 313 U.S. 409, 421 (1941); *Skelly Oil Co.* v. *FPC*, 375 F.2d 6, 18 (10th Cir. 1967), *modified on other grounds sub nom. Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). [4]

The statements cited by respondents also contain brief references to previous actions taken by the Commission which were relevant to issues on which I had been asked to testify.[2] I consider the presentation to Congress and the public of information about the nature and status of Commission activities to be one of the principal responsibilities of the Chairman, and see nothing in my recitation of such information which would constitute an appearance of prejudgment of this case. See *Cinderella Career & Finishing Schools, Inc.* v. *FTC, supra* at 590.

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[1] *In Association of Nat'l Advertisers, Inc.* v. *FTC*, No. 78-1421 (D.D.C. 1978), *appeal docketed*, No. 79-1117 (D.C. Cir. Jan. 29, 1979), the district court reaffirmed the legal standards governing disqualification in adjudicative proceedings and adopted them in the context of a Commission rulemaking proceeding.

[2] *See, e.g.*, Statement Before Subcommittees of the Senate Committees on Human Resources and the Judiciary, October 10, 1977, at 5.

At no time have I commented on the merits of the specific issues raised in the pleadings in this adjudication. Rather, as part of a catalogue of Commission activities in the health care field, I advised the Congress that a complaint had issued challenging portions of the AMA and ADA codes of ethics which "*may* unduly restrain information about physician and dentist services."[3] I then stated: [5]

> Since these matters are currently in litigation, I hope you will understand why it would not be appropriate for me to comment further about them.[4]

Respondents cite no statements in which I have expressed a view on the merits of specific issues presented in this adjudication, such as whether the respondent medical societies unlawfully restrict advertising, solicitation, or other practices of their members.[5]

I reiterate that I have not arrived at any conclusion regarding the specific factual and legal questions involved in this case, nor have I expressed any opinion as to ultimate liability. Rather, I am reserving judgment until I have completed review of the record properly before me. Accordingly, I decline to recuse myself from further participation in the proceeding.

I will of course not participate in the Commission's consideration and ruling on the alternative motion addressed to the Commission.

## INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

Nov. 13, 1978

### PRELIMINARY STATEMENT

On December 19, 1975, the Federal Trade Commission issued its complaint in this matter charging the American Medical Association (AMA), the Connecticut State Medical Society (CSMS), and the New Haven County Medical Association, Inc. (NHCMA) with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by restricting the ability of their members to advertise for and solicit patients and to enter into various contractual arrangements in connection with the offering of their services to the public. Specifically, the complaint charges that respondents have agreed with others to prevent or hinder their members from:

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[3] *Id.* (emphasis added).

[4] *Id.*

[5] Nor has AMA identified any statement I have made that respondents are "subject to the jurisdiction of the Commission," despite its effort to attribute such a conclusion to me, at page 7 of the motion.

(1) Soliciting business, by advertising or otherwise;

(2) Engaging in price competition; and

(3) Otherwise engaging in competitive practices.

The complaint alleges that respondents and others have caused the agreements to be published and circulated in a publication entitled Principles of Medical Ethics, and they have enforced and abided by the restrictions set forth therein. It is further alleged that, as a result of these acts and practices:

(1) Prices of physician services have been stabilized, fixed, or otherwise interfered with;

(2) Competition between medical doctors in the provision of such services has been hindered, restrained, foreclosed and frustrated; and

(3) Consumers have been deprived of information pertinent to the selection of a physician and of the benefits of competition.

The aforesaid acts, practices and methods of competition are alleged to be unfair and to constitute violations of Section 5 of the Federal Trade Commission Act. [2]

On January 23, 1976, respondent AMA filed an answer admitting that it has published and circulated a publication entitled the Principles of Medical Ethics, but denying that it or its members are engaged in business, and further denying it has otherwise violated Section 5, as alleged. AMA also raised as an affirmative defense a claim that AMA is not subject to the jurisdiction of the Federal Trade Commission. On January 26, 1976, respondents CSMS and NHCMA filed answers making generally the same admissions and denials as did AMA, and also raising the affirmative defense of lack of jurisdiction.

Complaint counsel stated at the first prehearing conference in this proceeding that the complaint had issued without any formal precomplaint investigation. As a result, extensive discovery was conducted with respondents and with state and local medical societies located throughout the United States. On May 11, 1976, and June 22, 1976, complaint counsel filed memoranda identifying respondents' ethical restrictions on contract practice, advertising, and solicitation being challenged in the complaint. At a voluntary meeting with respondents' counsel on November 8, 1976, complaint counsel further detailed the restrictions being challenged. The transcript of that meeting was made a part of the record of the prehearing conference held on November 18, 1976. Complaint counsel has asserted that the complaint charges respondents with agreement or conspiracy with others to restrict or restrain competition. Respondents deny there was an agreement or conspiracy, and further deny that their acts and practices have prevented or hindered competition. Respondents have also contended throughout this proceeding that their ethical interpretations have changed in recent years to comport with changing legal considerations so that this proceeding is no longer in the public interest and should be dismissed.

On March 24, 1976, AMA filed a Motion for Summary Decision Dismissing the Complaint for Lack of Jurisdiction. CSMS and NHCMA filed a similar motion on April 26, 1976.[1] These motions were denied on April 26, 1976, and May 20, 1976, respectively, for the reason, *inter alia,* that the facts involved were complex, many were in dispute, and others were capable of any of several varying inferences, making summary decision inappropriate. Requests for interlocutory appeals were likewise denied.

On January 14, 1977, respondent AMA filed a Motion for Certification to the Commission of AMA's Motion to Reconsider Issuance of the Complaint because of changed circumstances. [3] Respondents CSMS and NHCMA filed a similar motion on January 24, 1977. On February 15, 1977, respondents' motions were certified to the Commission. The Commission, on April 26, 1977, denied said motions for reconsideration.

Pretrial conferences were held on February 25, September 15 and November 18, 1976, and August 2, and September 6, 1977. Adjudicative hearings began September 7, 1977, and were concluded May 4, 1978, with 57 days of actual trial. Presentation of the case-in-chief in Washington, D.C., took 20 trial days, running from September 7 through October 19, 1977. Complaint counsel called 25 witnesses. AMA's defense, which was heard in Chicago, Illinois, Los Angeles, California and Washington, D.C., began on November 28, 1977, and ended on January 20, 1978. During AMA's defense, 27 days of hearings were held, and 52[2] witnesses testified. CSMS and NHCMA called eight witnesses during the four days of their defense case, which took place in New Haven, Connecticut, from January 23 through 26, 1978. Complaint counsel called three witnesses in their rebuttal case, which ran from April 3 through 5, 1978. During the surrebuttal hearings, which took place in Chicago, Illinois, from May 2 through 4, 1978, respondent AMA called seven witnesses.

On October 8, 1976, a subpoena duces tecum was issued to respondent AMA. AMA, on October 20, 1976, filed a timely motion to quash the subpoena. By order of November 12, 1976, AMA was directed to produce the subpoenaed documents, with certain modifications. By letter of December 7, 1976, AMA advised that it would not comply with the order, although AMA did comply with other subpoenas and discovery demands both prior and subsequent to this refusal. Complaint counsel thereafter requested that, pursuant to Section 3.38 of the Rules of Practice, certain inferences and sanctions be imposed on AMA because of its refusal to produce the documentary evidence being sought. By order of February 24, 1977, certain sanctions and adverse inferences were imposed on AMA to compensate for the withholding of the subpoenaed materials.

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[1] Respondents contended they were exempt from Federal Trade Commission jurisdiction as nonprofit corporations, not organized for their own profit or that of their members.

[2] Dr. William Ruhe, Senior Vice President, American Medical Association, a defense witness, was recalled as a witness at surrebuttal hearings on May 2, 1978.

Court enforcement of subpoenas duces tecum was necessary in the case of some nonrespondent medical societies. In one instance, complaint counsel was permitted to put on case-in-chief evidence during rebuttal hearings because of the delay caused by the necessity of court enforcement of a subpoena (*see* transcript of hearings for April 4, 1978, pages 9146-9242, especially page 9167). [4]

During the course of this proceeding, approximately 3000 exhibits were received into the record, about 100 of which were accorded *in camera* treatment. Many of the exhibits were multi-paged. The transcript of record consists of almost 10,000 pages. The record for the reception of evidence was closed on June 1, 1978.

This proceeding is now before the Administrative Law Judge for decision based upon the complaint, the answers, pleadings, testimony and other documentary evidence of record, proposed findings of fact and conclusions of law and legal authority submitted by all the parties. These submissions have been given careful consideration and, to the extent not adopted herein in the form proposed or in substance, are rejected as not supported by the record or as immaterial. All motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings of fact and conclusions of law submitted by the parties, the Administrative Law Judge makes the following findings of fact and conclusions and issues the Order set out at the end hereof.[3] [5]

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[3] References to the record and other material are given in parentheses, and the following abbreviations are used:

F. - Findings of this Initial Decision followed by the finding and page number being referenced.
Tr. - The transcript of record in this proceeding followed by the page being referenced.
CX - Commission Exhibit followed by number of exhibit being referenced.

(Continued)

## FINDINGS OF FACT

### I. DESCRIPTION OF RESPONDENTS AND THEIR STRUCTURAL INTERRELATIONSHIPS

### A. American Medical Association

1. Respondent AMA is a nonprofit corporation, organized under the Not For Profit Act, Ill. Rev. Stat. Ch. 32 §§ 163, *et seq.* AMA was founded in 1846, and was originally incorporated in 1897. Its principal place of business is located at 535 North Dearborn St., Chicago, Illinois (Comp. and AMA Ans. ¶ 1; Tr. 3922, 3932). AMA also maintains an office in Washington, D.C., which conducts AMA's affairs with Congress and governmental agencies (CX 1103E; Tr. 9886–87). AMA funds are derived principally from membership dues. Other sources of AMA funds are grants and contracts, primarily from the federal government, subscriptions to AMA scientific publications, and advertising revenue (RX 3). In 1976, AMA had projected annual revenues totaling $55,611,000 and total projected assets of $47,185,000 (RX 567, pp. 4, 7). The organization employs approximately 1,100 persons (AMA Interrogatory 49).

2. AMA's membership is comprised of physicians, osteopaths and medical students (Tr. 3944). Membership in AMA is not a precondition to obtaining a license to practice medicine (Tr. 3944–46). No physician needs to be a member of AMA in order to obtain board certification in a medical specialty or in order to join a specialty medical society (Tr. 3946). Similarly, no physician needs to be an AMA member in order to obtain hospital staff privileges (Tr. 3947). [6]

3. AMA is the largest medical and professional association in the world (CX 1522B). As of December 31, 1974, of the 379,748 licensed physicians in the United States, 52.6 percent were AMA members (RX 658, 660). Currently, approximately 60 percent of all physicians and over 75 percent of office-based medical practitioners in the United States are members of AMA (Tr. 3949–50). Over 80 percent of

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RX - Respondent AMA Exhibit followed by number of exhibit being referenced.
RCX - Respondent CSMS Exhibit followed by number of exhibit being referenced.
RNHX - Respondent NHCMA Exhibit followed by number of exhibit being referenced.
CPF - Complaint counsel's proposed findings, followed by the number of the proposed finding being referenced.
RAF - Respondent AMA's proposed findings, followed by the number of the proposed finding being referenced.
RCF - Respondent CSMS's proposed findings, followed by the number of the proposed finding being referenced.
RNF - Respondent NHCMA's proposed findings, followed by the number of the proposed finding being referenced.
Comp. - Complaint.

the board-certified physicians in the United States belong to AMA (CX 232-O, 1103E). Most AMA members are private practice, fee-for-service physicians who provide medical care for a fee (Comp. and AMA Ans. ¶ 4; CX 1042H-J, 197-O).

4. AMA is a federacy of its state associations, which are termed constituent societies. Constituent societies are recognized medical associations of states, commonwealths, territories or insular possessions of the United States which have federated to form the AMA (CX 990E). Component societies are county or district societies contained within the territory of and chartered by the state associations (CX 990E). There are 55 constituent societies of the AMA, and these constituent societies have chartered approximately 2,000 component societies. Some component (local) societies require their members to become members of the constituent (state) society (CX 2017C, 2020B). Membership in a local society is a prerequisite to membership in a state society (*e.g.*, CX 475F, U, 991D, M, 1886E, 1889C, 1891G, 1899D, 2543A-C); and, membership in a state society is a prerequisite to regular membership in the AMA (CX 990G). Most members of AMA are members of both state and local medical societies (Comp. and AMA Ans. ¶ 1). In Hawaii, Oklahoma, Illinois, Arizona and Wisconsin, membership in AMA is a condition of membership in the state society (Tr. 4045-46). Other state and local medical societies strongly encourage their members to join AMA (CX 1385B, 2020B). As of December 31, 1975, there were 359,683 nonfederal physicians, and 213,339, or 59.3 percent, were dues-paying members of state medical societies (RX 531A).

5. The articles of incorporation, constitutions and bylaws of AMA's constituent and component societies establish that an express purpose of these societies is to form, support and maintain, together with other medical societies, the American Medical Association (CX 14C, 47A, 472A, 756A, 983C, 991D, 1404A, 1736A, 1824C, E, 1827B, 1829D, 1833F, 1877B, 1886E, 1894A, 1899D, 1901D, 1904F, X, 1905D, 1915A, 1922A, F, 1961B, 1976I, 2017A, 2020A, 2021B, 2050J, 2226A, 2306C, 2307C, E, 2543A). AMA's constituent societies are required to and do collect AMA membership dues of each regular member and transmit these dues to AMA. A charge is made to AMA for this service (CX 990J; Tr. 4046). [7]

6. The AMA House of Delegates is the official legislative and national policy-making body of AMA (CX 990E). One delegate is elected for each one thousand, or fraction thereof, AMA members who are members of each state society (AMA Interrogatory 49; CX 958B, 990E, P; RX 220, pp. 27-28). Currently, there are 253 delegates (Tr. 3953). The House of Delegates is empowered to amend the AMA

Constitution, Bylaws and the Principles of Medical Ethics, to elect AMA's general officers and trustees, and to prescribe the amount of annual dues (CX 990E, F, J, Z-8; RX 220, p. 30). The House of Delegates acts as a legislative body by acting on reports of standing councils and committees of the AMA and on resolutions introduced by one or more members of the House of Delegates. Once the House of Delegates adopts a resolution or report, it becomes the policy of the AMA (Tr. 3954). The House of Delegates meets twice annually and the actions taken at its meetings are published (Tr. 3961-64; RX 53, 54, 101-02, 566). The members of the state societies' governing bodies are elected by their respective component societies (*e.g.*, F. 10; pp. 8-9; CX 477S, 1877B, 1889P, 1886F, 14F, 1899J, E, 475R, K).

7. The AMA's Board of Trustees is ultimately responsible for the day-to-day operations of the AMA. The Board is elected by the House of Delegates, and it supervises all activities of the AMA and is responsible for its annual budget and expenditure of resources (Tr. 9648; CX 990Z5-Z7; RX 220, p. 30). It is comprised of twelve trustee members and three general officers and has eight scheduled meetings per year, in addition to emergency meetings which are held as is necessary (Tr. 9649).

8. The AMA operates eight standing committees on specific subjects, which are known as Councils. The Councils study and evaluate matters in their respective subject areas and make recommendations to the House of Delegates (CX 990U-Y; RX 220, p. 30). The Council on Constitution and Bylaws periodically reviews and recommends revisions in those documents (Tr. 3974). The Council on Medical Education supervises the AMA's involvement in undergraduate and graduate medical education and accreditation functions (Tr. 3975). The Council on Medical Service is concerned with a variety of socio-economic problems in health care (Tr. 3976). The Council on Legislation analyzes legislation, gives testimony, prepares draft legislation, etc. (Tr. 3976-77). The Council on Long Range Planning and Development attempts to analyze the nation's future health care problems and areas the AMA should address itself to in the future (Tr. 3977-78). The Council on Continuing Physician Education prepares and conducts [8] courses in continuing medical education for physicians (Tr. 3978). The Council on Scientific Affairs concerns itself with the preparation of policy statements and public education programs concerning specific scientific issues affecting medical practice, such as the efficacy of laetrile in treating cancer (Tr. 3979-81). The Judicial Council has responsibility for interpreting the AMA Constitution and Bylaws and the Principles of Medical Ethics (Tr. 3982). Council members are nominated by the Board of

Trustees or by the AMA President, and are elected by the House of Delegates (CX 990U–V).

### B. Connecticut State Medical Society

9. Respondent CSMS is a nonprofit corporation, organized under the laws of Connecticut, with its principal office located at 160 St. Ronan St., New Haven, Connecticut (Comp. and CSMS Ans. ¶ 2). CSMS was incorporated and chartered by the State of Connecticut General Assembly in 1792. CSMS is a constituent society of AMA (RCX 146 at I). CSMS is a federacy of eight component county medical societies, all located within the State of Connecticut. Respondent NHCMA is a CSMS component society (CX 991K). Members of the component (county) medical societies are not required to become members of CSMS; however, active membership in CSMS is limited to licensed physicians in Connecticut who are members of CSMS's component societies (CX 243A, 991D). Membership in CSMS terminates automatically when a physician loses his membership in a component society (CSMS Interrogatory 48(b); CX 991M). As of December 31, 1975, CSMS had 4,461 dues-paying members, which constituted approximately 81.6 percent of the 5,469 physicians registered in Connecticut as of July 1, 1975 (CSMS Interrogatory 27; CX 890D). CSMS members are not required to become members of AMA, but are eligible to do so (Tr. 8279, 8281; RCX 146 at II; CX 1480). A physician in Connecticut does not have to belong to CSMS in order to be licensed to practice in Connecticut (Tr. 8277). CSMS's annual revenues for 1975 totaled $409,911 (RCX 68, p. 18). Its total assets for that year amounted to $592,508 (RCX 68, p. 14).

10. The CSMS House of Delegates is the legislative and policymaking body of CSMS. It has two scheduled meetings each year, which are an annual meeting and a semi-annual meeting; special meetings may also be called (Tr. 8276–77; RCX 146 at I, III). The House of Delegates is composed of delegates elected by component societies, voting members of the CSMS Council, and may include ex-officio non-voting members (past presidents of CSMS and others, as approved by the House of Delegates). The number of delegates is proportionate to [9] the number of CSMS members in the county societies: one delegate for each 35 (or fraction thereof) county society members who are also CSMS members. Based on year-end 1975 membership data, the 1976 House of Delegates would include 131 delegates, which would include 34 from respondent NHCMA (RCX 68, pp. 12–13, RCX 146 at I, IV). The House of Delegates is empowered to amend the society's Bylaws and to elect its general

officers and its delegates to AMA's House of Delegates (CX 991E, F, N).

11. The CSMS Council is the executive and administrative body of CSMS when the House of Delegates is not in session. The Council is composed of the general officers of CSMS, any member of CSMS who is serving as an officer of AMA, and representatives from the county societies (CSMS Interrogatory 48(b); CX 243A, 991G, H). CSMS's Council appoints an Executive Director who manages and supervises the ordinary affairs and operations of CSMS, and whose duties include maintaining active liaison with AMA and collecting AMA dues from all CSMS members who are also members of AMA (CSMS Interrogatory 48(a); Tr. 8205, 8243-44; CX 991H; RCX 146 at VI). As of December 31, 1975, 2,445 of the 4,461 members of CSMS were also members of AMA (CSMS Interrogatory 48(a)). CSMS actively encourages its members to join AMA (CX 1385B).

### C. New Haven County Medical Association, Inc.

12. Respondent NHCMA is a nonprofit corporation, organized under the laws of Connecticut, with its principal office located at 270 Amity Road, Woodbridge, Connecticut (Comp. and NHCMA Ans. ¶ 3). NHCMA is a component society of CSMS and its bylaws are required to be not in conflict with those of CSMS (Comp. and NHCMA Ans. ¶ 3; NHCMA Interrogatory 44(a); CX 140K). One of the purposes of NHCMA is to unite with other societies to form and maintain CSMS and AMA (NHCMA Interrogatory 44(a); CX 1404A, 1405A). Members of NHCMA are not required to become members of CSMS or AMA (Tr. 8283, 8439; RCX 146 at II; RNHX 139). As of December 31, 1975, NHCMA had 1,179 members, which constituted approximately 71 percent of the 1,660 physicians registered in New Haven County as of July 1, 1975 (CSMS Interrogatory 28, 29; CX 890D). NHCMA's requirements for eligibility for membership cannot conflict with the Charter or Bylaws of CSMS or with the Constitution or Bylaws of AMA (CSMS Interrogatory 48(b); CX 991L). NHCMA membership dues are collected by CSMS and then forwarded to NHCMA (NHCMA Interrogatory 44(a)). [10]

13. Active and life members direct the affairs of NHCMA. They conduct two regular meetings each year and elect the NHCMA officers, delegates and alternate delegates to the CSMS House of Delegates, and the Councilors to the CSMS Council (Comp. and NHCMA Ans. ¶ 3; CX 1404B, E; RNHX 139, p. 16). Between meetings of NHCMA, the NHCMA Board of Govenors is the policymaking body of NHCMA and is authorized to conduct all activities of the society. The Board of Governors is composed of the NHCMA

Executive Committee, the NHCMA delegates to CSMS and the chairmen of the NHCMA standing committees (Tr. 8436; RNHX 139, pp. 7-8; CX 243A, 1404D, E). The NHCMA Executive Committee, composed of the NHCMA President, Vice President, Clerk, Councilor and Associate Councilors to CSMS, and the immediate past president of NHCMA, is empowered to execute the policy of the Board of Governors between meetings of that body (Tr. 8436; RNHX 139, pp. 6-7). NHCMA has three staff employees: a part-time Executive Director, one full-time secretary and one part-time secretary. Prior to August 1977, the NHCMA Executive Secretary was employed on a full-time basis (Tr. 8436-38). All NHCMA policy matters must be approved by the Board of Governors or the NHCMA membership as a whole (RNHX 139, pp. 7-8).

### D. Commerce

14. The challenged acts and practices of respondent AMA are in or affect interstate commerce (Tr. 2120, 2124).

In the conduct of their business, members of CSMS and NHCMA receive substantial sums of money amounting to several million dollars from the federal government and from private insurers for rendering medical services, which money flows across state lines (Comp. and CSMS Ans. ¶ 5(b); NHCMA Ans. ¶ 5(b)). Substantial sums of money are paid by the federal government under Medicare and Medicaid, by Blue Cross, Blue Shield under the federal employees insurance program, and by other private health insurance firms and organizations for services rendered by CSMS and NHCMA members. Some of CSMS's and NHCMA's members receive and treat patients from other States of the United States and from foreign countries (Tr. 1741-42, 1781; Comp. and CSMS Ans. ¶ 5(a); NHCMA Ans. ¶ 5(a)).

The United States mail has been used by CSMS and NHCMA in corresponding with AMA and others, including specific applications of AMA's restrictions on advertising and solicitation (CX 78B, 673, 781, 783, 785; CSMS and NHCMA Adm. 20(b), (d), filed June 20, 1977), and in obtaining from AMA and distributing to their members copies of, or excerpts from, AMA's Principles of Medical Ethics and [11] interpretations thereof (CX 202-19, 221, 1748, 1787; CSMS and NHCMA Adm. 19(c), (d), filed June 20, 1977). Also, delegates, executives, members and employees of CSMS and NHCMA attend AMA conventions and conferences outside Connecticut, including conventions of AMA's House of Delegates at which AMA's Principles of Medical Ethics, and interpretations thereof, are adopted, amended, discussed and interpreted (CSMS and NHCMA Adm. 17(b), (c), filed June 20, 1977; CSMS Interrogatory 10(a)).

## II. ACTIVITIES OF AMERICAN MEDICAL ASSOCIATION

### A. Background

15. An important threshold question is whether the respondents are subject to the jurisdiction of the Federal Trade Commission. This question arises out of Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. 45 (a)(2), in which Congress limited the jurisdiction of the Commission to "persons, partnerships or corporations." The jurisdictional question hinges on whether respondents are "corporations" within the meaning of the Act. The word "corporation," for purposes of Section 5(a)(2), is defined in Section 4, 15 U.S.C. 44, to include:

> . . . any company, trust. . .or association. . .which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust. . .or association, incorporated or unincorporated, without shares of capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

Each respondent has argued vigorously that it does not come within this definition because it is not "organized to carry on business for its own profit or that of its members." Determining whether the respondents are within the Commission's jurisdiction requires an analysis of their activities. The following findings, contained in Sections II, III, V, VI, VIII, *infra*, detail the activities of respondents which have been considered in making this determination. [12]

### B. Educational Activities

16. (a) *Undergraduate and Graduate Medical Education.* From its inception, the AMA has been involved in medical education (Tr. 4068-70). Very early in its history, the AMA established a Committee on Medical Education to develop standards for admission to medical school and to establish a system of postgraduate medical education (Tr. 4070-73). The AMA group presently responsible for medical education is its Group on Medical Education. Approximately 10% of all AMA employees are directly assigned to this Group (Tr. 4067). The Group is divided into two divisions: the Division of Medical Education Evaluation and the Division of Educational Policy Developments (Tr. 4076-77).

The Division of Medical Education Evaluation, which is concerned with the establishment of standards of education and accreditation at all levels of medical education and in certain allied health fields, is divided into four groups:

(1) The Department of Undergraduate Medical Education, which deals with medical school accreditation and related activities;

(2) The Department of Graduate Medical Education, which deals with residency programs;

(3) The Department of Continuing Medical Education, which deals with accrediting institutions and organizations offering courses to practicing physicians; and,

(4) The Department of Allied Health Evaluation, which shares responsibility with various allied health professions in establishing and accrediting educational programs in health fields (Tr. 4077-78).

Since 1942, the AMA has shared medical school accreditation functions with the Association of American Medical Colleges through a joint enterprise called the Liaison Committee on Medical Education, a body whose accrediting power is recognized by the U.S. Commissioner of Education (Tr. 4074-75). [13]

The AMA is also involved in accreditation of medical education at the graduate level, which encompasses residencies and other activities after graduation from medical school (Tr. 4091). In January 1972, the AMA joined with several other organizations to create the Liaison Committee on Graduate Medical Education, which became the accrediting body for graduate programs on January 1, 1975 (Tr. 4094). The Liaison Committee, in addition to its accreditation functions, also prepares "Essentials of Approved Residencies" (RX 543A-2(10)), a document which is distributed to anyone seeking information on residency programs (Tr. 4092, 4095). "Essentials of Approved Residencies" is also included in the "Directory of Accredited Residencies" (RX 9), a document compiled and published annually by the AMA (Tr. 4097). The Directory also contains statistical data on and analyses of trends in graduate medical education, lists of residencies broken down by geographic location and specialty, information on the availability of graduate medical education in the U.S. and information on the standards against which residency programs are measured. It is distributed to all third year medical students, all deans of medical schools, all hospitals with accredited residency programs, state licensing boards and various other private and governmental entities (Tr. 4097-99). The AMA publishes about 40,000 copies of the Directory each year and distributes them without regard to membership in the AMA or the

Student American Medical Association, and at little or no cost (Tr. 4098–4100).

(b) *Continuing Medical Education.* In the area of continuing medical education, the AMA's involvement dates from the early 1900's (Tr. 4111). Today, AMA shares accreditation responsibilities with six other groups by means of the Liaison Committee on Continuing Medical Education (Tr. 4111). In 1977, the Liaison Committee reaccredited more than 900 organizations, agencies and institutions, which offer approximately 7,300 courses in continuing medical education (Tr. 4115). The general standards and requirements for accredited continuing medical education courses have been developed by the AMA and are published in a document entitled "Essentials for the Accreditation of Institutions and Organizations Offering Continuing Medical Education Programs" (RX 556; Tr. 4120). This document has been adopted by the Liaison Committee and is distributed to state medical boards and all institutions, organizations and agencies seeking to be accredited (Tr. 4121).

AMA's Department of Physician's Qualifications and Credentials is active in assisting individual physicians to maintain their professional knowledge and skills (Tr. 4151). [14] The AMA gives the Physician's Recognition Award to physicians who meet its established criteria for continuing medical education. Membership in the AMA or a state or local medical society is not required to receive the Award (Tr. 4153–54). This department further assists physicians in maintaining their medical skills by making films and other audiovisual materials available to hospitals and medical societies for group viewing (Tr. 4163). These films are distributed without regard to organizational affiliation (Tr. 4164). The Department is also active in the area of medical licensure, gathering information from state medical boards and making it available to the Federation of State Medical Boards, hospitals and health services agencies (Tr. 4164).

(c) *Allied Health Education.* The AMA's Committee on Allied Health Education Accreditation is recognized by the U.S. Commissioner of Education as the duly authorized accrediting body in more than 28 allied health fields (Tr. 4124). The AMA publishes the "Allied Medical Education Directory" (RX 560), which analyzes trends in allied health education and lists institutions which offer accredited allied health programs (Tr. 4130–31). The Directory is often used by high school students and their parents, high school guidance counselors and college guidance counselors as a reference work in evaluating health service careers (Tr. 4131–32). The selling price of the Directory is less than the AMA's cost of publishing and compiling it (Tr. 4134).

(d) *Summary.* It is AMA's position that AMA's accreditation of educational programs assures students that a school is properly prepared to train them and assures the public that a physician or other health professional has completed a satisfactory course of study (Tr. 4076). AMA asserts that it has undertaken accreditation activities because of its responsibility for the improvement and furtherance of education and knowledge in medicine and related health fields (Tr. 4075, 4090, 4104, 4128). In participating in the field of medical education, it is AMA's position that it has sought to promote the science of medicine and the betterment of public health (Tr. 5174). In doing so, AMA seeks to continually improve the qualifications and skill of American physicians (Tr. 5174-75), thereby improving the quality of care delivered to the patient (Tr. 5176). No fees are charged to medical schools for the accreditation process, and the income from other accreditation activities does not cover AMA's costs (Tr. 4101-03). AMA incurs a net operating deficit for [15] accreditation activities of approximately $2 million per year (Tr. 4102). The AMA contends that no pecuniary advantage accrues to members as a result of its involvement in the accreditation of undergraduate, graduate, continuing and allied medical education (Tr. 4091, 4119, 4129-30).

(e) *Education Counseling and Health Manpower.* The second division of the Group for Medical Education is the Division of Educational Policy and Development, which is, in turn, comprised of two departments: the Department of Health Manpower and the Department of Physician's Credentials and Qualifications (Tr. 4135). The Department of Health Manpower provides information and advice to people seeking information about health careers, including students, guidance counselors and health career program directors (Tr. 4137). The AMA responds to about 60,000 such inquiries each year (Tr. 4137). The Department also publishes a number of books on different health careers, which are available to the public upon request (Tr. 4147). The AMA does not charge for any of these services other than bulk requests for pamphlets, which are then sold at cost (Tr. 4138). The Department of Health Manpower is responsible for evaluating federal and state legislation which affects medical education and training programs, and for staffing the committee which recommends whether or not a new health occupation should be recognized for the purpose of establishing essentials for the educational program (Tr. 4138-39). The Department is also involved in the accumulation and distribution of data (RX 10, 28, 562), the AMA being the primary repository for physician manpower information needed by private agencies and local and regional planning bodies (Tr. 4139, 4144–45). Other data, developed by the AMA in conjunction with the Census Bureau and the National Center for Health Statistics, is used by the U.S. Department of HEW, state licensing bodies and other groups for such things as targeting continuing education courses (Tr. 4141, 4148–49). Data collected by the Department of Health Manpower is also used in the preparation of directories published by other AMA departments (Tr. 4139). AMA contends no pecuniary benefit flows to its members from these activities (Tr. 4150).

(f) *Vietnamese Medical Education.* In 1966, the Agency for International Development ("AID") requested the AMA to join in its efforts to improve the quality of Vietnamese medical education (Tr. 4756; RX 512). In response to this request, the AMA conducted a feasibility study and thereafter entered into a contract with AID whereby AMA agreed to assist in the development of medical education in South Vietnam. AMA's first attempts were to recruit American medical school faculty members to instruct Vietnamese students at the medical [16] school in Saigon (Tr. 4758). Over the course of several years this approach was modified, and the AMA concentrated on helping the Vietnamese faculty members improve their own methods of teaching (Tr. 4758). The program continued in force until the fall of South Vietnam in April 1975 (Tr. 4762). Prior to 1975, AMA was also involved in a program entitled American Volunteer Physicians Program for Viet Nam. The program was intended to bolster the medical resources in provincial hospitals of South Vietnam, and involved the recruiting of American physician volunteers to spend a 60-day period of service in Vietnam (Tr. 4771; RX 511).

When the Republic of South Vietnam was overrun in 1975, some 600 South Vietnamese physicians who escaped the country found their way to the United States. Most of them were unable to bring along their credentials to authenticate their medical training and licensure (Tr. 4773–74). The AMA, in conjunction with the Department of HEW, worked to provide authority and documentation for the Vietnamese physicians to practice in the United States (Tr. 4775–76; RX 510). AMA has also undertaken to place the foreign physicians in professional positions around the country (Tr. 4776).

## C. Scientific Activities

17. (a) *The AMA's Group on Scientific Affairs* is involved in a variety of scientific activities. The Group has 86 employees and is divided into two divisions, the Division of Scientific Affairs and the Division of Continuing Medical Studies (Tr. 4405). The basic func-

tions of the Division of Scientific Affairs are to disseminate scientific information to the medical profession and general public and to assist the AMA in developing policy positions on scientific matters (Tr. 4406). The Division is broken down into six departments dealing with the following substantive areas:

(1) Drugs;
(2) Food and Nutrition;
(3) Mental Health;
(4) Environmental, Public and Occupational Health;
(5) Medical Terminology and Nomenclature; and,
(6) Health Education (Tr. 4406). [17]

(b) *The Department of Drugs*, staffed by both physicians and nonphysician pharmacologists, evaluates new and existing drugs (Tr. 4406–07). These evaluations are published in the triennial "AMA Drug Evaluations" (RX 270), a book used by physicians, nurses, hospitals, pharmacists and medical students (Tr. 4407–09). The royalties paid to the AMA by the book's publisher do not cover the cost of performing the evaluations and compiling the book (Tr. 4412). In addition, the Department prepares articles on new drugs for the *Journal of the American Medical Association ("JAMA")*; these monographs discuss the uses, risks and benefits associated with new drugs (Tr. 4414). The Department is also responsible for answering the 500 to 1,000 drug-related inquiries received by the AMA each year; no charge is made for responding to these requests (Tr. 4416–17).

(c) *The Department of Environmental, Public and Occupational Health* provides the medical profession and the general public with information on environmental and occupational health problems (Tr. 4417). The AMA works with the Public Health Service and the National Center for Disease Control and has sponsored publicity efforts and television advertising to inform the general public of immunization campaigns (Tr. 4418). In the area of environmental health, the AMA publishes a number of brochures dealing with such topics as air pollution (RX 81), water pollution (RX 82) and noise pollution (RX 83), and has sponsored a series of conferences on various environmental matters, some of which have been published in book form (Tr. 4419; RX 84, 85, 86). The conferences are open to anyone who wishes to attend; AMA members receive no price discount in purchasing the various brochures and publications (Tr. 4420). In the field of occupational health, the AMA authors a number of publications, dealing with topics ranging from airport emergency services to the use of pesticides by farmers (Tr. 4423; RX 78, 599). (*See also* RX 79, 107, 597).

The Department of Environmental, Public and Occupational Health is also active in such diverse areas as industrial and household toxicology, venereal disease and sports medicine (Tr. 4421, 4428; RX 106). The AMA responds to questions from the medical profession and the general public at no charge, sponsors conferences and has published numerous brochures, such as "Comments in Sports Medicine" (RX 30), "Sports and Physical Fitness" (RX 92) and "Standard Nomenclature of Athletic Injuries" (RX 32; Tr. 4421-22. *See also* RX 31, 33, 34, 35, 105). Most of the publications offered by the Department are available to physicians and the general public at no charge (Tr. 4446; RX 619). [18]

(d) *The Department of Medical Terminology and Drug Nomenclature* has two major functions (Tr. 4453). In the area of medical terminology, the AMA provides all of the staff and editorial work for a compendium entitled "Physicians Current Procedural Terminology" (RX 8; Tr. 4454). The book seeks to systematize the nomenclature of procedures used in medicine and facilitate the compilation and analysis of statistical information used by physicians, medical economists and the government (Tr. 4455). The staff of the Department is also active in the field of standardization of generic names for pharmaceuticals (Tr. 4457). The AMA has a representative on the United States Adopted Names Council and provides the Council's secretarial staff (Tr. 4459). Finally, the Department performs functions which have carried over from the now defunct AMA Committee on Transfusion and Transplantation, including the distribution of documents, such as "Guide for Hospital Committees on Transfusions" (RX 180), a brochure which is distributed free of charge to anyone who requests it (Tr. 4461).

(e) *The AMA's Department of Mental Health* concerns itself with such topics as mental retardation, alcoholism, drug abuse and the problem of the impaired physician (Tr. 4462). The Department has eight employees and it provides information primarily to physicians and other health professionals to help them better understand the problems associated with mental illness and alcoholism (Tr. 4646). This information is distributed to all physicians without regard to AMA membership (Tr. 4647). Included among the activities of the Department of Mental Health are the publication of booklets and pamphlets, sponsorship of conferences, and abstracting of the scientific literature (Tr. 4648. *See, e.g.,* RX 35, 65, 142, 188). Reprints of articles from AMA scientific journals are distributed free of charge; charges for other publications are equal for AMA and non-

AMA members (Tr. 4649). The journal abstraction service is available without charge to anyone who wishes to use it (Tr. 4653).

The Department of Mental Health sponsors two types of workshops and conferences. One is a public program of presentations and discussion meetings; the other involves bringing together experts for a nonpublic meeting from which written material is eventually produced (Tr. 4654). Participation in conferences and workshops is not contingent upon being a member of the AMA (Tr. 4654). [19]

The Department is also involved in several ongoing projects in such areas as child mental health, television and health, and the problem of impaired physicians (Tr. 4655–58). The AMA has attempted to identify and influence the broadcasters and sponsors of violent television programs and supports research in that subject area (RX 514A–B; Tr. 4658, 4669). In its television and health program, the Department has made a number of grants to encourage further research. Grants have gone to the National Citizens Committee on Broadcasting ($36,000), the National Parent-Teacher Association ($32,000) and Professor George Gerbner of the University of Pennsylvania ($100,000). Several publications have resulted (RX 520, 521; Tr. 4659, 4662–63). The AMA also sponsors training sessions for physicians who are interested in learning more about the issues of television violence (Tr. 4665). The AMA receives no revenue as a result of this program (Tr. 4666). The AMA has also presented testimony before the Senate Health Committee's Subcommittee on Communications on the issue of television violence (RX 513A–J). The AMA's total out-of-pocket expenditure in connection with the television project is approximately $300,000 (Tr. 4670). The objective of the program is to reduce the deleterious impact of violent programming on viewers, particularly children (Tr. 4671).

The Department's program on impaired physicians involves determining how best to identify such physicians and remove them from practice until they are rehabilitated (Tr. 4672–76). The AMA has published an article in *JAMA*, entitled "The Sick Physician" (RX 523), has made recommendations on dealing with the impaired physician to state and local medical societies (Tr. 4675–78) and has drafted model legislation authorizing state licensing boards to examine and deal with impaired physicians and provide legal immunities for the person making an allegation of impairment (Tr. 4678–79). Other activities of the AMA in this area include involvements in workshops and symposia (RX 524–25; Tr. 4679). The out-of-pocket expenditure incurred to date by the AMA in connection with the impaired physician program is approximately $200,000 (Tr.

4681). These efforts are directed at AMA and non-AMA members alike (Tr. 4682–83).

(f) *The Department of Food and Nutrition* is another part of the AMA Group on Scientific Affairs. The AMA's formal involvement in the areas of food and nutrition dates back to 1929 (Tr. 4514). From 1955 to the present, the AMA has sponsored more than 40 symposia, published 15 books and caused about 125 articles to be published in *JAMA*, all [20] dealing with food and nutrition (Tr. 4517). The primary interest of the Department of Food and Nutrition is in the area of clinical nutrition. To this end, the Department has held symposia on topics such as the metabolic aspects of critically ill patients (RX 112, 618) and parenteral nutrition (Tr. 4520–22; RX 64, 108, 109, 110, 111. *See also* RX 602). These programs are open to all who wish to attend (Tr. 4528).

The AMA has developed a number of programs to further education in the area of nutrition. The Goldburg Medical Student Fellowship program enables medical students at schools that do not offer significant clinical experience in nutrition to attend a clerkship or preceptorship at a school which has a strong nutrition program (Tr. 4532). The award of a Goldburg Fellowship is not limited to members of the AMA or the American Student Medical Association (Tr. 4533). The Department also sponsors a roster of about 20 experts in nutrition who visit medical schools for two or three days each year and act as visiting professors, conducting seminars, lectures and the like (Tr. 4533–34).

A third interest of the Department is the area of public health nutrition (Tr. 4534). The AMA prepares pamphlets and articles in this field, acts as an information source for writers and broadcasters, responds to proposed governmental rules and regulations and helps develop testimony for Congressional hearings before bodies such as the Senate Select Committee on Nutrition (Tr. 4534–35). The Department also runs a program, aimed at physicians and the food industry, which deals with problems in the area of food composition, safety and toxicity (*Id.*).

The AMA is also responsible for originating the Western Hemisphere Nutrition Congress (RX 104), a symposium involving 800 to 1,000 participants, which is held every three years (Tr. 4535). The AMA manages the symposium, publishes a synopsis of its proceedings and is the major financial contributor to the Congress (Tr. 4536). The AMA has also worked in conjunction with the White House Conference on Food and Nutrition and various other groups (Tr. 4539–40). Several books have resulted from these conferences, including works in topics such as food processing technology (RX 47) and processed foods (RX 600, 601; Tr. 4540). These books are available to anyone wishing to purchase them (Tr. 4543). Other activities include the screening of articles on the subject of nutrition for publication in *JAMA* (Tr. 4530–31), the preparation of three continuing education films on subjects such as digestion and absorption (RX 52; Tr. 4544) and the compilation of book reviews of books on the subject of nutrition (RX 62). [21]

(g) *The Department of Health Education's* primary responsibility is to provide information regarding health and disease. The Department is currently involved in projects dealing with subject areas such as physical fitness, health in school and college communities and automobile safety (Tr. 4577). Another project is to establish a national patient education clearinghouse which would serve as a central source of information about patient education materials for anyone who is interested (Tr. 4578). The AMA's patient education activities also include responding, without charge, to the approximately 50,000 mail and telephone inquiries received from the general public each year (Tr. 4579–80).

The Department of Health Education has for the past eight years maintained a committee on exercise and physical fitness (Tr. 4580). In addition to developing exercise programs, the committee has issued various guidelines covering such topics as stress testing for cardiac rehabilitation and has published a variety of pamphlets and articles in connection with the President's Council on Physical Fitness (Tr. 4581–82).

The Department's work in the area of health education for schools includes involvement of the AMA's Medicine and Education Committee on School and College Health, a group composed of representatives from sixteen national organizations interested in school health (Tr. 4583). The Department also sponsors a biannual conference on the subject of physicians in schools, publishes numerous statements and pamphlets and has produced three books dealing with health instructions, health services and health environment (Tr. 4584–85). The AMA is also involved in such diverse projects as seeking to identify a relationship between school environment and learning, and screening school children for visual defects and hearing impairment (Tr. 4585–86).

In the automobile safety area, the AMA has helped develop a series of training films for driver's license examiners, has helped develop the Abbreviated Crash Injury Scale and has collaborated with the National Safety Council on subjects such as the efficacy of seat belts and motorcycle helmets (Tr. 4587–88). In addition, the AMA publishes several pamphlets in this area: "Drinking and

Driving" (RX 126), "You May Be Involved in an Automobile Collision Today" (RX 156) and "Are You Fit to Drive" (RX 177).

The Department also publishes pamphlets and brochures covering a wide variety of subjects (Tr. 4589). One group of brochures deals with a number of common diseases and is [22] used by consumers for general education purposes (Tr. 4591); it includes such publications as "Athlete's Foot" (RX 120), "Your Blood Pressure" (RX 130), "Venereal Disease" (RX 127) and "Smoking Facts You Should Know" (RX 134. *See also* RX 118, 119, 122, 125, 128, 129, 134, 146, 159, 162, 163, 168, 171, 179, 183, and 186). These pamphlets are revised and updated by a full-time staff of writers working in conjunction with expert consultants (Tr. 4592). Single copies of the pamphlets are given away free of charge, at a cost to the AMA of about $20,000 per year (Tr. 4591-92).

Another group of approximately 15 brochures deals with the area of dermatology, which includes "Something Can Be Done About Acne" (RX 173), "The Sun and Your Skin" (RX 155) and "Soap, Its Use and Abuse" (RX 132. *See also* RX 152, 175, 149, 144, 143, 117, 124, 138, 160, 161, 164, 136, 140, 588, 589, 590). A group of brochures deals with topics related to reproduction. Included in this group are "What To Do After Your Baby Comes" (RX 129), "Infertility" (RX 189) and "What You Should Know About the Pill" (RX 169. *See also* RX 139, 170, 93). Other sets of brochures deal with aging and retirement (RX 167, 172, 180, 178, 114), sex education (RX 99, 98, 91, 90, 62, 181, 137), food and nutrition (RX 131, 153, 154, 184), athletics (RX 187, 150, 113, 95, 185) and miscellaneous topics such as "Sensitivity Training" (RX 131), "Psychotic Drugs" (RX 176), "The ABC's of Perfect Posture" (RX 157) and emergency medical services (RX 87, 145. *See also* RX 141, 147, 148, 174, 166, 158, 182, 595, 123, 187). The AMA also distributes posters dealing with various medical problems, including athletic injuries (RX 203), venereal disease (RX 201), heroin (RX 199) and emergency medical identification tags (RX 197. *See also* RX 198, 200, 202). These pamphlets and posters are distributed primarily to the general public, and are available at no charge and without regard to medical society membership (Tr. 4596-97, 4599-4600, 4604, 4613).

In addition to brochures and posters, the AMA publishes the proceedings of conferences on a number of health issues. Several of these conferences have grown out of the Department's auto safety project, *e.g.*, "Proceedings, National Conference on the Aging Driver" (RX 569) and "Conference Proceedings on Current Problems in Driver Licensure" (RX 570. *See also* RX 571, 572, 573). These conferences bring together professionals with expertise in the area of auto safety, without regard to AMA membership (Tr. 4629). Other auto safety activities include reprinting *JAMA* articles on the subject; "Visual Factors in Driving" (RX 575) and "Physician Reporting of Driver Impairment" (RX 577) are just two examples of such reprints (*see also* RX 576, 578, 581, 582, 583, 584, 585, 586). Other publications include scales for standardizing automobile injury data (RX 574, 594, 579, 580). [23]

In addition to the above activities, the AMA publishes numerous scientific works, such as treatises on the neurobiology of cerebellar evolution or on spectroscopy as it relates to biomedical problems (RX 38, 63), "Current Concepts in Cancer" (RX 29) and "General Principles of Blood Transfusion" (RX 598). The AMA also publishes less technical books which, while intended for physicians, can also be used by laymen (Tr. 4475); "Human Sexuality" (RX 43), a work dealing with sexuality and other family problems, is an example of such a book (*see also* RX 46, 88).

Finally, the AMA puts out several publications designed for use in health education at the elementary and secondary levels (Tr. 4477-78); "The Wonderful Human Machine" (RX 58, 59) and "The Miracle of Life" (RX 60) are examples of such brochures. The AMA is also active in advising educators on methods of improving health services in schools. To this end, the AMA has issued three publications: "Healthful School Environment" (RX 39), "Suggested School Health Policies" (RX 40) and "School Health Services" (RX 41). The AMA has also participated with the National Education Association in preparing and publishing a book which instructs students in hygiene and personal health habits (Tr. 4482; RX 42).

The AMA prepares over 100 other brochures for distribution to the general public (Tr. 4484). These publications cover a broad range of areas, including such topics as prenatal care (RX 115) and diabetes (RX 116). While these brochures carry a nominal charge of 25 to 30 cents, they are generally distributed to individuals free of charge (Tr. 4483-85). Several AMA publications address the various problems related to child care. The AMA distributes height and weight interpretation folders (RX 214) to schools, physicians and others who need to chart the growth progress of a child, and has helped prepare "Growing Pains" (RX 74), a publication directed to parents (Tr. 4487). Other AMA publications are concerned with issues relating to drinking and smoking; "Breath Alcohol Tests" (RX 97) is an exposition of the various tests that can be used for measuring blood alcohol levels (Tr. 4488). The AMA also distributes plaques containing the words "For the Sake of Your Health and the Comfort of Others, No Smoking, Please" (RX 216, 217). The objective of the

AMA in placing a nominal price on some of the above-mentioned items is to recover a portion of the costs of printing and distribution and to make the documents more valuable to the purchaser (Tr. 4491).

(h) *Scientific Publications.* AMA publishes 10 scientific journals. The most well known of these is *JAMA,* which is published weekly (Tr. 5086). AMA also publishes nine specialty journals: *Diseases of Children, Archives of General Psychiatry, Archives of Internal Medicine, Archives of Neurology, Archives of Ophthalmology, Archives of Otolaryngology, Archives of Pathology, Archives of Surgery* and *Archives of Dermatology* (Tr. 5086, 5100). **[24]**

*JAMA* serves three separate functions. It is the official bulletin of the AMA and periodically contains information such as the names of AMA's elected officers, the AMA annual budget, etc. (Tr. 5087). It is also a scientific journal of medicine, as it includes a large number of articles on the diagnosis and treatment of disease (Tr. 5087). *JAMA* also publishes notices of relevant current events in American medicine, such as the date of scientific meetings, coverage of medical breakthroughs, etc. (Tr. 5087-88; RX 213, 608). Scientific articles take up the majority of space in *JAMA.* The AMA receives approximately 4,000 major scientific manuscripts per year from physicians and scientists around the world, and the editorial staff selects and edits about 800 of the articles for publication each year (Tr. 5088-89). *JAMA* is the world's most widely circulated medical journal, with a print run of about 250,000 issues per week (Tr. 5090-91, 5095). *JAMA* is distributed to about 210,000 subscribers (Tr. 5098). About 150,000 of these are AMA members who receive *JAMA* as part of their annual dues package (Tr. 5098-99). The remainder of the issues are distributed to nonmember subscribers such as physicians, scientists and libraries. Nonmembers receive *JAMA* at a cost of $30.00 per year in the United States and $50.00 per year in foreign countries (Tr. 5098).

The nine AMA specialty journals are published on a monthly basis and consist almost exclusively of scientific articles relating specifically to the particular medical specialty (Tr. 5100; RX 609-17). The articles are selected and edited by autonomous editorial personnel, most of whom hold positions of responsibility in medical education and are not members of AMA (Tr. 5104-05). The specialty journals occasionally sponsor symposia or conferences on a specific disease or treatment. The journals publish the papers which are presented at these meetings and distribute them to subscribers at no additional charge (Tr. 5106-07; RX 66-73).

The nine specialty journals have the following approximate circulation characteristics:

| | TOTAL CIRCULATION | CIRCULATION TO AMA MEMBERS |
|---|---|---|
| *Archives of General Psychiatry* | 23,000 | 14,000 |
| *Archives of Internal Medicine* | 60,000 | 15,000 |
| *Archives of Neurology* | 14,000 | 6,000 |
| *Archives of Opthalmology* | 17,000 | 7,000 |
| *Archives of Otolaryngology* | 13,000 | 5,000 |
| *Archives of Pathology* | 10,000 | 5,000 |
| *Archives of Surgery* | 45,000 | 38,000 |
| *Archives of Dermatology* | 16,000 | 7,000 |
| *Diseases of Children* | 26,000 | 16,000 |

(Tr. 5102–03)

[25] AMA members receive one specialty journal as a part of their regular dues package (Tr. 5101). Nonmembers are charged at an annual rate of $18 per journal, the same price which is charged to AMA members for additional specialty journals (Tr. 5102).

The AMA receives various advertising and subscription revenues in connection with its publication of the journals. Revenues from AMA medical journals go into the general funds of the Association and journal expenditures are made from the same general fund (Tr. 9571). Since 1975, the revenue received by AMA from advertising and subscriptions has roughly equaled the direct expenditures associated with the journals (Tr. 6438, 9590; CX 2586T, H; RX 567, pp. 7, 15, 17). In 1975, advertising, subscriptions and book and pamphlet sales revenues were approximately $12.253 million, and expenditures were approximately $10.703 million (RX 567, p. 7). In 1977, advertising revenues were estimated at $10.187 million, subscription revenues were estimated at $2.114 million and sales of books and pamphlets were estimated to earn $.545 million, for a total of $12.846 million; expenditures were estimated at $12.666 million (RX 567, pp. 15, 17). AMA's senior Vice President in charge of medical education, scientific activities and scientific publications testified that: "I think in any of our activities which we carry on, and its the same with non-publications, if there is a potential to offset the cost of that operation through legitimate income, we attempt to do it" (Tr. 9590).

Through its efforts in the areas of scientific affairs and publications, AMA contends that it has also sought to achieve its goal of improved patient care by encouraging continued medical research and by communicating the resulting knowledge to physicians (Tr. 517-679). These programs constitute one of the primary reasons for the Association's existence (Tr. 5182-83). AMA further contends that the few programs it offers which may directly benefit its membership, such as retirement and insurance plans, are not a primary function of the organization. The basic purpose of AMA, it is asserted, continues to be to advance the public health through its programs in medical education, scientific affairs and scientific publications (Tr. 5184-85).

### D. Public Health Activities

18.(a) The *Division of Medical Practice* concerns itself with federal and state medical regulations, practice management programs, professional peer review, a project to improve the **[26]** quality of medical care in jails, physician placement, the application of computer technology to the practice of medicine, rural and community health programs and a program involving consumer affairs (Tr. 4950).

In 1972, the American Bar Association and the Chief Justice of the United States Supreme Court coauthored a report concerning the quality of health care in American jails. The report urged organized medicine to join in an effort to improve the quality of such medical care (Tr. 5039-40). The AMA undertook a detailed study entitled "Medical Care in U.S. Jails" (RX 497), which it funded entirely at a cost of $48,000 (Tr. 5040). AMA organized a national advisory committee composed of representatives from the AMA, the American Bar Association, the American Correctional Association and the National Sheriffs' Association (Tr. 5041). Since 1972, AMA's effort has focused upon the development of a national accreditation program to determine whether jails have complied with certain minimum standards of medical care (Tr. 5044). The AMA has now completed a draft of minimum standards for medical and health care services in jails (RX 496). AMA representatives, along with those of the national advisory committee, have also attempted to monitor jails' compliance with the standards (Tr. 5048). The AMA has published and distributed a number of informational monographs for use by jail medical personnel (Tr. 5054-59; RX 498-507, 658). The AMA spent about $50,000 on the program during each of the years

1976 and 1977, and about $70,000 was budgeted for expenditure in 1978 (Tr. 5060-61).

In the area of federal and state regulations affecting medical practice, the Division of Medical Practice advises governmental agencies of the potential effect of such regulations upon the ability of physicians to deliver high quality care to patients. The AMA also attempts to keep the nation's physicians aware of the existence of governmental regulations which govern medical practice (Tr. 4951-52).

The AMA holds practice management seminars to instruct young physicians how to deliver high quality medical care to their patients in an organized and efficient manner (Tr. 4953-55). These seminars are available to the public, and are attended by nonphysicians and physicians who are not AMA members (Tr. 4954). The Division of Practice Management also conducts seminars to advise medical personnel of the increasing role of computer technology in the health care field, and publishes a newsletter on this subject. The computer seminars and newsletters are made available to the general public (Tr. 4958). [27]

The Division of Medical Practice helps to design and administer the operation of peer review organizations which evaluate the appropriateness and quality of medical services performed by physicians (Tr. 4957-62). Thus, the Division has established a number of task forces to look into development of health quality assurance programs nationwide (Tr. 4852). The AMA has also received a $1 million grant from the U.S. Department of HEW to help finance its project to develop sample criteria for care in short-stay hospitals. These criteria are designed for use by Professional Standards Review Organizations (PSRO's) around the country (Tr. 4853-54). The HEW grant facilitated publication of a resource manual containing sample criteria of care which is now in use throughout the nation (Tr. 4853-54).

The AMA's physician placement service is a program designed to locate physicians to serve areas in need of medical service. The placement service is available to any physician or community, and is run by the Division of Medical Practice free of charge (Tr. 4963). The AMA has also assisted the National Health Service Corps to locate physicians in medically underserved areas designated by the Secretary of HEW, and has performed a similar function on behalf of The Indian Health Service. The AMA made no charge for these services (Tr. 4964). In the areas of community and rural health, the Division of Practice Management has held numerous conferences and seminars to improve the delivery of health care in the urban and rural environment (Tr. 4966-67). The AMA is also involved in a pilot urban medical care program in cooperation with the Robert Wood Johnson Foundation and the National Conference of Mayors (Tr. 4968). The Division of Medical Practice is engaged in a program designed to improve the nation's emergency medical services (Tr. 4971). The Division is also in the process of establishing a consumer affairs program to provide patient input into the practice of medicine (Tr. 4971-72).

(b) The AMA's *Division of Public Affairs* includes programs in the area of federal communications, speech writing, public speaking, membership development, government interface and officer services (Tr. 4973). AMA's membership development programs are designed to maintain the level of AMA membership and to solicit nonmember physicians to join the Association. This is done through direct mail, publications, pamphlets and speeches (Tr. 4973-74). The Division is engaged in a continuing effort to provide information of interest to other medical organizations, such as state or county medical societies (Tr. 4975-76). The Division also staffs a speaker's bureau. At the request of public or civil organizations, AMA members are sent to speak on questions concerning medical practice and health care (Tr. 4976-78). AMA trains its [28] spokesmen in the art of public speaking, and makes the service available to the public, usually at no charge (Tr. 4977-79). The Division also employs a number of speech writers to prepare remarks for AMA officers who are called upon to speak at public meetings (Tr. 4980-84).

The AMA Division of Public Affairs conducts a program of government interface. There are two major aspects of the program: one involving legislative work with the Congress or state legislatures and one with federal administrative agencies such as the Department of HEW and the Veteran's Administration (Tr. 9827). In 1977, for example, AMA representatives testified or submitted statements concerning some 110 proposed bills or regulations affecting the public health (Tr. 9828). In the majority of instances, AMA testifies at the specific request of the committee or agency (Tr. 9829). AMA testifies on a wide range of issues from the use and regulation of drugs, funding of medical procedures under medicare, mental health programs, etc. (Tr. 9829; RX 696-97). The AMA also is engaged in the preparation of draft legislation and regulations, as well as lobbying for bills which it favors (Tr. 9831).

According to AMA, its purpose in engaging in a program of governmental interface is to encourage state and federal governments to initiate and maintain programs which will best serve the public health and to encourage government to promote economic efficiency in its health programs (Tr. 9835). AMA contends that there is no substantial economic motivation underlying AMA's program of governmental interface (Tr. 9836). When AMA formulates a position on a specific item of legislation or regulation, its probable economic effect upon physicians is rarely discussed and is not a major consideration (Tr. 9836-38). While AMA's position on some legislative matters, such as the Keogh Act, has been influenced by economic motivations, this occurs in only a small percentage of situations (Tr. 9836-38). AMA further states that the vast majority of AMA's efforts to influence government policymakers have involved questions which do not directly affect the economic welfare of physicians (RX 696-97). Over recent years the AMA's program of government interface has gradually increased as the number of health-related bills introduced in Congress has grown (Tr. 9838).

The AMA further contends that it does not engage in political activities, such as partisan activities on behalf of a specific candidate or political party, and does not collect or dispense money on behalf of political candidates (Tr. 9842). **[29]**

(c) The AMA's *Division of Professional Relations* is engaged in working with other professions and groups in areas of common interest. This activity most often involves participation in public health programs, such as AMA's involvement with the Joint Commission on the Accreditation of Hospitals (Tr. 4991-92. *See also* F. 41, p. 53). The Division is engaged in a liaison activity with the student's business and house staff sections of AMA. This program encourages greater participation of medical students and young physicians in AMA programs (Tr. 4992, 5000). The Division conducts various negotiation seminars to help physicians develop an ability to communicate well with patients, their colleagues and the public (Tr. 4993). The Division is also involved in a program to assist foreign medical graduates in their efforts to establish themselves in the United States and to help them enter the mainstream of the medical profession (Tr. 5002).

### E. Data Collection and Analysis

19. Chris N. Theodore, a Group Vice President of AMA, is responsible for the following four divisions of the AMA: the Division of Corporate Facilities and Services, which is charged with management of AMA's physical plant and office facilities; the Division of Personnel Management, the group responsible for supervision of AMA's employees; the Division of Computer and Information Systems, which supervises the acquisition and use of computer

systems in connection with Association activities; and the Center for Health Services Research and Development (Tr. 9721).

The *Center for Health Services Research and Development* ("Center") is engaged in a comprehensive program of research in the area of medical care. The Center collects data concerning the American physician population and analyzes the data in order to set out and evaluate alternative courses of action with respect to problems in the health field (Tr. 9725-26). The Center's physician data base was established in 1962, and was designed on the basis of recommendations made by an *ad hoc* committee of the United States Committee for Vital Statistics (Tr. 9735-37). One member of this committee was Professor Paul J. Feldstein of the University of Michigan. The Center is funded through general AMA revenues, which are allocated by the Board of Trustees. The Center's instructions from the Board of Trustees are to gather the most reliable data possible, to provide objective analysis of the data and to encourage other groups and institutions to participate in the field of health research and analysis (Tr. 9734-35). The Center will disseminate [**30**] information from its master physician file on request, although the identity of the individual physician-respondents are withheld to preserve the confidentiality of the data base (Tr. 9753-55). All of the Center's reports are made public after their completion (*Id.*).

The Center routinely performs a survey of AMA members to determine physicians' attitudes toward various contemporary health issues as well as certain activities of the AMA (Tr. 9758). This project is similar to one performed by the Department of HEW, and is designed to provide policymakers in government and at the AMA with accurate, reliable information on how physicians are likely to react to a proposed health program (Tr. 9760). The Center has also prepared a report, entitled "Analysis of Malpractice and Professional Liability." The report analyzed the effect of rising malpractice insurance premiums upon the location and practice of physicians. The report was designed to provide policymakers with information as to what effect the so-called "malpractice crisis" has had upon the availability of medical services (Tr. 9761-62).

The Center has been active in a program entitled "Commission on the Cost of Medical Care" (*See* F.20, p.33, *infra*). The AMA Center provided research and data collection services to the Commission at no charge, and prepared a three-volume report of the Commission's findings and recommendations (Tr. 9677).

The Center prepared a report entitled "Distributional Characteristics of Health Manpower." This report, prepared in response to a recommendation by the National Committee on Vital Statistics, sets out information on the distributional characteristics of physicians by specialty, geography and activity (Tr. 9767). The purpose of the project is to make such information available for the use of government officials, the academic community and other interested parties (Tr. 9678).

The Center has prepared an "Analysis of Physician Mobility" in order to provide legislators and federal agencies with information regarding the factors which may lead physicians to relocate in underserved areas of the country (Tr. 9678). The analysis was also prepared to make information about physician mobility available to medical schools, state governments and other researchers (Tr. 9768-70).

The Center periodically prepares a report entitled "Physician Distribution and Medical Licensure" which contains biographical information about physicians' licenses in the various [31] states (Tr. 9770-71). The report is prepared for use by medical licensing boards and government policymakers (Tr. 9771-72).

The AMA Center also publishes an "FMG Book" which contains biographic and demographic data concerning American physicians who have graduated from foreign medical schools (Tr. 9772). The Center prepared its FMG Book at the request of the Department of HEW in order to aid policymakers in evaluating the optimal utilization of foreign medical school graduates (Tr. 9772-73).

The Center has prepared a report entitled "Health Service Area and State Distribution of Physicians" in order to generate comprehensive and reliable information concerning the physicians located within "health service areas" (Tr. 9774). This report has been utilized by the Department of HEW (Tr. 9776).

The Center sometimes prepares "Policy Issue Papers" to set forth alternatives and recommendations concerning contemporary problems in health care. These papers are published in various medical and/or economic journals and are presented to AMA management (Tr. 9777). The Center has also prepared a report entitled "Analysis of Institutions Affecting Medical Care Delivery" which studies the economic effect of government regulations upon the delivery of medical care. This project is prepared for use by government policymakers and other research institutions (Tr. 9779).

The AMA's *Division of Library and Archival Services* serves as an information source for the Association, its members and the general public. It receives all major domestic medical journals and most major foreign language medical journals (Tr. 4693). The Division also reviews and indexes about 700 medical journals each month for use in a computer data collection service called "Medline" (Tr. 4694).

AMA makes Medline services available to physicians, whether or not members of AMA, and to the general public (*Id.*).

The Division operates a public service information project in conjunction with the National Health Service Corps. Under this program, physicians employed by the National Health Service Corps may call a toll-free telephone number to obtain medical literature and information free of charge from AMA (Tr. 4694). This program is available largely to physicians practicing in economically depressed areas (*Id.*). The Division prepares free medical bibliographies for physicians, whether or [32] not AMA members, upon request (Tr. 4695). The Division also donates volumes of its literature to other medical libraries throughout the country (Tr. 4699; RX 653).

The Division receives and responds to a large number of requests for information from the general public. This involves answering questions about specific diseases, treatments, etc. (Tr. 4702–03). The Division also processes complaints about individual providers of medical care (Tr. 4704).

Another activity of AMA involves the maintenance of biographical files on individual physicians. This information is stored with a computer data base, and can be retrieved via a cathode ray tube screen or reproduced in printed form (Tr. 4704–05). The AMA Survey Data Center is the nation's only centralized source of information about each of the country's licensed physicians, all of which is obtained via responses to a periodic AMA questionnaire form. Such information includes the physician's name, office address, medical school, year of graduation, place of internship and/or residency, specialty, subspecialty, licensure information, etc. (Tr. 4705). Many individuals and groups make use of this physician data base, including hospitals, state medical licensing boards, students and the general public. About 2,500 requests for information from the data base are processed each week (Tr. 4706). The only potentially derogatory information contained in the computer data base concerns the revocation of a physician's license to practice (Tr. 4710).

The Division also maintains certain other information in a group of inactive files from the AMA's Department of Investigation, which was disbanded in 1975. These files contain information concerning physician's medical licensure actions, medical society expulsion and unproven methods of medical practice. The Department of Investigation's files are not accessible to anyone at the AMA except the Director of the Division's Department of Automation and Technical Services (Tr. 4713). Information from the Department of Investigation's files is never released to an inquiring party (Tr. 4713). If an inquiry is made about a physician who has had his license revoked, for example, the inquiring party is informed that the appropriate state licensing board may have further information about the physician (Tr. 4713-14). Since May 31, 1975, only about 10 inquiries have been referred to other agencies or medical societies for further information (Tr. 4716). None of these incidents concerned a physician's involvement in allegedly unethical advertising or contract practice (Tr. 4717-18). [33]

F. Miscellaneous

20. AMA lists the following activities under a category of "miscellaneous." In 1976, the AMA Board of Trustees created a 27-member Commission on the Cost of Medical Care. The Commission is comprised of representatives from organized medicine, federal and state government, private industry, the insurance industry and organized labor. The Commission later divided into task forces examining cost increases arising from miscellaneous market factors, technological advancements, the increased demand for services and the supply of health services. After completion of its analyses, the Commission plans to report on the causes of rising health care costs and to recommend options for policies to contain such costs (RX 3, p. 6; CX 1545E-F). In 1975, the AMA established a committee to study disciplinary mechanisms of medical associations, determine the effectiveness of medical discipline and recommend modifications in self-regulation and in state statutes and regulations (CX 1545F).

In 1975, the AMA supported legislation to modify the Self-Employed Tax Retirement Act ("Keogh Act"). The modification increased the annual limit of contributions which a self-employed individual can make to a qualified personal retirement fund to the lesser of 15 percent of earned income or $7,500 (CX 1533A. *See also* F. 29, p. 45, *infra.*).

In 1967, the Legal Research Department of the AMA prepared a model partnership agreement to aid attorneys in drafting partnership agreements for physicians (CX 340).

In 1973, in response to a request, the AMA sent a physician a copy of a monograph, entitled "The Sale or Disposition of a Medical Practice." There is no indication that this material was prepared by the AMA (CX 347-48).

The AMA participated in the preparation of a model health insurance claim form. There is no indication that use of this material has been limited to AMA members or of the benefit which its use may have conferred upon insurance companies, government agencies or the general public (CX 351A-G).

A publication entitled *The Business Side of Medical Practice* was published by the AMA to assist physicians in efficiently organizing a practice and managing an office. There is no indication that the use of this material was limited to AMA members (CX 376). The AMA prepared a paper, [34] entitled "The Doctor Rents an Office," to assist physicians in dealing with the problems of renting an office. There is no indication that this material was made available only to AMA members (CX 378). The AMA, the American Association of Medical Clinics and Medical Group Management Association issued a pamphlet entitled "Group Practice Guidelines to Joining or Forming a Medical Group." This publication was first published in 1962 and revised in 1972. There is no indication that it was distributed to or used only by members of the AMA (CX 380).

The AMA frequently assists boards of medical examiners in the evaluation of credentials of physicians who are applying for licenses to practice (Tr. 6726).

Other AMA activities include publishing a weekly news publication entitled *American Medical News*, which is distributed to its members and certain selected outside readers. *American Medical News* reports news on legislative, economic, legal and other nonclinical areas and includes a monthly opinion section which provides a forum for interpretation and analysis from authors on the socioeconomic aspects of medicine (CX 1046Z-17, 896).

The AMA offers its members and their families various insurance plans at reduced rates. In soliciting new members or renewals, the AMA has indicated the availability of its plans (CX 1521, 1523, 1537-38, 1542, 1548, 1561). The AMA also offers a retirement plan for its member physicians who are self-employed practitioners. The plan is open to nonmember partnerships provided at least one physician partner is a member of the AMA (CX 331-35).

In a number of its activities, AMA is assisted by volunteers who are not compensated for their efforts. The majority of volunteer time used by the AMA is devoted to its programs in the areas of medical education, scientific affairs and scientific publications (Tr. 9557-58). For example, each of the standing advisory committees of AMA's Council on Medical Education is staffed entirely by volunteers, as is the Council itself (Tr. 9557). AMA's survey team in the accreditation of medical educational programs is comprised largely of volunteers (Tr. 9557-58). The AMA Council on Scientific Affairs staffs consultant panels comprised exclusively of volunteers (Tr. 9558). The editorial staffs of AMA's 10 medical journals are comprised largely of volunteers (Tr. 9559). Volunteer time is also spent on legislative work. The volunteer time spent on behalf of AMA in the area of legislative work is far less than that devoted to scientific and educational pursuits (Tr. 9560-63). [35]

### G. AMA Education and Research Foundation

21. The AMA Education and Research Foundation was established in 1954 as a means of providing financial support for medical education (Tr. 5167). Since 1954, the Foundation has solicited donations from physicians which are used to finance scholarships and loans to medical students who demonstrate financial need (Tr. 5167-71). Loans are granted to applicants without regard to their affiliation with the Foundation or the American Student Medical Association (Tr. 5169-70). The Foundation has also granted about $1 million per year to American medical schools in unrestricted grants (Tr. 5171; RX 564). Another AMA program finances interest-free loans for underprivileged medical students (Tr. 5171-73).

### H. American Medical Political Action Committee

22. The American Medical Political Action Committee ("AMPAC") was established by the AMA in 1961 as a nonprofit, voluntary individual membership organization (Tr. 4785; CX 1258A, 1493A, 1723G, 1487A, 1021B). AMPAC is a separate, segregated fund of the AMA and operates in conformity with the provisions of the Federal Election Campaign Act of 1971, 2 U.S.C. 431-455. This law permits membership organizations to establish separate, segregated funds with which to make campaign contributions to Federal candidates under certain limitations (CX 1021A-B). AMPAC has its own constitution and bylaws, and its own board of directors (Tr. 4797).

The AMA Board of Trustees appoints the ten-member Board of Directors of AMPAC, which consists of nine physicians and one physician's spouse (CX 1021B). Many of AMA's current officials, including its two highest officers, Executive Vice President Dr. James Sammons and Deputy Executive Vice President Joe D. Miller, served previously as high AMPAC officials. Dr. Sammons served as chairman of AMPAC's Board of Directors and Mr. Miller served as AMPAC's Executive Director (Tr. 4025, 4030-31, 4801-11; CX 460). Similarly, a substantial number of AMPAC's board members have also served on the AMA Board of Trustees and the AMA Council on Legislation (Tr. 4003-35, 4803-11). AMPAC's bylaws were approved by AMA (CX 1484A). AMPAC Board members serve a one-year term and may be appointed for a maximum of 10 consecutive years (Tr. 4799). No individual has ever served as a director of the AMPAC

Board while simultaneously serving as an officer, director or trustee of the AMA (Tr. 4826). [36]

AMPAC conducts a two-phase program; one phase is a political educational program and the other is a political action program (Tr. 4783, 4796). AMPAC's political education activities are intended to increase the participation and effectiveness of physicians and their families in the political process (Tr. 4874-85). These activities consist of the distribution of the AMPAC newsletter and other written materials, as well as sponsorship of films and seminars for physicians on activities such as conducting absentee ballot drives, voter education and registration drives, establishing a telephone bank, managing a campaign, scheduling and advance work (Tr. 4784, 4786-87). AMPAC political education activities are available to physicians regardless of their party affiliation or political views.

The second phase of AMPAC activities consists of its political action program, in which AMPAC makes financial contributions to candidates for the United States Senate and House of Representatives (Tr. 4787). A committee of the AMPAC Board decides which candidates will receive contributions (Tr. 4787).

AMA provides 100 percent of AMPAC's administrative and operating expense budget (Tr. 4800). During five past fiscal years, AMA made the following transfer of funds to AMPAC:

| | |
|---|---|
| 1972 | $744,500 |
| 1973 | 689,435 |
| 1974 | 804,825 |
| 1975 | 642,420 |
| 1976 | 650,422 |

AMA budgeted $900,382 for AMPAC support in 1977 (RX 743, App. IID). AMPAC rents office space in the AMA headquarters building and rents computer services from the AMA. AMPAC owns its personal property and office furniture, and maintains its own administrative and support services separate from those of the AMA (Tr. 4796-97).

In the past, AMPAC board members appeared before the AMA Board of Trustees to outline and justify the amount of funds AMPAC requested for its political education activities. This presentation is now given in writing (Tr. 4800-01). AMA and AMPAC do not now cosponsor joint meetings or seminars (Tr. 4812-13). Prior to 1975, they cosponsored an annual meeting to educate physicians on political processes such as campaign management techniques or the formation of [37] political action committees (Tr. 4812-13). In 1975 and 1974, the AMA and AMPAC boards had dinner together (Tr.

4812). On two occasions, new members of the AMA Board of Trustees attended AMPAC board meetings as observers in order to acquaint themselves with AMPAC activities (Tr. 4828-29). The Chairman of AMPAC has made a three-to-five minute speech to the AMA House of Delegates to urge the delegates to participate in and to join AMPAC (Tr. 4794-95).

Prior to 1969 or 1970, AMPAC maintained field offices in various cities throughout the country. In 1972 and 1974, in the months immediately prior to national elections, a number of AMA field representatives were placed upon the AMPAC payroll to work directly on AMPAC political campaigns that were providing support services for candidates (Tr. 4795, 4815-16). The AMA field service staff also worked with AMPAC officials in planning AMA-AMPAC Public Affairs Workshops, where numerous physicians participated in discussions of campaign techniques and health legislation (CX 1050Z8, 1051Z9). AMA's field offices were closed in 1974 (Tr. 4795). In 1975, responsibility for various AMPAC membership activities was transferred to the AMA Department of Federation Affairs (CX 1376A-B).

AMPAC conducts political education activities in cooperation with state medical political action committees. It provides information to these organizations upon request. AMPAC sends a bulletin to sustaining members of AMPAC, who are people that have contributed a large sum of money to AMPAC, and to members of boards of directors of other medical political action committees (Tr. 4825-26). AMPAC and state medical political action committees occasionally solicit funds jointly (Tr. 4821). AMPAC from time to time gives an award to a state political action committee which joins in an AMPAC program that results in breaking an AMPAC membership record (Tr. 4821-22). AMPAC has made one grant of funds to a state medical political action committee (Tr. 4824). AMA constituent medical societies raise money for AMPAC's candidate funding activities by soliciting contributions to AMPAC (CX 1436L, M). The AMA House of Delegates has commended these state medical societies, urged other societies to raise money for AMPAC and urged AMA members to support AMPAC (CX 1436L, M, 1484B). In 1976, AMPAC reported campaign fund transfers of more than $1 million (CX 1760), making it the second largest political action committee in the United States (CX 1722B. *See also* F. 39, p. 50). [38]

## III. ACTIVITIES OF THE AMERICAN MEDICAL ASSOCIATION WHICH HAVE PECUNIARY BENEFIT FOR ITS MEMBERS

### A. Organizational Attributes and Acknowledged Benefits to Members

23. AMA was founded and exists as an organization of and for the medical profession (CX 1042J). The original constitution of AMA proclaimed as one of its purposes, "promoting the usefulness, honor and interests of the medical profession" (Memorandum in Support of Respondent American Medical Association's Motion for Summary Decision Dismissing the Complaint for Lack of Jurisdiction filed March 24, 1976, p. 13). The articles of incorporation adopted by AMA near the turn of the century declared one of its purposes to be "safeguarding the material interests of the medical profession" (CX 1355H). In 1975, the AMA House of Delegates recognized that one of the "major missions" of the AMA is to "act as a spokesman for physicians to the public, the government, industry, and others" (CX 1042S).

Membership in the AMA is limited to those who hold the degree of Doctor of Medicine or Bachelor of Medicine, hold an unrestricted license to practice medicine or surgery, are interns and residents in training or are medical students, all duly authorized by their state societies as members of the state societies (CX 990G). Over 75 percent of office-based medical practitioners and over 80 percent of the board-certified physicians in the United States are members of the AMA. Most AMA members are private practice fee-for-service physicians (Comp. and AMA Ans. ¶ 4; Tr. 3949–50; CX 197 0, 232 0, 1042H–J, 1103E). AMA is the largest medical and professional association in the world (CX 245B, 1522). It professes to be the national spokesman for the medical profession (CX 263Q), and it is the only national organization of physicians large enough to act as an umbrella organization to represent the entire physician community in the United States (CX 246, 1042N).

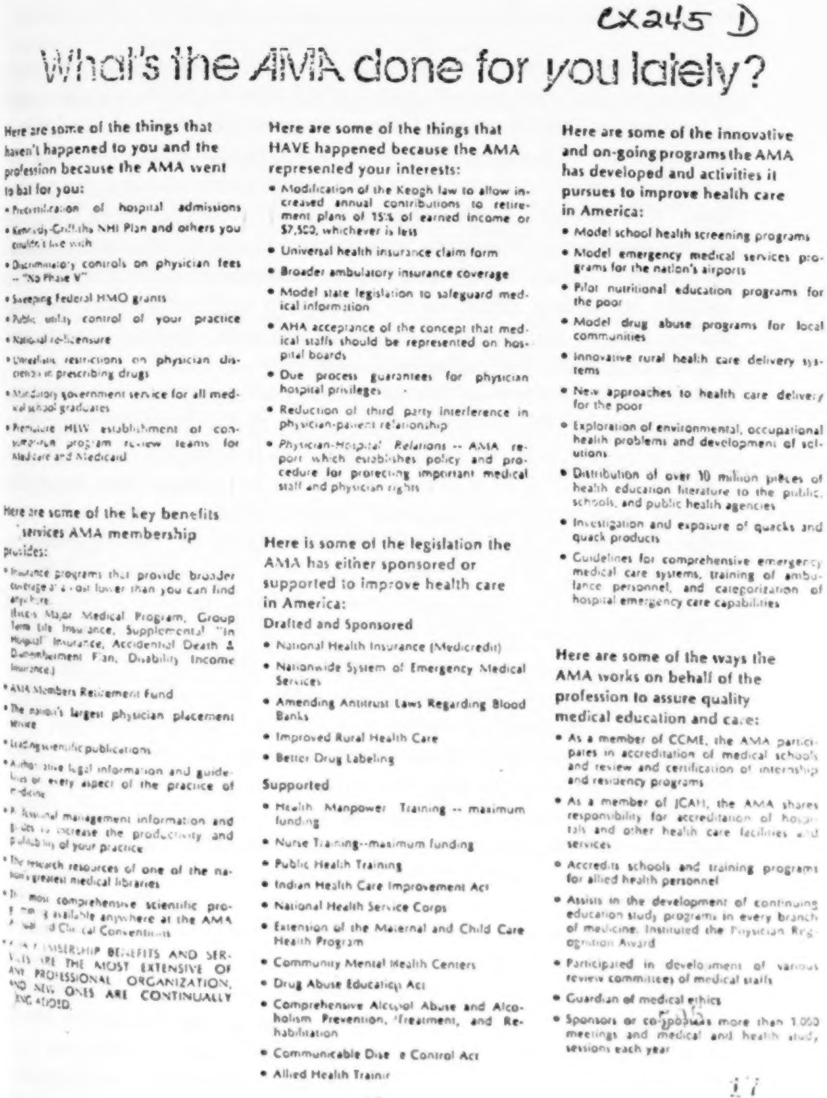
AMA's budgeted expenses in 1977 were $46,205,000 (RX 567, p. 15). Its income totalled $57,770,000, of which $36,869,000, or 63.8 percent, came from members' dues (RX 567, p. 15). The bulk of the remainder came from advertising and subscription revenue from AMA's publications (RX 567, p. 15). Only a very small portion of AMA's income comes from disinterested third parties (RX 567, p. 15).

Most of AMA's members are in private practice and receive fees for the services they render to patients (CX 1042J; Comp. and AMA Ans. ¶ 4). AMA has repeatedly told its members that it operates to protect and foster their interests (CX 232D, 263–O, 1224, 1528B, 1532B) and that one of its primary purposes is to serve its membership (CX 259C). It has frequently cited [39] the remarkable range of tangible benefits it provides for its members (CX 259C, 263Z4) and the intangible benefits they receive from AMA's collective action to influence legislators (CX 259A). In its activities, AMA supports the "usual, customary and reasonable fee" concept for the compensation of physicians for their services (CX 954F, 1697B, C). AMA has acknowledged that, as the single, strong national voice speaking for American doctors (CX 1545D), it does at times represent the self-interests of the profession (CX 1109L). In 1973, AMA's House of Delegates voted that AMA officers and the Board of Trustees should take steps to increase AMA's capacity to "speak with authority in representing the interest of the medical profession and the public in the socioeconomic areas" (CX 2589B).

Some representations which AMA has made to its members about AMA activities for the benefit of its members are as follows:

> AMA won landmark victories in the Federal courts; made significant progress towards solving the medical liability crisis; won an important legislative battle to prevent Federal control of residencies; fought for and won exemption for current medical students from paying back Federal grants to medical schools; supported a pay increase for V.A. physicians; and many more. None of these accomplishments could have happened without the active participation and continued support of all members. (1976 Direct AMA Members Renewal Letter - CX 1522).

One page from an AMA brochure, entitled "What's the AMA done for you lately?," is reproduced hereafter: [40]



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# What's the AMA done for you lately?

**Here are some of the things that haven't happened to you and the profession because the AMA went to bat for you:**

- Precertification of hospital admissions
- Kennedy-Griffiths NHI Plan and others you couldn't live with
- Discriminatory controls on physician fees -- "No Phase V"
- Sweeping Federal HMO grants
- Public utility control of your practice
- National re-licensure
- Unrealistic restrictions on physician discretion in prescribing drugs
- Mandatory government service for all medical school graduates
- Premature HEW establishment of conversion program review teams for Medicare and Medicaid

**Here are some of the key benefits services AMA membership provides:**

- Insurance programs that provide broader coverage at a cost lower than you can find anywhere.
  (Excess Major Medical Program, Group Term Life Insurance, Supplemental "In Hospital" Insurance, Accidental Death & Dismemberment Plan, Disability Income Insurance.)
- AMA Members Retirement Fund
- The nation's largest physician placement service
- Leading scientific publications
- Authoritative legal information and guidelines on every aspect of the practice of medicine
- Professional management information and guides to increase the productivity and profitability of your practice
- The research resources of one of the nation's greatest medical libraries
- The most comprehensive scientific programs available anywhere at the AMA Annual and Clinical Conventions
- AMA MEMBERSHIP BENEFITS AND SERVICES ARE THE MOST EXTENSIVE OF ANY PROFESSIONAL ORGANIZATION, AND NEW ONES ARE CONTINUALLY BEING ADDED.

**Here are some of the things that HAVE happened because the AMA represented your interests:**

- Modification of the Keogh law to allow increased annual contributions to retirement plans of 15% of earned income or $7,500, whichever is less
- Universal health insurance claim form
- Broader ambulatory insurance coverage
- Model state legislation to safeguard medical information
- AHA acceptance of the concept that medical staffs should be represented on hospital boards
- Due process guarantees for physician hospital privileges
- Reduction of third party interference in physician-patient relationship
- *Physician-Hospital Relations* -- AMA report which establishes policy and procedure for protecting important medical staff and physician rights

**Here is some of the legislation the AMA has either sponsored or supported to improve health care in America:**

**Drafted and Sponsored**

- National Health Insurance (Medicredit)
- Nationwide System of Emergency Medical Services
- Amending Antitrust Laws Regarding Blood Banks
- Improved Rural Health Care
- Better Drug Labeling

**Supported**

- Health Manpower Training -- maximum funding
- Nurse Training--maximum funding
- Public Health Training
- Indian Health Care Improvement Act
- National Health Service Corps
- Extension of the Maternal and Child Care Health Program
- Community Mental Health Centers
- Drug Abuse Education Act
- Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation
- Communicable Disease Control Act
- Allied Health Training

**Here are some of the innovative and on-going programs the AMA has developed and activities it pursues to improve health care in America:**

- Model school health screening programs
- Model emergency medical services programs for the nation's airports
- Pilot nutritional education programs for the poor
- Model drug abuse programs for local communities
- Innovative rural health care delivery systems
- New approaches to health care delivery for the poor
- Exploration of environmental, occupational health problems and development of solutions
- Distribution of over 10 million pieces of health education literature to the public, schools, and public health agencies
- Investigation and exposure of quacks and quack products
- Guidelines for comprehensive emergency medical care systems, training of ambulance personnel, and categorization of hospital emergency care capabilities

**Here are some of the ways the AMA works on behalf of the profession to assure quality medical education and care:**

- As a member of CCME, the AMA participates in accreditation of medical schools and review and certification of internship and residency programs
- As a member of JCAH, the AMA shares responsibility for accreditation of hospitals and other health care facilities and services
- Accredits schools and training programs for allied health personnel
- Assists in the development of continuing education study programs in every branch of medicine. Instituted the Physician Recognition Award
- Participated in development of various review committees of medical staffs
- Guardian of medical ethics
- Sponsors or co-sponsors more than 1,000 meetings and medical and health study sessions each year

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## [41] B. Efforts to Influence Governmental Action

24. AMA furthers the economic interests of its members through legislative and lobbying activities. AMA stresses to its members that it represents their interests before Congress and federal administrative agencies (CX 232D, 1223, 1224, 1225, 1532, 1545D), "serving the vital functions of intermediary between government and the profession" (CX 1545D). AMA declares that although it offers the most extensive range of "tangible benefits and services" of any professional association (CX 259C), the "most important" AMA membership benefit is having AMA as an "effective and influential national spokesman to represent your views, yes *your* views, interests and rights" (CX 259Z13)(Emphasis in original).

AMA's legislative activities focus on legislation of economic significance to its members. The three major areas of activity of AMA's Department of Governmental Relations for the year July 1972 to June 1973 were price controls on physicians' fees under the federal Economic Stabilization Program, health maintenance organization legislation and professional standards review organizations (CX 1050Z-12). In the following year, its major activities involved price controls on physicians' fees, professional standards review organizations and national health insurance (CX 1051Z-14). AMA's Department of Congressional Relations identified five legislative proposals of particular concern to AMA from July 1973 to June 1974—national health insurance, price controls on physicians' fees, health maintenance organizations, professional standards review organizations and liberalization of the Keogh Act (CX 1051Z13, Z14). In 1975, the year this proceeding began, the AMA declared that AMA's "number one priority" was resolving the malpractice insurance crisis (CX 1102B) which threatened many of its members with "loss of livelihood" (CX 1003A). The economic significance of these legislative issues and AMA's positions on them are detailed hereinafter (*See* F. 25, p. 43; 27-30, pp. 44-46; 35, pp. 47-48; 43-44, pp. 54-55).

AMA stated recently that lobbying to protect its members' interests is equally as important as lobbying for passage of health legislation for the public's benefit (CX 1224). AMA has also explained to its members that its representatives have testified before the Congress on more than two dozen occasions during the 92nd Congress to state and explain the profession's views, "To protect its interests," in addition to being advocates for passage of legislation for better health care (CX 1225). AMA has also declared that it concerns itself with any congressional bill that affects the public's health *or* the profession's interests—"The AMA does represent our profession - and effectively" (CX 1223). [42]

Communicating with AMA members in 1975, the head of the AMA New England field office distinguished between those legislative actions AMA undertakes for the benefit of the public and those it undertakes for the benefit of its physician members:

> *In behalf of the consumer,* your patients, AMA has sponsored bills to develop rural health delivery systems, community emergency medical programs, to provide education against drug abuse, to ensure safety and quality in medical devices, and to make available better funding for maternal child care. These are but a sampling.
>
> *For the physician,* AMA has lobbied for and secured markedly increased tax-deferred contribution allowances under the Keough [*sic*] Law, obtained acceptance by the AHA and the JCAH that physicians on medical staffs should be represented on hospital boards, has successfully resisted pre-certification of hospital admissions, Phase V controls on physicians' fees, national re-licensure, mandatory service for all medical school graduates, cradle-to-grave federally financed national health insurance, and sweeping federal aid for HMOs. These too comprise only a partial list. (CX 246) (Emphasis in original).

AMA has intensified its lobbying and legislative program in recent years (CX 209M, 1042T; *cf.* Tr. 9838), and these activities have become one of AMA's most important functions (CX 1360C). AMA has 10 lobbyists registered with the federal government, five of whom lobby regularly before Congress (Tr. 9886). In addition, three AMA Washington office staff members are directly responsible for handling relations with federal administrative agencies (Tr. 9886–87). AMA lobbyists are in contact with members of Congress and congressional staff every day (Tr. 9887). The lobbyists spend 75 percent of their time on Capitol Hill when Congress is in session (Tr. 9887). Also, AMA board members and other AMA officials spend considerable amounts of time preparing and delivering testimony before Congress (CX 1055E, 1225, 1228, 2586I). [43]

### C. Price Controls on Physicians' Fees

25. AMA took an active role in its opposition to federal price controls on physicians' fees (CX 246, 258C, 434, 998E, 1697D, 461Z18–Z23, 1051Z8). AMA challenged controls on physicians' fees administratively through the Cost of Living Council in 1973; its representatives met with President Nixon and testified many times on Capitol Hill in 1974 in opposition to such controls (CX 461Z18–Z23). In 1974, AMA also mounted an antiprice controls letter writing campaign by physicians, who sent over 15,000 letters to Congress (CX 461Z21; Tr. 9921). In 1974, when the Economic Stabilization Control Program was about to expire, AMA successfully opposed congressional efforts

to continue the price controls on physicians' fees (CX 245D, 998E). While controls on self-employed physicians' fees were still in effect, AMA objected to the *removal* of price controls from nonphysician psychologists and optometrists, and from salaried physicians working in health maintenance organizations and hospitals (CX 434B, 461Z20).

### D. Medicare

26. AMA opposed the initial passage of the Medicare program in 1965 (CX 1543P). Since passage of Medicare legislation, AMA has actively sought to ensure that the program does not adversely affect its member physicians (CX 1543P, Q). It has done so by championing private practice and fee-for-service health care delivery (CX 1545C), and insisting that physicians providing services under the Medicare program be paid their usual, customary and reasonable fees (CX 1697B, C; Tr. 8852, 8887–89, 9860, 9906–07).

In 1974, AMA's Council on Legislation opposed a congressional proposal to allow governors to establish statewide Medicare fee schedules (CX 1697B; Tr. 9906–07). Under the proposal, lists of physicians agreeing to accept payment according to the fee schedules were to be published; those physicians not agreeing to do so were to be reimbursed under the existing usual, customary and reasonable fee system (CX 1697B). The AMA Council feared that unless state medical society approval for each fee schedule were required, the resulting "ceiling on physician charges" would not accord with physicians' usual and customary charges (CX 1697B). The Council emphasized to the AMA Board of Trustees that the legislation would "have a far-reaching and deleterious effect on the reimbursement which physicians receive" (CX 1697B). AMA officials subsequently testified against the statewide Medicare fee schedule legislation which, in AMA's judgment, violated the usual, customary and reasonable fee concept (Tr. 9906–07; RX 652J). [44]

The chairman of the AMA Board of Trustees also testified before Congress against a Nixon administration proposal to place a four percent cap on physicians' annual fee increases under the Medicare program, and a delegation of AMA officials subsequently met with President Ford to protest against this proposal (CX 1545C). In 1976, AMA informed its members that, to many physicians, this one action was worth many times the $250 annual AMA dues (CX 1545C).

### E. National Health Insurance

27. In recent years, AMA has opposed national health insurance

proposals harmful to the economic interests of physicians, including those that involve more government scrutiny of physicians' incomes and fees (Tr. 8886–87; CX 1109G, H, 263L, M, 2586G). Thus, AMA has opposed national health insurance legislation that would provide for reimbursement of physicians on the basis of a nationwide fee schedule or out of a predetermined budgetary allotment for each region of the country (CX 1109G, H; Tr. 8887, 9848). AMA has favored a national health insurance program retaining private practice, fee-for-service medicine as the dominant mode of medical care delivery (CX 258C, 263L, M, 1224, 1533B, 1545C), a system under which physicians have the highest incomes of any profession (Tr. 9837).

In the last five years, national health insurance has been one of AMA's major concerns (CX 1228A, 1051Z13–Z14), involving work by the AMA Field Service until its phase-out in 1975 and by the AMA Washington Office staff (CX 1050Z7, 1051Z13–Z14). AMA "dues money," "many, many man-hours of a superb Washington staff," testimony and speeches by virtually every one of AMA's officers and trustees and many of its council and committee members have helped to dissipate support for the national health proposals AMA opposes (CX 1228A–B).

AMA's current national health insurance proposal is a departure from its long-standing opposition to national health insurance (Tr. 8999-9000; CX 2586K, 2601, 1435Z60–Z61). It is more favorable to physicians however than other national health insurance proposals (Tr. 8999-9000, 9049–50; CX 1109G–H). Previously, AMA spent over $2.5 million in 1950 alone—over half its annual budget—on a National Education Campaign against President Truman's national health insurance proposal (CX 1435Z61–Z62, 2598B, 2601). The public relations firm of Whitaker and Baxter directed the campaign, coordinating the efforts of AMA and its state and local affiliates and arranging for dissemination of approximately 100 million pamphlets and brochures in a single year (CX 2601C, D, E). [45]

### F. Health Maintenance Organizations

28. Health maintenance organizations ("HMOs") are prepaid comprehensive health care delivery systems that offer alternatives to the fee-for-service delivery system (Tr. 484, 550, 4886. *See also* F. 102, p. 134). The AMA House of Delegates has recognized that potential domination of community hospital medical staffs by closed panel prepaid group practice physicians "poses some threat to private practitioners" (CX 959Z43–Z44). In 1971, AMA opposed the initial proposals for federal funding of HMOs (CX 1710A, B). In 1972

and 1973, the AMA Field Service mounted a campaign against HMO legislation, describing HMOs as "contract practice" (CX 1950Z7). In its lobbying "[f]or the physician," AMA succeeded in limiting the HMO Act that was passed in late 1973 to restricted experimentation (CX 246, 258C, 1226). Since the Act's passage, AMA has opposed legislation "liberalizing" the HMO Act because the amendments would "foster the development of prepaid group practices" (CX 1681B; RX 652F; *cf.* Tr. 9851-52, 9855-58). In 1974, the AMA House of Delegates voted to seek federal legislation requiring employers offering their employees HMO coverage also to offer them coverage through standard health indemnity insurance companies or health care service plans, *i.e.*, Blue Cross-Blue Shield (CX 461Z327). AMA has supported legislation to require HMOs to obtain certificate-of-need planning agency approval before they can build or expand their medical facilities (RX 4, p. 35; Tr. 9918). AMA, however, has opposed application of such requirements to private physicians' plans to install expensive medical equipment in their private offices (Tr. 9918, 9936-37).

### G. Keogh Act

29. AMA's lobbying efforts contributed significantly to the initial passage of the Keogh Act, which created substantial tax benefits for self-employed individuals, including the bulk of AMA's members (CX 245D, 998, 1532, 1533B). AMA's efforts were stated to have the most substantial impact of any of the supporters for the Keogh Act amendments adopted by Congress in 1974 (CX 1533B). These amendments permit increased tax savings for each self-employed individual and member of a professional corporation (CX 246, 1532A, 1533B). In its June 1974 annual report, the AMA Washington Office identified the Keogh Act modification bill as one of five pieces of legislation before Congress of concern to AMA (CX 1051Z13-Z14). AMA has reminded its members that each year they can save up to six times their annual AMA dues under the Keogh Act legislation which AMA "secured" (CX 246, 258C, 1532A, 1533B). In a report to its members on what it accomplished for them in 1975, AMA included a statement by former Congressman Keogh giving credit to AMA for developing the concept of the Keogh Act and working for its passage (CX 1533B). [46]

### H. Professional Liability Insurance

30. AMA led an extensive legislative campaign in state legislatures across the country in 1975 for malpractice insurance legisla-

tion designed to stabilize premiums and ensure coverage of physicians (CX 1003A, 1102C, D). The campaign was successful in getting 30 states to pass new professional liability laws, most of them based on AMA model legislation (CX 1102D). AMA staff visited 30 state medical societies to help them develop legislative proposals designed to reduce the amount of damages plaintiffs could recover for malpractice, reduce the frequency of litigation, and make it more difficult for plaintiffs to prevail in malpractice litigation (CX 263-O, 361B, 384D, 1026G, 1102D).

### I. Relicensure and Continuing Medical Education

31. Through 1977, AMA has opposed legislation at both the federal and state levels requiring relicensure, retraining, recertification or continuing medical education by physicians in order for them to continue to practice and earn a living as physicians (CX 263P, 1003A, 2586G; RX 4, p. 38, 564, p. 3044). AMA opposition was a major factor in the defeat of one proposal setting up a federal relicensure system (CX 258C).

### J. Hospital Cost Containment

32. AMA has testified against passage of the Carter administration's proposal to place limits on annual increases in hospital revenues (RX 4, p. 24, 696I, J; Tr. 9918-19). The bill, if adopted, could lead hospitals to reduce their revenues by limiting the number of beds available for physicians' patients. The proposal also raises the prospect of federal government cost containment controls on individual physicians' charges (*See* Tr. 9011-12).

### K. Relative Value Studies

33. In 1977, the AMA House of Delegates voted to seek legislative recognition of the medical profession's authority to develop and use relative value studies (RX 4, p. 10). Relative value studies are numerical unit designations expressing the relative value of one professional service to another that can be used by both physicians and insurance companies to determine the fees to be charged, or paid, for specific physician services (CX 260C, D). AMA has declared that such relative value studies are useful in preventing inequities and economic injustice to physicians (CX 260D). [47]

### L. Allied Health Professionals

34. Through 1977, the AMA's legislative position has been that allied health professionals should practice only under the supervi-

sion of a physician, with the physician billing for their services (Tr. 9852-53, 9866-67, 8859-61, 9014-16, 9018-19, 9050-53; RX 696J, K; CX 2586G, N). AMA takes the position that physician's assistants, in particular, should practice only under the supervision and in the employ of private practicing physicians, and should not be supervised by salaried hospital physicians or be employed by a hospital (CX 461Z161; Tr. 8859-69).

Certain nonphysician health professionals, including clinical psychologists, podiatrists and optometrists, practice independently of physicians in various states (Tr. 9916-16). AMA has lobbied to bar coverage of such professionals' services in federal health programs unless a physician specifically refers the patient to the nonphysician (Tr. 9854-55, 9865-66, 9914-18). Such legislation would make clinical psychologists, for example, dependent on referrals from psychiatrists for the patronage of persons covered under government medical programs (Tr. 9916-17). AMA has also lobbied to exclude the services of certain nonphysician competitors of physicians from federal health program coverage (Tr. 8858-59; CX 2586N). For example, AMA specifically opposed inclusion of the services of optometrists in the original Medicare law (Tr. 8858-59, 9054-55; CX 2586N).

### M. Professional Standards Review Organizations

35. In 1972, AMA opposed the initial passage of the Professional Standards Review Organization ("PSRO") Act (Tr. 9927). This law conditions Medicare payments to a physician on the finding of a review organization of other local physicians that the services rendered were medically necessary and performed in the least expensive appropriate setting, 42 U.S.C. 1320c-4(a)(1), c-7. The PSRO law poses a substantial economic threat to physicians (*See* Tr. 9017).

After the Act's passage in 1972, the AMA House of Delegates voted to seek its repeal (Tr. 9927; CX 461Z289). Because repeal seemed unlikely, AMA later adopted a strategy of seeking amendments to the Act, hoping to "ameliorate an otherwise objectionable program" (CX 1543P, Q, 461Z293; Tr. 9928, 9931). [48]

AMA has pressed in 1977-78 for legislation empowering local physicians to vote on whether a PSRO deserves continued recognition by the Department of HEW (Tr. 9929). AMA lobbied for repeal of a section of the PSRO law providing for imposition of financial penalties on physicians who violate their obligations under the PSRO law (Tr. 9930). AMA also lobbied in 1977 for repeal of provisions of federal law authorizing recovery of payments from those physicians who violate the PSRO law (Tr. 9931).

Even though PSROs review the services of podiatrists and dentists, as well as physicians, AMA has refused to support legislation allowing placement of a single podiatrist or dentist on either local PSROs or the National PSRO Council, both of which are composed entirely of physicians (Tr. 9931-33; 42 U.S.C. 1320c, c-12(b)).

## N. National Health Service Corp.

36. AMA has supported those provisions of the National Health Service Corps law that condition the placement of salaried, federally funded Corps physicians in particular communities on the local medical society's certification that its community is a physician-shortage area (RX 652G; Tr. 9911-14; 42 U.S.C. 2546(b)(2)(A)). The local medical society can be overridden only if the Secretary of HEW makes a specific finding that the society has been arbitrary and capricious (Tr. 9913-14; 42 U.S.C. 2546(b)(2)(A)). AMA has continued to press for increased medical society involvement in the placement of National Health Service Corps physicians (Tr. 9911-14). These actions place AMA members at the local level in a position of strength to control the entry of competition from salaried National Health Service Corps physicians (*See* Tr. 8872-73, 9006).

## O. Foreign Medical Graduates

37. AMA's policy on foreign medical graduates ("FMGs") draws a sharp line between FMGs who come to this country to continue their medical studies as hospital interns and residents, intending to return to their homelands, and those who wish to make a career in this country as practicing physicians (RX 564, pp. 3051-54; Tr. 8870-73, 9920-21, 9873-75). AMA has pressed for tight restrictions on those FMGs who try to stay in this country as practicing physicians and, thereby, compete with American physicians (RX 564, pp. 3052-54; Tr. 8871, 9874).

AMA has urged the Labor Department to remove preferential immigration status for foreign physicians who want to come to this country to practice (Tr. 9920; RX 564, pp. 3051-53). [49] AMA took this position in large part because of the increase in supply of American physicians (Tr. 9920-21). A report approved by AMA, and published in the December 1976 *JAMA*, urged federal administrative agencies to support changes in federal laws and to adopt safeguards to prevent the use of physician-exchange visitor programs as pathways for FMGs to immigrate to the United States on a permanent basis (RX 564, pp. 3052, 3054, 3055). The report urged the federal government to require that visiting foreign medical students be committed to return to their home country on completing the agreed upon educational program (RX 564, p. 3052), and to limit, in general to two years, the duration of graduate medical education in this country for all visiting foreign physicians (RX 564, p. 3053).

### P. Miscellaneous Legislation

38. In the 1970's AMA has favored legislation to provide cash benefits and more equitable treatment for physicians covered under the Social Security Act (CX 1050Z10, 1051Z12; RX 697D). AMA has also drafted proposed legislation that would require the Internal Revenue Service to treat professional corporations as corporations for purposes of federal income tax (Tr. 9926–27). AMA has participated in a successful nation-wide lobbying campaign to defeat a bill that would have imposed restrictions on the tax and pension advantages of professional incorporation (Tr. 9925–26).

In 1977, AMA declared its official backing for legislation authorizing collective bargaining under the National Labor Relations Act by interns, residents and housestaff physicians, which would help them obtain higher wages (RX 696G, 697D; Tr. 9000–01).

AMA lobbied unsuccessfully against the National Health Planning Act of 1974 (CX 258C, 263K), which, according to AMA, gave too much authority to a "bureaucracy. . .where emphasis will be on cost" (CX 1532A). It did succeed in removing from the Act, as passed, a provision for a governmentally imposed fee schedule for physicians' services (CX 998E).

In the 1930's, believing that there was an excess of physicians, AMA sought to reduce the supply of physicians by limiting medical school enrollments (CX 1109D; Tr. 5186–88, 8874–75). AMA still opposes legislation conditioning federal capitation grant money to a medical school on the school's agreement to increase its enrollment (RX 696A; Tr. 9004).

Over the past few years AMA has also lobbied to increase the pay scales of physicians serving in the armed forces and the Veterans Administration (CX 1004B, 1522B, 1528, 1530; RX 652C, 696P). [50]

### Q. American Medical Political Action Committee

39. AMA seeks to further its legislative objectives through the American Medical Political Action Committee ("AMPAC"). AMPAC was organized by AMA in 1961, and AMA finances AMPAC's activities (*See* F. 22, pp. 35–37, *supra*). AMPAC complements AMA's legislative efforts by contributing money to congressional candidates supportive of the profession (CX 1493B, 461Z414, 1487B, 1722B). In

deciding which candidates to support, the AMPAC board relies heavily on the degree of political support for the individual candidates among the physicians residing in each candidate's district (Tr. 4788, 4791, 4823).

### R. AMA's Activity with Third-Party Payers

40. AMA promotes the economic interests of its members in their dealings with third-party payers, including Blue Shield, commercial insurance carriers and government medical care programs (CX 2586H). AMA was instrumental in the creation and development of the national network of medical society sponsored Blue Shield plans that provide coverage for physicians' services (CX 2574C, D, 1435Z51-Z53, Z60-Z61, 2586H). AMA helped found the first association of Blue Shield plans, Associated Medical Care Plans, Inc. (CX 1435Z55, Z59-Z60, Z62-Z63). Until very recently, AMA representatives served on the board of the National Association of Blue Shield Plans, which develops policies that help determine physician reimbursement levels (CX 2574C, 1051Z4, 2586I).

AMA support is premised on the "Blue Shield concept," which involves medical society representation in determination of policy, medical society cooperation, freedom of choice of physician and acceptance of leadership by the medical profession (CX 2574C). Among other things, conformance to these principles assures that benefit allowances are "fair" to physicians and prevents "abuses" of physicians (CX 2574C). So long as Blue Shield plans remain committed to the "Blue Shield concept," AMA has backed them as the "economic arm of the medical profession" and as a substantial bulwark against compulsory national health insurance (CX 2574C, D).

The "foundation for medical care" is a recent development in the field of health care delivery (RX 51, pp. 25, 26; CX 461Z222-Z224). A foundation for medical care is a health care organization sponsored by a county or state medical society and controlled by physicians (RX 51, p. 26; CX 461Z222). It performs centralized billing and fee supervision for participating physicians in offering prepaid medical coverage [51] to subscribers (RX 51, p. 26; CX 461Z222). The AMA Division of Medical Practice's Department of Health Insurance provides liaison services to foundations (CX 1051Z4), and a number of AMA representatives serve on the Board of Directors of the American Association of Foundations for Medical Care (CX 1051Z4).

With respect to commercial health insurance, AMA has intervened with the Aetna Insurance Company to "improve" Aetna's "payment and communication practices," including the company's method of informing subscribers when physicians' charges exceed prevailing fee levels (CX 404F, 1061A, B). In addition, in the 1970's, AMA has been instrumental in getting insurance coverage which has provided physicians with a greater percentage of reimbursement for their services (CX 245D, 258D). AMA has also voiced its opposition to mandatory consultation (second opinion) programs as cost containment measures by health insurance companies (RX 4, p. 14). AMA has now embarked on a program of intervening directly with insurance companies on behalf of physicians when disputes are of national significance (CX 1533B, 1524).

In dealing with the Department of HEW over the past decade, AMA has worked to assure that physicians providing services under Medicare are paid their "usual, customary and reasonable" fees (CX 1697B, C; Tr. 8852, 8887-89, 9860). AMA representatives have frequently met with HEW officials to "correct directives that adversely affect Association members" (CX 1543P, Q). In 1975, for example, AMA declared that proposed HEW regulations setting criteria for determining the reasonableness of physicians' prevailing charges were inequitable and unfair to physicians (CX 1004B). In 1977, the AMA House of Delegates voted to seek elimination of HEW reimbursement policies that AMA said established reasonable charge limits for new physicians that were too low (RX 4, p. 7).

AMA has also sought to protect the economic interests of member physicians who provide services to patients under the Civilian Health and Medical Program of the United States ("CHAMPUS") (CX 2592B, C, 404F). CHAMPUS is the Defense Department program providing coverage to military dependents, 10 U.S.C. 1071, *et seq.* In the 1950's, AMA coordinated negotiation sessions with the Department of Defense when CHAMPUS was being established (CX 404F). In 1976, the AMA House of Delegates protested CHAMPUS's reductions in physicians' fees and urged AMA members to bill their patients directly and not to accept direct payments from CHAMPUS (CX 2592B). The House of Delegates voted to negotiate a "no rollback" of physicians' fees with the Department of Defense and to maintain physicians' "usual and customary" fees (CX 2592B, C). [52]

The AMA Council on Medical Service developed and distributed five million copies of a Uniform Health Insurance Claim Form (CX 351, 245D, 1046Z7). By simplifying and standardizing the claims process, the uniform claim form, *inter alia,* reduces physicians' office practice costs in obtaining payments from third parties (CX 351E, F).

Two AMA publications, *Current Medical Information and Terminology ("CMIT")* and *Current Procedural Terminology ("CPT")*, are valuable business aids to physicians (RX 8; CX 2591B). Both provide detailed coding information on hundreds of medical services and are useful to physicians in billing insurance companies and to insurance companies in making payments to physicians (CX 2591B; RX 8, pp. iii, xii, xiii; Tr. 4500-03). The AMA House of Delegates has acknowledged the value of *CMIT* in ensuring that physicians' services are properly defined and "fairly compensated" (CX 2591B). *CPT* provides a means for effective communication between physicians, third-party payers and patients (RX 8, p. iii). It simplifies the physician's task in reporting professional services to third-party payers (RX 8, p. xii). In 1977, a new edition of *CPT* was published which contains guidelines on how to use it in submitting insurance claims (RX 8, pp. ii, xiii). Over 50,000 copies of the previous edition were distributed (Tr. 4500).

## S. Promotion of Hospital Medical Staff Physicians' Economic Interests

41. There are often sharp differences between hospital administrations and hospital medical staffs (CX 1055G), particularly where economic limitations are placed on the ability of physicians to negotiate satisfactory agreements with hospitals (CX 1543Z1). AMA promulgates ethical restrictions on contract practice which promote the economic interests of private practicing physicians (*See* F. 145-51, pp. 207-26). AMA supports medical staffs in their disputes with hospital administrations to protect members of the profession in the defense of their rights (CX 405A, 1055G, 257B) and helps them maintain control over payments made for medical services in hospitals (CX 1475B, D-H). AMA also helps hospital resident physicians pursue their economic objectives (CX 405A).

In 1977, the AMA House of Delegates renewed AMA's call for due process protection for AMA members on hospital medical staffs where their professional ability, honor, reputation or right to make a living is in question (RX 4, p. 36). AMA has also sought to increase physician representation on hospital governing boards (CX 245D, 246) [53] and has opposed hospital requirements that physicians pay a fee to the hospital in exchange for privileges at the hospital (CX 959Z57-Z58, 462Z26).

The AMA House of Delegates has voted that hospital medical staff membership should be limited to physicians and dentists, thereby excluding podiatrists, clinical psychologists and all other nonphysician health professionals from eligibility for medical staff membership (CX 461Z234). It is also AMA's official policy that allied health professionals should work in hospitals only on tasks specifically permitted by the medical staff and under the supervision or direction of members of the medical staff (CX 461Z161), even though many allied health professionals, such as clinical psychologists, can legitimately practice on an independent basis without physician supervision (*See* F. 34, p. 47).

The AMA House of Delegates has noted that it is critical that every physician's assistant be supervised by a physician (CX 461Z161. *See also* F. 34, p. 47). It has also stated that each physician's assistant must be employed by a private practicing physician and not by a hospital with supervision provided by a full-time salaried hospital-based physician (CX 461Z161; Tr. 8859–60).

AMA is a founding member of the Joint Commission on Accreditation of Hospitals ("JCAH") and has participated in the adoption and distribution of JCAH hospital accreditation standards (CX 1965C, 344, 1963, 1964, 1943D). Seven of the twenty JCAH commissioners are AMA representatives (CX 1943C). The JCAH accreditation standards follow AMA policy by barring podiatrists and clinical psychologists from medical staff membership (CX 1965Z3), by allowing allied health professionals to work in hospitals only when under the supervision and direction of a physician and on those tasks specifically permitted by the medical staff (CX 1965Z14), by requiring hospitals to afford due process protection to medical staff physicians (CX 1965Z8–Z9) and by encouraging physician representation on hospital governing boards (CX 1964D, 246).

### T. Litigation

42. AMA represents its members' economic interests by challenging government economic and regulatory policies in court. In 1974, AMA directly sought to aid its members financially by filing suit against federally imposed price controls on physicians' fees (CX 271). AMA specifically opposed governmental limitation of physicians' revenue margins on the ground that it would impose a ceiling on the maximum [54] dollar amount of the physician's "profit" from medical practice (CX 271S). AMA challenged as arbitrary and capricious the government's decision to place price controls on physicians in private practice but not on their competitors—optometrists, clinical psychologists and those physicians under contract with health maintenance organizations and hospitals (CX 271B, C, O, Q–T).

Other AMA litigation has included a suit against federal utilization review programs designed to block federal reimbursements for unnecessary surgery and hospital admissions (CX 1055F, 263I, J, 1532A, 257C; ***AMA*** v. ***Weinberger***, 395 F. Supp. 515, 517, 520 (N.D. Ill. 1975), *aff'd*, 522 F.2d 921 (7th Cir. 1975), participation in a suit seeking to bar a hospital governing body from changing hospital medical staff bylaws (CX 257B) and a challenge to the National Health Planning Act (CX 257C).

## U. Professional Liability Insurance Activities

43. AMA's number one priority in 1975 was resolving the malpractice insurance crisis (CX 263–O, 1102B, 1026A. *See also* F. 24, p. 41). During this crisis, many AMA members have had to pay high premiums and have been threatened with loss of livelihood and financial disaster (CX 1102D, 1003A; Tr. 6450). In 1975, AMA began a major drive for the benefit of its members (CX 361B, 384C) to reduce or stabilize malpractice premiums and to make liability insurance available to physicians at a reasonable cost (CX 1042Z9, 1026A, L). AMA launched an extensive state-by-state campaign that year to obtain new malpractice insurance legislation (*See* F. 30, p. 46).

At the direction of its House of Delegates, AMA founded the American Medical Assurance Company ("AMACO") in 1975 to provide reinsurance for captive medical liability insurance companies owned by state medical societies (CX 1022A, B, 1026K, L, 1533A, 1055H). AMA made a $2 million investment in AMACO in 1976 (CX 1022B; RX 567, pp. 4, 12; Tr. 6451–52). AMACO is governed by a board of directors composed entirely of AMA officers and executive committee members (CX 1022B).

AMA's efforts to lower malpractice premiums and assure the availability of malpractice insurance at a reasonable cost, including its creation and funding of AMACO, have served the economic interests of AMA's members (RX 743, p. 7, Appendix IIC; Tr. 6364, 6450, 8869).

## V. Economic Research

44. AMA promotes the economic interests of its members through the activities of its economic research department, the Center for Health Services Research and Development. [55] Data provided by the Center permits AMA to develop counter-proposals in the legislative arena (CX 2202C. *See also* CX 1543N), helped it lobby in 1974 against limits on physicians' Medicare and Medicaid reimbursements (Tr. 9785) and, in the mid-1970's, enabled AMA to induce the federal government's Cost of Living Council to reduce the impact and duration of price controls on physicians' fees during the Economic Stabilization Program (CX 1055N. *See also* F. 25, p. 43).

The Center analyzes proposals for professional standards review organizations, health maintenance organizations, foundations for medical care and national health insurance (CX 2202C). It also undertakes projects exploring physicians' costs of doing business and ways to increase physician productivity (CX 2202C, 1051G). These include studies of the impact of prepayment programs, effective use of allied health personnel and its economic implications, economies of scale in health care, determinants of prices and profit mark-up in medical practice, proper mix of labor and capital in the physician's practice as an entrepreneur, and relationships of specialty mix and practice scales on physician productivity (CX 1051G, 2202B-C, 1052B, 1543W; Tr. 9781-82).

Much of the work of the Center provides valuable information directly to physicians interested in adjusting their fee schedules (CX 1051H-I, 197Z49-Z60, Z125-Z134; RX 18, pp. 155-71) or in relocating their practice (Tr. 4169; RX 15, 19, 21, 22, 23, 24, 28). The Center distributed information to physicians on how they could raise their fees during the Economic Stabilization Program without violating government regulations (CX 461Z21, 281B, C, 1051H). The Center also publishes and distributes *Profiles of Medical Practice* annually, which contains extensive economic data and analysis on the medical services market, including detailed breakdowns of average physician fees by specialty and region for initial office visits, follow-up office visits, hospital visits and periodic examinations (RX 18, pp. 155-71; CX 197Z49 - Z60, Z125 - Z134).

Through the Center, AMA maintains exclusive control over a unique data base on physicians (Tr. 9793; RX 562, p. 4), which enhances AMA's effectiveness in its legislative efforts (Tr. 8924-26, 9105-07, 9785; CX 1055N, 2202C, 1543W, 1360C).

### W. Public Relations

45. AMA spent approximately $3 million in 1977 on public relations activities designed to boost the image of physicians (Tr. 6446-48) and increase public acceptance of AMA legislative positions supportive of physicians' interests [56] (CX 1543G-H, 2190Z37, 1541F). AMA is expanding its public relations activities (CX 232Q; RX 4, p. 48; Tr. 6466) to overcome the public's perception that the medical profession is self-centered (CX 1543G).

AMA has historically used public relations to promote its positions on issues of substantial economic concern to physicians (CX 2586R, 1050Z16). In 1950, for example, AMA spent millions of dollars in a "national education campaign" against national health insurance (CX 2598B, 2601, 1435Z61-Z62. *See also* F. 27, p. 44). In recent years, AMA has trained hundreds of physician spokesmen who have carried AMA's position on national health insurance to millions of consumers (CX 1087, 1051Z8–Z9; Tr. 9910). In the 1970's, the public relations efforts of AMA and its constituent societies on the professional liability insurance problem have been successful in developing an atmosphere conducive to passage of legislation easing the malpractice insurance crisis (CX 1022A. *See also* F. 43, p. 54).

AMA actively counters media reports that are critical of the medical profession (CX 1051Z16, 1050Z16, 2586R, S, 1055H; Tr. 8897) or that stress the high incomes received by physicians (Tr. 9789–90). For example, AMA has challenged media reports focusing on unnecessary surgery (CX 2586R, S, 1055H), largely in order to defuse public support for stricter economic sanctions against physicians doing unnecessary surgery (CX 2586R, S).

### X. Negotiations Assistance

46. The AMA Department of Negotiations aids AMA's members in private practice in their socioeconomic confrontations with third-party payers and helps hospital-based physicians further their economic interests (CX 402A, 410B, 405A, 436A, B, 437, 1543Y–Z6). The Department trains medical societies and individual AMA members in negotiating skills to help physicians obtain a reasonable return for their services (CX 405B) and lower malpractice insurance premiums (CX 410B, 1543Z2). When local disputes are of national significance, AMA will intervene to represent its members' socioeconomic interests (CX 410B).

The Department of Negotiations was established in 1975 and quickly began sponsoring a series of negotiating seminars to help physicians deal with their "adversaries" (CX 410B, C, 406, 409), which include insurance carriers making marked-down payments (CX 405B). AMA has accelerated its involvement in the negotiating realm (CX 403, 404), such as by increasing its negotiations program by 50 percent in 1977 (CX 1543Z11; RX 743, Appendix IIB, C). [57]

### Y. Practice Management

47. AMA offers a variety of practice management programs (CX 1115Z12) to help its members increase the efficiency, productivity and "profitability" of their practices (CX 259N, 245D, 263Z5; Tr. 4954, 6363–65). Through publications, seminars and workshops, the AMA Department of Practice Management has guided AMA members on financial management and the business side of practice (CX 1001B, C, 1115F, Z12, 376A–Z47, 377, 1064, 380, 1077, 1105Z22–Z25. *See also* F. 20, pp. 33–34). AMA has more than doubled its practice management program in the last three years (CX 1543H–M, Z10; RX

743, Appendix IIB, C), following the AMA Division of Medical Practice's recommendation that programs which present the most tangible benefits to AMA members should be given a high priority (CX 1543Z10).

AMA advises its members on the financial aspects of opening a practice, buying insurance, improving cash flow, bookkeeping, billing and collecting fees, shortcuts in processing health insurance claim forms, how much to pay employees and how to manage, develop and invest in real estate (CX 1115I-K, 376, 1064, 1090, 1551). AMA gives detailed guidance to its members on setting fees, cautioning them that charging fees that are too low will lessen respect for physicians and advising them to peg their fees to local fee ranges (CX 376Z19-Z20). AMA suggests that each physician consider the fees of his colleagues along with his own level of experience and specialty in developing a conversion factor to be applied to a medical society relative value "fee-setting" guide (CX 376Z19-Z20).

The Department of Practice Management sponsors approximately 25 practice management seminars and workshops for physicians annually, which AMA members can usually attend at a discount (Tr. 5013-14; CX 1115F, 1090, 1064C, D). The Department also sponsors practice management training for physicians' office staffs (Tr. 5013; CX 1116, 1001). In addition to the Department of Practice Management, the AMA Council on Medical Service also sponsors health care socioeconomics conferences and programs designed to increase the productivity and efficiency of physicians' office practices (CX 1050X, 1000, 1073). These business and financial management services help AMA members avoid cash shortages and provide important economic benefits to AMA members (CX 376G; Tr. 6363-65; RX 743, pp. 6, 7, Appendix IIB, C). [58]

## Z. Legal Services

48. AMA provides legal advice to its members on the business aspects of their medical practice (CX 2190Z38). AMA's Office of the General Counsel offers guidance to AMA members on estate management (CX 275), professional liability, physician partnership agreements (CX 340), fees, wills, trusts, taxes, model forms, sale and disposition of medical practices (CX 347) and avoiding unnecessary rental expenses (CX 378E). The AMA General Counsel's office also assists state and local medical societies in their disputes with governmental agencies, hospital boards and advertising health maintenance organizations (CX 392C), and provides medical societies with model malpractice legislation (CX 350).

AMA cosponsors "medicolegal" symposiums on various topics, including HMOs, foundations, PSROs (RX 51, pp. 25–40), malpractice insurance (CX 1113G, 1067, 1068B; RX 49, pp. 27–57, RX 50, pp. 38–80), the rewards and risks of professional incorporation (CX 1113F), how to "Protect the Professional from Consumerism" (CX 1068C) and "Tax Tips" for professionals (CX 1067; RX 49, pp. 58–63).

### AA. Miscellaneous Activities

49. There are various other activities of AMA which economically benefit its members. AMA operates the nation's largest physicians' placement service (CX 259D). The AMA physicians' placement service works to match physicians seeking placement with opportunities in solo practice, partnerships, associations, groups, hospitals and clinics (CX 1018B, 1019). Placement service listings run regularly in *JAMA* (Tr. 9596; CX 1270, 1279; RX 213, pp. 719, 721–22, 724–25, 729-31, 734–36, 738).

AMA publishes *JAMA* and distributes it as a free benefit of membership (RX 3, p. 1. *See also* F. 17(h), pp. 23–25). *JAMA* contains articles not only of a technical nature (RX 213, pp. 635–36, 652–75), but also on financial topics (CX 275). The technical articles provide practical benefits to physicians because they improve physicians' efficiency, productivity and skill (Tr. 5123; RX 213, pp. 663–67, 635–36).

Since 1963, AMA has sponsored the AMA Members' Retirement Plan to enable members to take advantage of the tax deductions and other benefits of the Keogh Act (CX 1030C, D, H, 332, 335). The plan is open only to AMA members, their partners and their employees (CX 335B, 259H). As of January 30, 1976, the plan held $140 million in assets (CX 1030U), over $13 million of which was invested by plan participants in the preceding year (CX 1030Z4–Z5). The plan has pecuniary benefit to AMA members because of the economies AMA gains through [59] mass purchasing of securities and guaranteed rate insurance annuities, and because AMA charges a minimal administration fee and does not charge any sales, service or redemption fees (CX 259H, 335K). The retirement plan is supervised without compensation by a committee composed entirely of AMA officers and trustees (CX 1030M, N). In addition, AMA recently began a tax-exempt income fund (Tr. 9594).

AMA sponsors a range of insurance programs offering financial benefits and savings to its members (CX 1548, 259D; RX 743, p. 7, Appendix IIC). AMA sponsors disability, office overhead, excess major medical, in-hospital, group term life and accidental death insurance; written premiums for these programs totalled over $15 million in 1975 (CX 1561B, 1548). These programs are available only to AMA members (CX 1523, 262-O). These AMA membership insurance programs offer broad insurance coverage at the lowest available costs (CX 263Z5, 259D; RX 3, p. 13), and thereby provide economic benefits to AMA members (RX 743, pp. 6, 7, Appendix IIC; CX 1548C).

AMA publishes *American Medical News*, distributed free to all AMA members, as a vehicle to keep its membership informed on legislative, economic, legal and other nonclinical news (RX 3, p. 12; CX 896A). AMA spends over $3 million annually on the weekly paper (RX 743, Appendix IIA). One purpose of the paper is to "achieve consensus within the Federation structure" (RX 3, p. 12) on legislative and professional issues affecting the economic interests of physicians (CX 2586J, 1046Z17; RX 3, p. 12; Tr. 8920-24). AMA's increasing activity in the courts on behalf of physicians, efforts to resolve the professional liability insurance crisis, and national developments in health insurance, Professional Standards Review Organizations and health maintenance organizations were the five *American Medical News* topics specifically identified in the AMA Communications Division's annual report for the year ending June 30, 1975 (CX 1046Z17). *IMPACT*, the periodic supplement to *American Medical News*, operates in a similar fashion by dealing with socioeconomic issues of interest to physicians (CX 278A).

AMA's ethical restrictions on advertising, solicitation of patients and contractual arrangements of physicians and medical care organizations have insulated physicians from competition. This lessening of competition has significant economic benefit to AMA members. [**60**]

## BB. Federal Income Tax Status of AMA

50. The AMA is treated as an organization exempt from the payment of federal income tax, pursuant to Section 501 (c)(6) of the 1954 Internal Revenue Code (Affidavit of Russel Juhre, submitted in support of AMA Motion for Summary Decision, March 24, 1976). The Internal Revenue Regulations describe a Section 501(c)(6) organization as follows:

> A business league is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. (Internal Revenue Regulation § 1.501(c)(6)-1).

Section 501(c)(3) of the 1954 Internal Revenue Code exempts the following organizations from federal income tax:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in, (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office. (Affidavit of John F. Kelly, Chief of the Conference and Review Staff, Exempt Organization Technical Branch, Internal Revenue Service, filed April 8, 1976 with Complaint counsel's opposition to AMA's motion for summary decision).

**[61]** The American Medical Association Education and Research Foundation, a subsidiary of AMA, in contrast to the Section 501(c)(6) federal income tax exemption of AMA, is exempt from federal income tax under the provisions of Section 501(c)(3) (Affidavit of John F. Kelly, *supra*).

## IV. EXPERT TESTIMONY ANALYZING AMA'S BUDGET ALLOCATIONS AND EXPENDITURES

### A. Identification of the Experts

51. In support of AMA's position that it does not operate for the profit of its members, AMA called as a witness Dr. Frederick Sturdivant, Professor of Business at Ohio State University (Tr. 6301, 6324-25). Dr. Sturdivant is an expert in the analysis of corporate institutions, business history, organizational theory and marketing (Tr. 6301-24, 6418). Prior to being retained in this proceeding, he had done no scholarly work relating either to the medical profession or to nonprofit associations (Tr. 6416-17). Dr. Sturdivant also acknowledged that he possessed no expertise in the areas of accounting or cost allocation theory (Tr. 6418-19).

Dr. Sturdivant was primarily responsible for writing a report, *Comparative Analysis of the American Medical Association Versus Other Associations* (RX 743), through his association with Management Analysis Center, Inc. (Tr. 6320, 6325, 6332). The study was prepared for purposes of this proceeding (Tr. 6327). The stated purpose of the Sturdivant report was "to determine whether or not the American Medical Association is organized and operated for its own profit or that of its members" (RX 743, p. 1).

In rebuttal on this issue, complaint counsel called Dr. Paul Feldstein, Professor in The School of Public Health and in the Department of Economics at the University of Michigan (Tr. 8815).

Dr. Feldstein is an expert in the analysis of business institutions, with a specialty in the economics of medical care (Tr. 8815-35). Dr. Feldstein has spent 17 years studying, teaching and working in the health care and medical economics fields, first as a director of research for the American Hospital Association and since then at the University of Michigan (Tr. 8816-23). He has also served as a consultant and advisor to various government and private organizations on the economics of health care in his area of specialty (Tr. 8826-30). He has written numerous books and articles in the health care economics field (Tr. 8825-26, 8831). In 1977, he authored a book that analyzed the implications of various legislative positions taken by [62] AMA and six other nonprofit associations in the health field, entitled *Health Associations and the Demand for Legislation: The Political Economy of Health* (Tr. 8831, 8832-35). Dr. Feldstein also prepared a report for use in this litigation, entitled *An Analysis of the Sturdivant Report* (CX 2586). He was critical of the budget analysis approach used by Dr. Sturdivant to demonstrate AMA's economic relationship to its members (CX 2586C-D).

### B. The Budget Analysis Approach

52. The Sturdivant report was based on an examination of project account request forms ("project sheets") used by AMA staff members to describe their projects for budgeting purposes in 1977 (*See, e.g.*, CX 2190; Tr. 6336, 6338-39). These "project sheets" represent approved requests for funding for 1977 (Tr. 6348). The year 1977 was chosen because it was the most recent fiscal year for which figures were available (RX 743, p. 5).

Dr. Sturdivant believed that "[t]he character of an organization is best revealed by an examination of how it allocates its resources" (RX 743, p. 5). Consequently, he categorized each of the project sheets into one of four major categories. These categories were:

(A) educational, scientific and association maintenance activities (Tr. 6344);
(B) activities resulting in indirect economic benefit (Tr. 6343-44, 6363);
(C) activities resulting in direct economic benefit (Tr. 6344, 6364); and,
(D) Miscellaneous (RX 743, p. 5).

The term "economic benefit" is to be distinguished from the term "profit." Profit is a technical term, and is used in the accounting sense to describe the net surplus of income over expenses (Tr. 6365;

RX 743, p. 4). Economic benefit refers to activities that would contribute to the financial enhancement of the physician either directly or indirectly, or aid in the maintenance of that income (Tr. 6364, 8838–39; RX 743, p. 4).

A project was classified in Category A (educational, scientific and association maintenance) if it assists the medical profession in: **[63]**

(a) The acquisition of knowledge;
(b) The dissemination of knowledge;
(c) The certification that knowledge has been correctly taught and mastered;
(d) The delivery of medical services;
(e) The presentation of its views on issues related to the practice of medicine or the public health; or
(f) The maintenance of the association (RX 743, p. 6).

Category A was divided into eight subcategories as follows (Tr. 6353; RX 743, p. 7):

$A_1$ Lay Public Education - Activities designed to disseminate public health information, *i.e.,* information on mental retardation, the importance of brushing teeth, etc. (Tr. 6353–54);

$A_2$ Journals and Scientific Publications - Activities designed to disseminate scientific materials to professionals (Tr. 6354–55);

$A_3$ Scientific Policy - Activities lending to the formulation of scientific policy (Tr. 6355–56);

$A_4$ Other Scientific - Scientific activities not falling into the three previous categories (Tr. 6356);

$A_5$ Data on Physicians and Health Care - Activities relating to the generation and distribution of socioeconomic information about the practice of medicine and the status of public health in the United States (Tr. 6356–57);

$A_6$ Medical Quality Control and Education - Activities designed to certify that knowledge is correctly taught and mastered (Tr. 6358–59);

$A_7$ Government Interface - Activities designed to present the views of the medical profession on issues related to the practice of medicine and the public health (Tr. 6359–62); and,

$A_8$ Organizational Maintenance and Operations - Activities designed to generate and retain members and perpetuate the Association (Tr. 6362). **[64]**

A project which failed to fall within one of the criteria of Category A was placed in Category B, C or D (Tr. 6343–44; RX 743, pp. 6–7, 9).

As part of his analysis of whether or not the AMA is organized for the profit of itself or its members, Dr. Sturdivant also prepared a "comparative operating ratio analysis," which compared the income and the expenditures of the AMA to the income and expenditures of other associations, in order to determine whether the AMA more closely resembled a profit-oriented association or a nonprofit-oriented association (Tr. 6370-71; RX 743, p. 10). The figures used as the basis of this comparison were taken from a document of the American Society of Association Executives ("ASAE"), entitled *The Association Operating Ratio Report* (RX 805; Tr. 6371-72). The AMA figures used were 1975 figures furnished by the AMA to the ASAE (Tr. 6375).

The ASAE is an organization comprised of the chief executives of the major trade associations and professional societies in the United States (Tr. 6127). The ASAE report was based upon data submitted by a number of ASAE's member associations. Five thousand ASAE members were sent a questionnaire prepared by Touche, Ross & Co., a public accounting firm, which requested comprehensive information about the income and expenditures of the organization. Approximately 1,300 organizations submitted completed questionnaires. The results were ultimately based upon the responses of 1,006 associations with the remaining responses discarded because the information appeared to be inaccurate or of questionable reliability (Tr. 6147). Thus, the response rate to the ASAE questionnaire was only about 20 percent. The validity of this statistical base upon which the report revolved is questionable (Tr. 8842-43).

After receiving the completed questionnaires and tabulating the data contained therein, Touche, Ross prepared data summaries for 47 different association categories. Each summary contains statistics concerning the revenue and expense characteristics of the relevant association group (RX 805, pp. 15, 19-65). Touche, Ross did not conduct a formal audit of the responses (Tr. 6199, 6382). There is a likelihood that there were substantial errors in the responses of associations to the questionnaire, as evidenced by a $7 million error found in the AMA response, an error that went unnoticed by the accounting firm that prepared the ASAE report (Tr. 6532-33) and the AMA until Dr. Sturdivant brought it to the attention of the AMA during the preparation of the Sturdivant report (Tr. 8839-40, 6531-33, 6380-83). **[65]**

Dr. Sturdivant compared the AMA with the following types of associations (RX 743, pp. 11-12; Appendices III and IV):

(a) All associations with corporate membership;
(b) All associations with individual membership;

(c) Corporate member associations in the area of manufacturing;
(d) Corporate member associations in health care;
(e) Individual member associations in the legal area;
(f) Individual member associations in the medical area; and,
(g) Individual member associations in the educational area.

The AMA figures submitted to the ASAE were adjusted by Professor Sturdivant so as to include under the rubric "Executive and Administrative Expenses" indirect costs amounting to $8,100,000 (Tr. 6378–80; RX 743, p. 11). This reallocation corrected the error in the AMA figures which were submitted to ASAE and it brought AMA executive and administrative expenses for 1975 to 24.6 percent of the budget; consequently, a proportionate downward adjustment of the other percentages for AMA expenditures submitted to ASAE was required (Tr. 6380).

Dr. Sturdivant's comparison of the various types of associations was made in terms of income and functional expenditure variables (Tr. 6384–86). The income variables utilized were income from:

(a) Dues regular;
(b) Dues associates;
(c) Special payments;
(d) Education programs;
(e) Certification, accreditation and standardization activities;
(f) Meetings and conventions; [66]
(g) Exhibits;
(h) Publications;
(i) Subscriptions to publications;
(j) Other sales of publications;
(k) Insurance programs;
(l) Grants and contracts;
(m) Investments; and,
(n) Other (RX 805, p. 19; Tr. 6384–85).

The expenditure variables utilized were:

(a) Executive and administrative costs;
(b) Membership;
(c) Public relations;
(d) Government relations;
(e) Publications;
(f) Conventions and meetings;
(g) Educational programs;
(h) Certification, accreditation and standardization activities; and,

(i) All other activities (RX 805, p. 19; Tr. 6385–86).

Also, as part of the analysis of whether or not the AMA is organized for its own profit or that of its members, Dr. Sturdivant presented what he termed a "comparative cultural analysis." In this analysis, he compared the AMA to six other associations in terms of six attributes discussed by the Commission in its opinion in *National Commission on Egg Nutrition*, 89 F.T.C. 89, 177 (1976) (RX 743, pp. 18–27; Tr. 6391, 6394–95). The attributes were:

(a) Origin;
(b) Character of membership;
(c) Sources of funding and relationships with profitmaking groups;
**[67]**
(d) Nature of publications;
(e) Stated purpose; and
(f) Accessibility to nonmembers (RX 743, pp. 18–19; Tr. 6394-95).

The six associations, in addition to the AMA, compared were:

(a) American Marketing Association;
(b) Association of American Geographers;
(c) American Association of University Professors;
(d) American Institute of Architects;
(e) Association of American Law Schools; and,
(f) Manufacturing Chemists Association (RX 743, p. 19; Tr. 6392-94).

Dr. Sturdivant set up a matrix analysis, wherein he assigned the values 0, 5 and 10 to each association for each of the six attributes, with 0 denoting for-profit status, 10 denoting nonprofit status and 5 being an intermediate point (RX 743, p. 21; Tr. 6398–6400).

### C. Evaluation of the Budget Analysis Approach

53. For the reasons stated herein, it is concluded that the budget analysis approach is an unreliable method for establishing the purposes of an association such as the AMA. Therefore, this approach does not resolve the jurisdictional question of whether or not the AMA is organized for its own profit or that of its members.

Based upon his analysis of AMA's activities for 1977, Dr. Sturdivant testified that 66.5 percent of the Association's budget is devoted to scientific and educational activities, and 25.8 percent of the budget to organizational activities (RX 743, pp. 7–9, Appendices I and II). Consequently, he stated that 92.3 percent of the AMA's 1977 budget went toward noncommercial activities (Tr. 6333). He concluded that AMA activities are largely devoted to scientific, educational, professional, organizational and maintenance activities (Tr. 6369–70) and, therefore, that the AMA's nonprofit activities overwhelm those activities of the AMA that might be linked to the economic interests of physicians. [68]

The Sturdivant report characterized all of AMA's legislative and so-called "government interface" expenditures as not providing any direct or indirect economic benefits to AMA members (RX 743, pp. 6–7). This view is inconsistent with the evidence, taken mostly from AMA documents, that is cited heretofore in this initial decision (F. 23-50, pp. 38–61. *See also* Tr. 8847–49). Dr. Sturdivant admitted that he had done no systematic or substantial study of health care legislation and that his knowledge of AMA's legislative activity was based on a cursory reading of AMA positions on legislation (Tr. 6454–59). On the other hand, Dr. Feldstein, who has made a career study of health care and medical economics, and has published a book on the legislative positions taken by AMA and others in the health field, was of the view that political activities are the most significant aspect of AMA's benefits to its members (Tr. 8847). While some of AMA's activities in the political arena are consistent with the public interest, the predominant interest furthered is that of economic benefit to AMA members (Tr. 8882. *See also* F. 24–39, pp. 41–50; 43–45, pp. 54–56). AMA has recognized this fact by acknowledging that one of the "major" missions of the AMA is to "act as a spokesman for physicians to the public, the government, industry and others" (CX 1042S). AMA has stated that the most important membership benefit is having AMA as the physician's "national spokesman" (CX 259Z13).

Although AMA expended less than $100,000 in 1976 on lobbying activities to seek economically favorable legislative treatment for physicians and AMA's total budget for all legislative activities amounted to about $971,000, or 2.3 percent of total expenditures (RX 3, p. 5), the economic benefit to physicians is significant to a disproportionate degree (CX 2586H). For example, in informing its membership that it had played a major role in obtaining changes in the Keogh Act, AMA stated: "This [modification] potentially saves a physician in the 40 percent tax bracket $1500 a year, which is 14 times the $110 dues to the AMA" (CX 258C–D). Similarly, in reporting on AMA testimony before Congress and on a meeting of AMA officials with President Ford to protest the possibility of a four percent ceiling being placed on physicians' annual fee increases in the Medicare program, AMA told its members that, to many physicians, this one action was worth many times the $250 annual AMA dues (CX 1545C).

Furthermore, in its 1976 report to member physicians on where their dues dollars go (*What The AMA Dues Dollar Does - A Report To Physicians On The Programs 1976 Revenues Supported,* RX 3), it was stated that: **[69]**

> [T]he AMA is vigorously involved in basic economic research . . . . [W]ithout the data [thereby generated which] the AMA was able to bring to the many meetings of the Cost of Living Council, the controls on fees [imposed on physicians by the Economic Stabilization Act from late 1971 through early 1974] would have undoubtedly hurt more and lasted longer than in fact they did. (RX 3, p. 9).

Dr. Sturdivant classified expenditures associated with gathering such data as not benefiting AMA members economically (Tr. 6356-57). Dr. Feldstein testified that these activities had some economic benefit to AMA members (Tr. 8896–97).

The AMA also informed its members that their dues dollars go to activities such as the AMA Physician Placement Service (RX 3, p. 8) and support of AMACO, the reinsurance corporation that backs up physician-owned medical liability insurance companies, to the tune of a $2 million initial capitalization provided by AMA (RX 3, p. 6; F. 43, p. 54; 49, p. 58). The Sturdivant report did not take into account this $2 million investment (Tr. 6451–52).

Indeed, in reference to the group rates available to members in the various insurance and retirement programs offered by the AMA, members were informed, in bold-faced type: "In many cases, a physician member can save more than the equivalent of his annual AMA dues" (RX 3, p. 13).

The Sturdivant report's budgeting approach was also criticized by Dr. Feldstein because it excluded the value of physicians' volunteer time used by AMA to promote legislative and political goals as well as other activities that promote physicians' economic interests (CX 2586H–J; Tr. 8882–83). This led Dr. Feldstein to conclude that the budget allocation approach results in an understatement of the extent to which the AMA confers economic benefits on its members (Tr. 8847. *See also* F. 20, p. 34).

The Sturdivant report purported to analyze AMA's expenditures for one year; that year may not represent a typical budgetary year since economically oriented activity, such as lobbying and political efforts, is likely to vary, especially when there is a major piece of health legislation that is pending in Congress in a particular year (Tr. 8889–91; CX 2586J–L). For example, AMA spent $2.5 million in a National Education Campaign to fight President Truman's national health insurance plan in 1950 alone (F. 27, p. 44). **[70]**

Dr. Feldstein testified that in his recalculation of AMA's budget he used members' dues as the relevant expenditure base because he believed that this represented the best reflection of what an AMA member is getting for his dues dollars (Tr. 8900; CX 2586S–W; RX 3). Dr. Feldstein eliminated from the expenditure base the expenses associated with AMA's publications, as well as the income from the publications, on the basis that the income and expenses from the publications are roughly offsetting and are not supported by dues income (Tr. 8901). Dr. Feldstein also removed from dues income that portion of such income that was not spent, but was placed in a reserve, which amounted to $11.6 million (Tr. 8909).

Dr. Feldstein concluded that AMA expenditures of $11.8 million provided economic benefits to its members. Since expenditures were made from both dues and nondues revenues, he calculated two expenditure bases (CX 2586V–W). Thus, the $11.8 million figure represents 43 percent of the dues expenditure base that went to conferring economic benefits on AMA members and 35 percent if the dues and non-dues expenditure base is utilized (CX 2586X–Z; Tr. 8913).

Since the budget approach is not appropriate to measure the degree to which AMA serves the economic interests of its members, it compounds the error to compare AMA's budget to the budgets of hundreds of other associations of various types (CX 2586D; Tr. 8839). Dr. Sturdivant's comparative operating ratio analysis is premised largely on an unsupported assumption—that associations of individuals in the education field are not oriented toward promoting the economic interests of their members (RX 743R, T; Tr. 8844). The report compared AMA's budget with those of organizations in various categories without regard to organizational size (Tr. 6538–40; RX 743M–U, Z27–Z35, Z48–Z60). The information submitted in response to the ASAE questionnaires was not audited (Tr. 6199, 6382). There is a likelihood that there were substantial errors in the responses of associations to the questionnaire, as evidenced by the $7 million error found in the AMA response (Tr. 8839–40, 6531–33, 6380–83; F. 52, p. 68). The validity of the statistical base upon which the report was based is questionable since it had a response rate of 20 percent (Tr. 8842; F. 52, p. 64). AMA itself has criticized the validity of survey results even when based on a response rate of 40 percent (Tr. 9790). Thus, the comparison of AMA's budget to the budgets of other organizations is too speculative to be of value.

The Part III "cultural" analysis in the Sturdivant report is unpersuasive in its treatment of and assumptions about the other six organizations that were analyzed. The author's premised reasoning and factual basis for making [71] various judgments about the other organizations are not documented or otherwise justified (Tr. 8845-46). For example, the report draws a sharp contrast between AMA's organizational purposes and those of another organization that had once had articles of incorporation stating that it sought to protect the "general interests" of its members (RX 743, pp. 21, 25-26). Indeed, an early section of the AMA's articles of incorporation declared, as one of the AMA's purposes, that: "The object of this Association shall be . . . for the purpose . . . of safeguarding the material interests of the medical profession" (CX 1355H).

The report also concludes that the American Institute of Architect's commitment to "elevate the architectural profession as such and to perfect its members practically and scientifically" is an indication that it may be organized for the economic benefit of its members (RX 743, pp. 21, 26), while, in another section, AMA's early commitment to the "elevation of the whole [medical] profession" is cited as an indication that AMA was not organized for the economic benefit of its members (RX 743, p. 2).

The Sturdivant report is unpersuasive in its treatment of and assumptions about the other six associations that were analyzed. For example, in applying the six criteria which the report selected as best showing the fundamental character of the organizations being studied (F. 52, pp. 66-67) the American Association of University Professors (AAUP) was described as having all the essential characteristics of an organization that is not organized for the profit of its members (RX 743, p. 21). However, Dr. Sturdivant admitted to knowing that the AAUP devoted 31 percent of its budget to collective bargaining on behalf of its members and an additional 11 percent of its budget to studying ways to enhance its members' economic status (Tr. 6552-53).

### D. Conclusion

54. Dr. Sturdivant's budgetary analysis of AMA activities (RX 743, pp. 5-10), comparative operating ratio analysis (RX 743, pp. 10-18) and comparative cultural analysis (RX 743, pp. 18-27) are each premised on highly subjective judgments and are inherently problematical, as are Dr. Feldstein's conclusions about the nature of the AMA based upon his budgetary analysis (CX 2586D, E, F; Tr. 8838, 8845, 8942, 8962-63, 9055).

The intrinsic degree of subjectivity involved in the classification of AMA activities as economically oriented or noneconomically oriented gives rise to inconsistencies [72] not only between the testimony of Drs. Feldstein and Sturdivant but, even more significantly, within each witness' budget allocation analysis. For instance, Dr. Sturdivant classified professional liability insurance as providing a direct economic benefit, but he classified an AMA project on the analysis of malpractice and professional liability as noneconomic (Tr. 8895).

A significant number of AMA's activities can be fairly characterized as both producing an economic benefit for physicians and containing a health benefit for the public (CX 2586 O–Q; Tr. 8882, 8988, 9065–79, 9082–83, 9129–30). Therefore, a budget allocation approach is unworkable in its attempt to compartmentalize activities that are both economic and noneconomic in nature. One important value of AMA to its members is that it is an existing organization with vast expertise in the medical field. Its organizational expenses, expenses of its public relations work and expenses of maintaining the organization and maintaining its membership are expenses that must be characterized as providing some economic benefit to its members since it is an ongoing organization available to assist physicians when any need arises in the political arena, or otherwise, as with the malpractice insurance crisis. One of the most important benefits, "of overriding importance," is the fact that "as a member, you have an effective and influential national spokesman to represent your views, yes *your* views, interests and rights" (CX 259Z13) (Emphasis in original).

In sum, the actual nature of AMA's activities, for purposes of determining whether or not the AMA is organized for its own profit or that of its members, cannot be ascertained by reviewing budgetary allocations based upon various income and expenditure categories (CX 2586F–L, CX 1042R; Tr. 8838, 8846–48, 8882–83), or by comparing AMA's revenue and expenses with those of other organizations about which little accurate, factual information is known. For purposes of determining the issue of AMA's profit orientation, evidence in the form of, or based upon, a budget allocation approach would be of evidentiary value only as support for, and confirmation of, findings of fact resting upon more solid footing. Since the record contains substantial actual evidence of AMA's activities, evidence based upon the subjective analysis of expenditures is of very limited value. [73]

## V. ACTIVITIES OF CONNECTICUT STATE MEDICAL SOCIETY

### A. Committees and Programs

55. CSMS annually holds a Scientific Assembly for the presentation and discussion of subjects relating to science and medicine. CSMS selects speakers and persons to present papers at the

Assembly on the basis of quality; CSMS does not distinguish between members of CSMS and nonmembers in the selection process (Tr. 8232, 8287-90; RCX 79, 146, p. VII).

CSMS has scientific sections in 26 specialty areas: allergy; anesthesia; dermatology and syphilology; emergency medicine; family medicine; forensic medicine; gastroenterology; internal medicine; neurology; neurosurgery; obstetrics and gynecology; occupational health; ophthalmology; orthopedics; otolaryngology; pathology; pediatrics; physical medicine and rehabilitation; preventive medicine and public health; proctology; psychiatry; pulmonary diseases; radiology; surgery; thoracic and cardiovascular surgery; and urology. Membership in CSMS scientific sections is open to CSMS members and student members who have an interest in the work of the section. The purpose of the scientific sections is to conduct the work of the annual CSMS Scientific Assembly and related work (CX 1352U-V; RCX 146, p. VII). The scientific sections meet at least once annually, at the time of the Scientific Assembly. At the section meeting, there is a general topic of discussion and/or a featured speaker (Tr. 8288; RCX 79, 146, p. VII).

CSMS has the following committees (CX 1352P-T): The CSMS committe on continuing medical education is charged with responsibility for investigating and evaluating alternatives in continuing medical education programs, the quality of courses and course materials and liaison with educational bodies concerned with continuing medical education (Tr. 8285-87; RCX 68, pp. 27-28).

The committee on the program of the scientific assembly is responsible for developing the format and program of the annual CSMS Scientific Assembly (Tr. 8287-90; RCX 68, pp. 28-29).

The committee on insurance has responsibility with respect to endorsement of voluntary health and accident insurance programs (Tr. 8291-92; RCX 68, p. 29).

The committee on professional liability has responsibility for investigating the occurrence of malpractice and matters relating to professional liability claims and insurance. The committee has worked to develop educational programs and to decrease the incidence of malpractice (Tr. 8294; CX 321A-B, 366A-C, 369A-C, 428, 431A-B; RCX 68, pp. 29-30). [74]

The Committee on peer review systems has been concerned with matters of peer review and regulation by third parties. The committee undertook a study of ways to help elderly patients by increasing the number of physicians willing to be reimbursed by Medicare solely on the basis of the assignment of patients' Medicare benefits rather than requiring extra payments by the patients. The

Committee's report was sent to the Connecticut Congressional delegation and the Department of HEW (Tr. 8301-07; RCX 68, p. 30, 102A-D, 103A-M).

The committee on third-party payments has been concerned with patients' insurance coverage and has served as a liaison for policy/philosophy interchange between CSMS and third-party payers in Connecticut. At one time, this committee worked on a relative value guide (Tr. 8307-08; CX 411-414, 418A-B, 425A-B, 426A-B, 451A-F; RCX 68, pp. 30-31. *See also* F.60, p. 83; 63, pp. 85-86).

The judicial committee is concerned with philsophical considerations such as involuntary sterilization, health care of the elderly and informed consent. It is also authorized to serve as an appellate body for members who feel aggrieved by a disciplinary action taken by a county association. Although the judicial committee is empowered by the CSMS bylaws to initiate disciplinary proceedings, the committee has not exercised original jurisdiction in at least the last 30 years (Tr. 8310-12; RCX 68, p. 31, RCX 146, p. X).

The editorial committee of *Connecticut Medicine* is responsible for supervising the publication of the CSMS monthly journal (Tr. 8321; RCX 68, pp. 31-33).

The committee on legislation is concerned with legislation related to health and medical care. In recent years, the committee has been concerned with the potential malpractice crisis, peer review, health education in the schools, immunity for persons providing Good Samaritan services, the ability of minors to secure treatment for venereal disease, reforming the State's abortion law, developing a definition of death, organ transplants and the use of extraordinary technology to prolong life. Members of the committee may, upon occasion, testify at hearings of the State legislature (Tr. 8323-26; RCX 68, p. 33). [75]

The committee on public relations is concerned with developing information on health care and health tips for CSMS to provide to the media and the public, and also with publicity for CSMS activities (Tr. 8329-31; RCX 68, pp. 33-34).

The committee on accident prevention and emergency medical services was formed to aid in the development and implementation of emergency medical services in Connecticut. The committee has been concerned with sports medicine, rape victims, standards for public vehicle operators and, along with the CSMS committee on legislation, the support of legislation which would provide emergency medical services (Tr. 8331-32; RCX 68, p. 34).

The cancer coordinating committee has coordinated activities in the fields of cancer treatment, research and education throughout

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Connecticut, has worked with the committee on legislation to support legislation to maintain a cancer tumor registry, developed a booklet on follow-up cancer treatment and has emphasized physician education regarding cancer treatment (Tr. 8332–35; RCX 68, p. 35, RCX 97).

The committee on drug abuse education is concerned with educating the public with respect to drug and alcohol abuse and the treatment of alcoholic patients. Recently, it has been particularly concerned with the "sick physician" who is abusing drugs or alcohol (Tr. 8336; RCX 68, pp. 35–36).

The committee on maternal morbidity and mortality is interested in the management of obstetrical delivery in terms of the appropriateness of treatment and lowering the incidence of risk in maternal and newborn care. This committee drafted a statement setting forth professional guidelines for performing abortions when, after the United States Supreme Court decision, the Connecticut legislature failed to set guidelines (Tr. 8336–38; RCX 68, p. 36, RCX 117A-B).

The committee on medical aspects of sports focuses on injury prevention in high school sports, has published "The Team Physician" and publishes the *SportsMed* periodical (Tr. 8338–39; RCX 68, p. 36).

The committee on mental health, formed to promote the care and welfare of persons with mental health problems, works in areas that include mental health legislation, the "sick physician" problem and the evaluation of mental health programs (Tr. 8340; RCX 68, pp. 36–37). **[76]**

The committee on organ and tissue transfers is responsible for developing guidelines for implementing organ and tissue transfers and blood transfusions. It has worked with the committee on legislation in legislative matters relating to the definition of death and the propriety of organ and tissue transfers (Tr. 8340–41; RCX 68, p. 37).

The committee to study perinatal morbidity and mortality is concerned with the pre- and post-natal welfare of the newborn, and has sponsored symposia on care of the newborn (Tr. 8341–42; RCX 68, p. 37, RCX 80).

The committee on public health is interested in matters of public health such as immunization, venereal disease, rural health needs, health education in schools and nutrition. It has sponsored symposia and meetings on these and other public health matters, and has worked closely with State and municipal officials on matters of public health (Tr. 8342–43; RCX 68, pp. 37–39).

The committee on continuing medical care, formerly known as the committee on aging, is concerned with the welfare of patients in extended care facilities, the transfer of medical data, the coordination of care of the elderly and legislation dealing with long term care (Tr. 8344; RCX 68, p. 39).

The areas of interest of the committee on statewide medical planning include containment of health care costs, uncovering Medicare fraud, national health insurance legislation, other health planning legislation and work on the Connecticut Ambulatory Care Study (Tr. 8345–47; RCX 68, pp. 39–40).

CSMS sponsors continuing medical education ("CME") programs. These programs are available to all physicians, regardless of membership in CSMS, and to members of other health-related professions. There is generally no fee for attending CSMS sponsored CME programs; occasionally, there may be minor registration fees, applicable to all persons attending the programs. Examples of CME programs which CSMS has sponsored are the sixth biennial perinatal seminar program (topics included fetal placental health, obstetrical anesthesia, blood gases and newborn intensive care) and the second conference on planning CME in community hospitals (program topics included planning and evaluating CME programs) (Tr. 8286; RCX 80, 82). [77]

CSMS has developed a series of seminars to study the input of the physician in health care costs and the establishment of hospital committees to work with hospital administrators toward minimizing physician related hospital costs. The CSMS sponsored seminars are given free of charge and are open to members and nonmembers of CSMS as well as the general public. These seminars have been concerned with the impact on health care costs of the use of antibiotics, respiratory therapy and the pathology laboratory (Tr. 8346–47).

## B. Publications

56. CSMS publishes *Connecticut Medicine*, the journal of the Connecticut State Medical Society, on a monthly basis. The journal has been in publication since 1936. It has a physician editor as well as a CSMS committee which functions as an editorial board (Tr. 8321–23; CX 1352Q; RCX 129. *See also* F. 71, n. 91). *Connecticut Medicine* is available to CSMS members and nonmembers who wish to subscribe, as well as through public libraries. The subscription rate is $7.50/year for CSMS members and $15.00/year for nonmembers. Approximately 150 to 200 nonmembers subscribe to *Connecticut Medicine*. The members' subscription costs are allocated out of the $100 membership dues of CSMS (Tr. 8240, 8254–55). *Connecticut*

*Medicine* generally contains articles of educational value in clinical medicine; philosophical issues in medicine; comments of the Dean of the University of Connecticut; articles of general intellectual interest (for example, by the Connecticut Society for the Humanities); comments of CSMS officers, employees, or representatives; the proceedings of the CSMS House of Delegates; notices of scientific symposia; letters to the editor; and a physician placement service. Many of the authors of these articles are not members of CSMS (Tr. 8322-23; CX 1352A-Z85; RCX 129). The physician placement service includes listings of physicians wishing to locate in Connecticut and entities wishing to list opportunities for practice. The service is available without charge to all physicians, regardless of membership in CSMS, and to Connecticut municipalities and governmental agencies seeking physicians (Tr. 8238-40; RCX 129). *Connecticut Medicine's* costs of publication exceed the revenues obtained from advertising, subscriptions and reprints. In 1975, CSMS lost about $44,000 in publishing and maintaining *Connecticut Medicine* as the Society's journal (Tr. 8369; RCX 68, pp. 14, 16-17).

CSMS publishes *Connecticut SportsMed*, which is distributed by CSMS free of charge several times annually to team physicians, coaches, trainers and others interested in contact sports in Connecticut. *SportsMed* is primarily intended for consideration and use by people dealing with sports in the middle and secondary schools. The April 1976 [78] issue of *Connecticut SportsMed* (Vol. 3, No. 1) included articles on lateral flexion injury to the neck; cauliflower ear; athletic training; physical examinations; and, injury reporting (Tr. 8330; RCX 94).

### C. Public and Governmental Interface

57. The CSMS staff writes and issues press releases to the news media on subjects such as food choking, high blood pressure, health care of the elderly, psoriasis, poisonous plants, yard and gardening accidents, hypertension and weight control (Tr. 8248-50; RCX 84, 86, 89A-B, 90, 91A-B, 92A-B, 127A-C, 128).

CSMS offers pamphlets on health related matters to the public free of charge. CSMS has distributed pamphlets relating to the Heimlich maneuver of rescuing victims of food choking, high blood pressure (in English and Spanish editions), a form regarding the use of extraordinary life supports, the identification of drug abusers, first aid chart and weight control (Tr. 8250-52; RCX 83, 85, 87, 88, 111, 125, 147).

CSMS has developed informational pamphlets and materials for use by physicians and others. Examples include "The Team Physician: A Brochure for Team Physicians, Coaches & Trainers" and "Follow-up of Cancer". These booklets have been distributed by CSMS free of charge to physicians (CSMS members and nonmembers) and other interested persons (Tr. 8333–34, 8338–39; RCX 93, 97).

CSMS receives telephone requests from members of the public seeking information about locating a physician. The CSMS staff refers to a national specialist directory which CSMS purchases each year; CSMS selects three names of specialists at random from the directory, and provides the telephone caller with the names and biographical information published in the directory. CSMS does not distinguish between members and nonmembers of CSMS in determining what physicians' names to provide to telephone callers seeking information (Tr. 8247–48).

CSMS sends designated representatives and advisors to governmental and quasi-governmental bodies concerned with health care. CSMS sends representatives and delegates to the following groups: committee on allied medical services (considering the interrelationship of care rendered by physicians and nurses); committee on hospitals; committee on cooperation with the medical schools of Connecticut (resulting in educational programs cosponsored by CSMS); liaison committee with the Connecticut Pharmaceutical Association; liaison committee with the State Department of Social Services; Connecticut Health Association; Connecticut Nutrition Council; Connecticut Advisory Council on School Health; Connecticut Advisory Committee on Food [79] and Drugs; Council of New England State Medical Societies; State hospital, pharmaceutical, dental, and nurses' associations; and several state medical associations. CSMS has two designated representatives on the Connecticut PSRO Council, which is the state-wide board responsible for the federally mandated PSRO function in Connecticut (Tr. 8347, 8349–51, 8353–54; CX 1352T, U; RCX 68, pp. 40–44).

CSMS, under a contract with the Health Services and Mental Health Administration of the Department of HEW, sponsored a Connecticut Ambulatory Care Study that began in 1972. The purpose of the study was to develop a statistical analysis and to compare the quality of care rendered in various types of medical provider settings. A final report was filed with the Department of HEW (Tr. 8351–52; RCX 68, p. 18).

CSMS contributed approximately $25,000 to the formation of the Connecticut Medical Institute, which was organized to establish four federally mandated PSRO's in Connecticut (Tr. 8353).

CSMS annually provides an $8,000 grant to the medical schools in Connecticut, to be used as a revolving loan fund for needy students.

The funds are disbursed at the discretion of the deans of Connecticut's medical schools (Yale and University of Connecticut)(Tr. 8350, 8361; RCX 68, p. 15).

In December 1971, CSMS instituted an antitrust action against the Connecticut Medical Service, Inc. (Blue Shield) seeking to enjoin that organization from requiring physicians to participate in all contractual benefit plans in order to participate in any one plan. The CSMS motion for temporary injunction was denied in December 1971, and CSMS withdrew the action in its entirety in January 1972. CSMS expended $4,249 in legal fees in connection with the suit (CX 417A-L, 2430A-J; RCX 154, 155A-C. *See also* F. 64, pp. 86-87).

CSMS has communicated with governmental officials and legislators concerning issues of health care and health care regulation in order to express its opinions regarding the delivery of health care in the State of Connecticut, including: establishing a State poison information center; State Health Department authority to regulate fishing in contaminated areas; protecting members of peer review panels; strengthening the powers of public health inspectors regarding unsanitary restaurants; fees for State Health laboratory work; licensing of clinical laboratories; reexamination of motor vehicle operators; health education in public schools; disclosure of information regarding [80] patients in mental health facilities; radiation level limits for health treatment; the practice of chiropractors; professional liability (malpractice) and the establishment of a commission to study that issue; the establishment of a separate commission on physician disability; maintenance of a State license registration fee; the practice of nursing; insurance coverage for mental or nervous conditions; disclosure of information received from the State Department of Health by the Commission on Hospitals and Health Care; defining the types of surgical practices performed by podiatrists; ear piercing; generic drug prescription; drug interchange and equivalency; procedures for the State Welfare Department payment for provider services; child abuse; motor vehicle operation; prenatal testing of pregnant women; school sports; sale of BB guns; fluoridation of water; abortion; human experimentation; optometrists' recommendation of physicians; health insurance for ambulatory care; restructuring of Medical Examining Board; and other matters referred to above in the discussion of committees (Tr. 8323-29; CX 192, 368A-F, 429, 1236A-D, 1252A-B, 1253, 1256A-B, 1257, 1263A-D, 1264, 1749; RCX 5, 10A-B, 142, 143, 144, 145. *See also* F. 64, p. 86; 66-67, pp. 88-89).

CSMS has retained a lobbyist to provide legislative counseling and representation in connection with health and medical care legislation proposed at sessions of the Connecticut General Assembly. The function of the lobbyist is to inform CSMS of health related bills, advise CSMS as to proposed positions with respect to pending legislation and facilitate contact with legislators so that CSMS can properly represent its positions to the legislators. In 1975, CSMS expended $8,731 for legal and legislative counseling, which includes the cost to CSMS of retaining a lobbyist; in 1974, the expenditure for legal and legislative counseling was $7,641 (Tr. 8360-61; CX 1255A-B; RCX 68, p. 15).

On occasion, CSMS may communicate with federal officials. In 1974, CSMS sent a mailgram to a Connecticut Congressman regarding proposed federal legislation to extend the Economic Stabilization Act (CX 1268).

### D. Connecticut Medical Political Action Committee

58. The Connecticut Medical Political Action Committee ("COMPAC") is a political action committee which is registered with the Federal Election Commission. COMPAC was formed [81] on a voluntary basis by a group of Connecticut physicians in 1961 or 1962. At about that time, the CSMS House of Delegates passed a resolution which encouraged a voluntary group of physicians to form a political action committee. COMPAC's 1972 registration form filed with the United States House of Representatives listed CSMS as an "organizer" of COMPAC (CX 500A-C, 1214A-C, 2599A. *See also* F. 67, p. 89). Membership in COMPAC is voluntary. In 1975, COMPAC had a total membership of 297. COMPAC's membership in other years has been as many as 320-340 members. COMPAC is governed by the COMPAC Board of Directors (CX 458A-C, 1214B-C, 1712, 1714A-H, 1715A-H; RCX 68, p. 27).

CSMS did not contribute or grant money to COMPAC during the five-year period 1973-78, but did make financial grants to COMPAC in its early years. COMPAC administrative and clerical matters are routinely performed by COMPAC officers and do not involve CSMS (Tr. 8258-60; CX 1211, 2599D).

CSMS provides COMPAC with office space and use of a telephone line to make local telephone calls at the CSMS office free of charge. CSMS staff employees, from time to time, provide administrative or clerical services to COMPAC in connection with the processing of dues statements or the sending out of occasional pieces of mail. CSMS charges COMPAC for all postage, long distance and toll telephone charges, office supplies, printing charges and other expenses which might be incurred by, or billed to, CSMS and which are attributable to COMPAC. CSMS maintains a ledger sheet for recording expenditures chargeable to COMPAC, and on the basis of the ledger sheet bills COMPAC for such expenditures (Tr. 8240-41, 8243; CX 2599D; RCX 123A-C).

CSMS processes dues statements on behalf of COMPAC. CSMS dues envelopes for 1975, 1976 and 1977, sent to CSMS members and prospective members in seven Connecticut counties (all but Hartford), contained a separate line entry for "Voluntary COMPAC-AMPAC Membership. . . . $25.00." CSMS charges COMPAC for the administrative costs of processing dues, in the amount of one percent of political action committee dues processed. In 1975, approximately $7,595 in political action committee dues was administratively processed by CSMS and forwarded to COMPAC; in 1976, approximately $7,295 was so forwarded (CX 1714A-H, 1715A-H, 2599C-D).

In 1974-75, 1975-76 and 1976-77, none of the COMPAC officers were officers of CSMS (CX 1352 O, 2105B, 2599B; RCX 68, p. 5). There were common officers of CSMS and COMPAC prior to these years (Tr. 8387-89; CX 1214C, 2109B). [82]

On one occasion, during the years 1975-76, and on one occasion in 1974, CSMS published an issue of a newsletter, entitled "Political Roundup," which provided information submitted to CSMS by Connecticut candidates for the United States Senate and House of Representatives; the front page of each of these two newsletters included a "message" from the COMPAC Chairman (CX 1206A-L, 1711, 2599C).

### E. Insurance Programs

59. CSMS has endorsed several health and accident insurance programs. CSMS endorsement permits insurance agencies to market the programs to CSMS members. Brochures on the health and accident insurance programs are included in the CSMS membership information file which is provided to new members. CSMS expends no funds to promote these programs. Participation by CSMS members in endorsed programs is voluntary. Insurance policies written in connection with the programs are written on behalf of the individual CSMS member choosing the plan and not in the name of CSMS (Tr. 8992-94; CX 203, 205A-D, 207A-C, 208, 210A-D, 216A-C, 221, 314A-E, 316, 317, 1748; RCX 148B, F-K).

Since 1971, CSMS has endorsed a professional liability insurance program which is administered and underwritten by the Aetna Life and Casualty Company. A brochure on the Aetna program is presently included in the CSMS membership information file which is provided to new members (Tr. 8294; RCX 2B, 148N). A physician must be a CSMS member in order to participate in the CSMS endorsed program. Participation is voluntary and subject to Aetna's determination of insurability. Policies written in connection with the professional liability program are issued by Aetna to individuals, not to CSMS on their behalf. Approximately 85 percent of the CSMS membership obtain professional liability insurance through the Aetna program (Tr. 8295, 8297, 8300; RCX 3A-E. *See also* F. 70, p. 90 *infra*).

The loss control and education programs, which were undertaken in conjunction with the professional liability program, have included sponsorship of hospital-based educational seminars which are open to physicians regardless of whether they are CSMS members, and regardless of whether they are insured under the Aetna program (Tr. 8297).

Nonmembers of CSMS, and members of CSMS who choose not to participate in the above-described Aetna program, can purchase individual professional liability insurance policies from Aetna, but at a higher rate. Other insurance [83] companies sell group professional liability insurance policies in Connecticut, but only to members of certain medical specialty societies (Tr. 8377-79, 8778).

### F. Relative Value Guides

60. A relative value guide lists relative values of various medical/surgical services. A "conversion factor" is a unit value which may be used to convert relative values to dollar values for particular services (Tr. 8308-09; CX 1175D, Z-83 (pp. 3, 111). *See also* F. 55, p. 74; 63, pp. 85-86). CSMS adopted a Relative Value Scale, in 1965, as an attempt to define the relative importance of medical/surgical procedures in terms of time, experience, challenge and responsibility of the procedure. In 1971, CSMS adopted a Relative Value Guide which superseded the 1965 Relative Value Scale (Tr. 8309-19; CX 201D, 1175A-Z98; RCX 152A-F, 153A-B). At one time, CSMS distributed the relative value guide to new members. In 1975, the CSMS House of Delegates voted to make the 1971 relative value guide available to CSMS members upon request and at a charge, and the CSMS Council voted that the current usefulness of relative value guides be evaluated (CX 221, 1180). CSMS discontinued all distribution of the relative value guide in August 1977 (Tr. 8410; RCX 68, p. 19).

### G. Income and Expenditures

61. In 1975, CSMS received gross income of $353,196 (less journal income). This amount included $305,442 annual dues payments from

members, less $539 in administrative charges paid to a county association for processing CSMS dues payments in that county; $35,155 special assessment of the CSMS membership to cover the funds granted by CSMS to the establishment of the Connecticut Medical Institute to implement federally mandated PSRO legislation; $18,095 interest and dividends on CSMS reserves; $5,800 rental income to CSMS from renting a portion of the CSMS building; $1,763 received from the AMA as compensation for administrative costs of processing AMA dues payments; less $13,487 loss on sale of securities; and $967 miscellaneous (Tr. 8356-57; RCX 68, p. 14).

In 1975, CSMS made expenditures of $242,229 (RCX 68, p. 14). Expenditures of $4,488 were used in the publication of CSMS Newsletters from the Executive Director's Office to CSMS members (RCX 68, p. 15); $10,386 represents the cost of sending CSMS delegates and officers to the AMA [84] conventions twice a year; $8,731 represents legal fees and the cost of retaining a legislative lobbyist; an $8,000 contribution to a financial aid fund for medical students was made; and, $2,886 was paid to a consultant to study the CSMS endorsed professional liability program (Tr. 8358-62; RCX 68, p. 15).

In 1975, CSMS expended $9,059 from a contingency fund, including expenditures for publishing *SportsMed*, a cancer handbook, a grant to the CSMS Women's Auxiliary, a study of acupuncture, mailing a continuing medical education calendar to members, emergency medical cards, sending representatives to medical conferences, etc.; $737 represented an expenditure for a "special mailing—third party payments"; $323 represented the cost of a liaison dinner with the Connecticut Hospital Association at which malpractice legislation was discussed; and, $250 represented the cost of sending CSMS representatives to a meeting with members of Congress to discuss national legislation proposals (Tr. 8362-66; RCX 68, p. 16).

In 1975, CSMS expended $7,257 in committee allotments which represented the costs of holding meetings, notifying members of meetings, secretarial work, and refreshments; $2,315 of this amount was expended for the committee on legislation. The net expense of running the CSMS annual and semi-annual meetings in 1975 was $9,091 (Tr. 8366-69; RCX 68, p. 16).

In 1975, CSMS received $56,715 in income from the publication of *Connecticut Medicine*, primarily from advertising revenues ($42,160), subscriptions ($2,996) and reprints ($11,203); the expenses incurred in publishing *Connecticut Medicine* were $100,625, for a net loss to CSMS of $43,910 (Tr. 8369-70; RCX 68, pp. 16-17).

As of December 31, 1975, CSMS had general fund reserves of

$359,697, building fund reserves of $152,442, depreciation fund reserves of $61,942 and other special fund reserves of $5,365 (RCX 68, p. 14).

## VI. ACTIVITIES OF CSMS WHICH HAVE PECUNIARY BENEFIT FOR ITS MEMBERS

### A. Background

62. CSMS acts on behalf of the medical profession of Connecticut, representing its professional interests and its professional responsibilities to the public, in a way [85] that it would be impossible for individual physicians to act on their own behalf (CX 192B). CSMS protects the physician in private practice whom CSMS believes should be the keystone of the Connecticut health care system (CX 892A-B). One of CSMS's long-standing "Guiding Principles and Policies" is that physicians should always have the right to charge their usual, customary and reasonable fees (CX 204B-C, 2435A-B; RCX 103I).

A key benefit of membership in CSMS is that it makes the individual physician eligible to join the AMA (CX 1105U, 221, 1748; RCX 148Q, p. 1), which in turn entitles the physician to receive the various benefits of AMA membership (*See* F. 23-49, pp. 38-59). Over half of CSMS's members are also AMA members (CX 1385A; Tr. 8244-45).

CSMS's adoption, dissemination and enforcement of its ethical principles restrains competition among Connecticut physicians, insulates CSMS's members from competition and contributes to their economic benefit.

### B. Relative Value Guide

63. CSMS has published, distributed, and urged the use of the CSMS *Relative Value Guide* (CX 1175. *See also* F. 55, p. 74; 60, p. 83). The CSMS *Relative Value Guide*, a detailed coding of relative values for various medical procedures, is used by physicians in setting their fees, by medical society committees in fee related deliberations and by third-party payers in physician reimbursement decisions (CX 1175D, 204C, D, 2412B, 1181). CSMS has advised each CSMS member to use the *Relative Value Guide* to set his fees in conjunction with conversion factors (CX 1175Z85, 1171). It has suggested consultation with colleagues to determine dollar conversion factors so physicians' fees will "accommodate" with those usually charged by comparably qualified doctors in the community (CX 1171).

The first edition of the CSMS *Relative Value Guide* was adopted in

1965, and was based on AMA's publication, *Current Procedural Terminology*, and the California Medical Association's relative value scale (CX 1175D). After lengthy preparation by various CSMS committees, a new edition of the *Relative Value Guide* was published in CSMS's *Connecticut Medicine* in 1971 (CX 1175D, 381). Following its publication, CSMS regularly distributed copies of the 1971 *Relative Value Guide* to all new members (CX 1748, 221, 1171). In 1972, CSMS strongly recommended use of the CSMS *Relative Value Guide* by all third-party payers in Connecticut (CX 2434); the *Relative Value Guide* has since been used by the Connecticut Health Insurance Council to determine usual, customary and reasonable fees around the state (CX 1181A). [86]

In November 1975, the CSMS House of Delegates voted to continue distribution of the *Relative Value Guide* to members requesting copies and to print additional copies as needed (RCX 129, p. 68; CX 1180). Thereafter, continued distribution of the *Relative Value Guide* remained CSMS policy until August 1977 (Tr. 8410; RCX 68, p. 19).

### C. Third-Party Payers

64. CSMS promotes its members' economic interests in dealings with third-party payers by opposing policies of government agencies and medical insurance carriers that compensate physicians at rates below their "usual" fees (CX 417K, 418A, 422A–B, 451A, B, E, F, 450, 204B–C, 2430, 2435A–B; RCX 103I). CSMS's official policy is that government medical care programs should pay physicians on the usual and customary fee basis, and should not make "reduced or substandard payments" to physicians (CX 2435A). CSMS attempts to eliminate administrative policies that offer "reduced or substandard" reimbursement (CX 2435B) and to oppose state government "economizing" on physicians' fees in the Medicaid program (CX 420A). CSMS representatives have sought increases in Medicaid payment schedules (RCX 68, p. 42, 103I), and warned the insurance carrier administering the program that "reasonable" must not be defined as "cheap" in the company's fee reimbursements to Connecticut physicians (CX 422B). Through its representatives on the Medical Advisory Committee to the Connecticut Welfare Commissioner, CSMS has also pressed on behalf of its members for prompt payment of claims owed to them for medical services rendered to Medicaid patients (CX 431A, 432A).

CSMS actively opposed the "Century Contract" adopted by Connecticut Medical Service, the Connecticut Blue Shield Plan, under which the maximum payments the Blue Shield Plan made to physicians were lower than the levels of usual and customary charges then being received by CSMS member physicians and, therefore, deemed unacceptably low by CSMS (CX 420A, 417, 418, 2430). Acting in behalf of and representing its members, CSMS joined in a lawsuit in 1972 challenging the Blue Shield contract—after the contract had been approved by the state insurance commissioner—in an effort to protect CSMS members from suffering "substantial competitive disadvantage," undergoing loss or damage to their businesses and being deprived of their ability to determine the level of compensation for their services (CX 2430B, D, E). In the year the suit was filed, CSMS [87] allotted $4,249 to "Legal Fee—special litigation" and $1,009 to "Third Party Payments" committee activities, a total of $5,258; it allotted only $5,289 to all the rest of its committees (RCX 155C).

CSMS has opposed health insurance company cost containment measures involving determinations that certain physicians' charges are not usual, customary and reasonable if the insurer does not clear its procedures with CSMS (CX 450; 451A, B, E, F). CSMS strenuously objected when the Aetna Life and Casualty Company adopted a policy of paying physicians' fees up to the prevailing fee levels that Aetna had determined and, then offering assistance to policyholders who wished to contest any additional charges by their physician (CX 450, 451A-F). The CSMS Council voted down a resolution reminding physicians to "discuss their fees with patients *before* rendering services" so as to avoid disagreements with patients over fees that exceed the patients' health insurance coverage limits (CX 451F) (emphasis in original). The Council specifically endorsed an AMA resolution calling on insurance carriers to consult with "duly constituted representatives of organized medicine" before determining usual, customary and reasonable fees, and calling on the insurers to utilize physician-controlled peer review mechanisms to resolve differences with physicians regarding fees (CX 450, 451A-F). CSMS supports such medical society peer review committees, in part because they protect the physicians (CX 204B), and provide a forum consisting exclusively of physicians (RCX 129, pp. 34, 68) where physicians can press claims that insurers' reimbursements have been inadequate (CX 411-14).

## D. Foundations for Medical Care

65. The CSMS Council voted that foundations for medical care are more acceptable to it than HMOs, partly because of CSMS's concern for protecting the physician in private practice (CX 892A). The Council has urged the CSMS component medical societies to consider forming foundations for medical care on a county-by-county

basis, each foundation to serve as the negotiating agent for contracting physicians in all matters having to do with third-party payments to physicians (CX 892A–B, 2414C). CSMS has issued a $4,999 interest-free loan to the New Haven County Foundation for Medical Care to be repaid "when feasible" (RCX 68, p. 17).

Foundations "owned, controlled and administered by organized medicine" and incorporating fee-for-service medicine as a basic principle are one means available to [88] medical societies to protect the interests of practicing physicians (CX 388A, B, E, F). They provide physicians with a "common front in meeting the socioeconomic pressures facing the practice of medicine," such as presented by HMOs, where fees are not necessarily controlled by doctors (CX 2412E, F).

### E. Efforts to Influence Governmental Action

66. CSMS seeks to exert influence on the course of legislative proposals of interest to physicians (CX 1255A). The CSMS Committee on Legislation lobbies primarily at the state government level, and also lobbies in cooperation with the AMA at the federal level (CX 192A, 1255A). In 1971, 1974 and 1975, CSMS's allotment to state and national legislation committee activities was over twice as large as its budgetary allotment for any other committee (RCX 155C, 68, p. 16).

CSMS opposed price controls on physicians' fees (CX 192, 1268). CSMS's Executive Director declared, in 1974, that by contacting Connecticut's two Senators and six representatives, and obtaining their support, CSMS was instrumental in terminating Phase 4 price controls on physicians' charges (CX 192A).

CSMS pressed for repeal of the Connecticut law requiring physicians to pay an annual registration fee of $150 (CX 1236D, 1256A-B, 430, 1257), announcing that its primary concern with the statutory registration process for Connecticut physicians was the amount of the annual fee physicians had to pay (CX 1256A). Consistent with its announced concern about legislation which it believes would place one modality of medical practice at a competitive disadvantage with respect to others (RCX 5A), CSMS has opposed legislation that would waive the registration fee requirement for non-fee-for-service, salaried physicians (CX 1256A).

CSMS has also lobbied for adoption of malpractice insurance legislation (RCX 68, pp. 29–30; CX 1749A, E) to forestall continued premium increases in physicians' liability insurance costs (CX 1252A, 1749A). A number of CSMS's legislative proposals, in 1974 and 1976, were specifically designed to make it more difficult for plaintiffs to prevail in malpractice litigation and to reduce the size of malpractice liability awards against physicians (CX 1262, 1263; Tr. 8324).

In 1974 and 1975, CSMS lobbied for increases in and faster payment of physicians' claims under the Medicaid program in Connecticut (CX 431A, 432, 1236C; RCX 68, p. 42, 103I; Tr. 8396-97). CSMS has also opposed the charging of [89] fees by the State Health Laboratory, questioning whether the state government should compete with the private sector (CX 1264), and has opposed legislation expanding the scope of practice of podiatrists (CX 1236C) and chiropractors (CX 192A).

### F. Connecticut Medical Political Action Committee

67. CSMS organized COMPAC to support CSMS's legislative activities by contributing money to candidates for public office (CX 500A-C, 458A, 1214A. *See also* F. 58, pp. 80-82). COMPAC's activities are designed to "stem the tide" of governmental actions adversely affecting Connecticut physicians, such as price controls on physicians' fees, increased physician license registration fees, liability awards against physicians and national health insurance (CX 454). COMPAC serves as the "political arm" and "tool" of the medical profession in Connecticut (CX 223, 1711, 1206A), seeking to protect and enhance the private practice of medicine in concert with the American Medical Political Action Committee ("AMPAC") (CX 1214A-B).

CSMS made financial grants to COMPAC in its early years (Tr. 8258-60; CX 1211), and COMPAC officials have attended CSMS Committee on Legislation meetings (CX 458A). Various physicians have served simultaneously as officers of COMPAC and as officials of CSMS (Tr. 8387-89). For example, in 1971, the physician who chaired both the CSMS Public Affairs Division and National Legislation Committee was also the chairman of the COMPAC board (CX 1214C, 2109B). CSMS's president, president-elect, vice president, treasurer, the chairmen of the CSMS judicial, public relations and third-party payments committees and three other CSMS officials all were on the COMPAC board that year (CX 1214C, 2109B). Promoting membership in COMPAC has been one of the two main goals of the CSMS public affairs committee (CX 1258B). CSMS endorses COMPAC and acts as its collection agency, soliciting contributions to COMPAC and AMPAC in the annual dues statements sent to CSMS members (CX 1214C, 1714, 1715, 312). CSMS provides office space and local telephone service to COMPAC at no charge and receives reimbursement from COMPAC for other administrative services CSMS provides for COMPAC (CX 2599C, D). The two organizations are in close liaison (CX 1206A), and work together (CX 1214C). COMPAC reports to the CSMS Council twice a year (Tr. 8383–84) and files reports with the CSMS House of Delegates (RCX 129, p. 68; CX 458B). [90]

G. Membership Services

68. CSMS provides a physicians' placement service (CX 1285B; Tr. 8238–39). This program benefits CSMS members who are interested in making a geographical change in their practice and those members who are seeking professional associates (CX 192A). Placement assistance to out-of-state doctors seeking opportunities within Connecticut enhances the potential for increased membership in CSMS and has considerable public relations value (CX 1285C).

CSMS offers a variety of other services to its members. These include scientific assemblies held twice a year (CX 213B, 991I) and estate planning and settlement advice (CX 355; RCX 129, p. 71).

H. Public Relations

69. The CSMS public relations program is designed to "maintain constructive and dignified relationships" with the public and other groups in the health care field (CX 213B). It includes efforts to "enlighten and direct" the public on issues relating to HMOs, foundations for medical care and PSROs (RCX 5C, 148Q, p. 3).

I. Insurance Programs

70. CSMS sponsors a variety of group insurance programs available exclusively to its members, the most significant being the Professional Liability Insurance Program (RCX 2D, 68, p. 29; CX 192B, 206F. *See also* F. 59, pp. 82–83). This program, underwritten by the Aetna Life and Casualty Company, is designed to assist CSMS members caught in the "expensive bind" of rising malpractice costs (CX 367U, 1235, 1328). The program is available only to CSMS members (Tr. 8299; CX 1328, 309, 317), and is the only group malpractice insurance available in Connecticut with the exception of policies available to members of certain medical specialty societies (Tr. 8378–79, 1722–23; CX 1328). A Connecticut physician who is ineligible for a group policy can obtain malpractice insurance only by purchasing a nongroup, individual policy from Aetna at a higher rate than that charged to CSMS members under the sponsored program (Tr. 8778). Approximately 85 percent of CSMS's members subscribed to the program, and CSMS intervenes with Aetna on behalf of CSMS members who protest initial determinations by

Aetna refusing coverage of them (Tr. 8295, 8297, 8300; CX 428; RCX 2D, 148N, 3A-E). [91]

Other group insurance plans sponsored and endorsed by CSMS and available only to its members (CX 314, 317), include a life insurance program at substantial savings (CX 207B; RCX 148H), office disability insurance to provide "continuing income in the event of disability" (CX 210B; RCX 148K), office overhead insurance to "save money" (CX 314C; RCX 148J), health and accident insurance (CX 216, 213B; RCX 148F), in-hospital indemnity insurance (RCX 148B) and major medical insurance (CX 205, 213B; RCX 148G, I), all offered at lower rates than would be available in individual policies (RCX 148B, F).

### J. Publications

71. CSMS publishes *Connecticut Medicine* and distributes it as a benefit of membership (RCX 146, p. 9, 129Z, p. 76. *See also* F. 56, p. 77). The journal contains scientific articles, articles on socioeconomic, legal, governmental and ethical issues (RCX 68, p. 32), and articles of economic interest to Connecticut physicians on PSRO's, governmental health systems agencies, malpractice insurance, the Connecticut Commission on Hospitals and Health Care (RCX 68, p. 32), financial entitlements of physicians who have contractual arrangements with hospitals (RCX 129, p. 27) and estate planning (RCX 129, p. 71). *Connecticut Medicine* includes a section of physicians' placement listings (RCX 129, pp. 73-74). The articles on medical subjects in the magazine are not only of scientific value, but also provide practical, economic benefits to improve physicians' efficiency, productivity and skill (RCX 129, pp. 13-14).

CSMS has utilized *Connecticut Medicine* to keep its members informed on such economic issues as compulsory insurance, prepaid medical insurance, group practice, licensure of foreign medical graduates, proposed legislation on social security for physicians, professional liability insurance, corporate practice of medicine, use of the CSMS *Relative Value Guide* and CSMS official policy statements on physicians reimbursement and payment mechanisms (RCX 129, pp. 41-50, 68; CX 2412, 204).

### K. Source of Funds

72. CSMS's total income in 1975 was $409,911, of which $340,058 (83.0 percent) was derived from membership dues and assessments, and $56,715 (13.8 percent) was derived from *Connecticut Medicine* (RCX 68, p. 18). A very small portion, if any, of CSMS's income comes

from contributions and grants from disinterested parties (RCX 68, p. 18). [92]

## L. Federal Income Tax Status of CSMS

73. CSMS is exempt from federal income taxation under Section 501(c)(6) of the Internal Revenue Code (CX 1393. *See also* F. 50, pp. 60–61).

## VII. ACTIVITIES OF NEW HAVEN COUNTY MEDICAL ASSOCIATION

## A. Committees and Programs

74. The NHCMA bylaws establish the following standing committees: Board of Censors and committee on third-party payments, which together comprise the peer review committee; credentials and orientation; medical ethics and deportment; legislation; program; nominating; and policy and procedure. In addition, NHCMA has committees on public relations, bylaws revision, insurance, finance and liaison to the Woman's Auxiliary (Tr. 8436, 8441–47; CX 995E-M; RNHX 139, pp. 7–15).

The Board of Censors is the committee which initially investigates and hears matters of complaint made regarding the conduct of an NHCMA member, including any allegation of misrepresentation, deception, unethical practice or provision of inadequate care. This committee serves an "ombudsman" function in receiving and responding to inquiries and complaints made by members of the public (Tr. 8462–63, 8475–76).

The third-party payments committee is concerned with matters relating to insurance plans and other plans of third-party entities. This committee meets with the Board of Censors to comprise the peer review committee, which reviews all fee related complaints and inquiries made to NHCMA by the public and third-party payers (Tr. 8442; RNHX 139, pp. 10, 15).

The committee on credentials and orientation is responsible for reviewing and ensuring the authenticity of statements made on applications for membership in NHCMA, and also conducts an orientation program for new members (Tr. 8442–43; RNHX 139, pp. 11–12).

The committee on medical ethics and deportment is concerned with claims of malpractice (Tr. 8443; RNHX 139, p. 12). [93]

The committee on public relations has two functions: to improv internal relations within NHCMA and between NHCMA and others and to educate the public with regard to health care matters. Thi committee is also responsible for the publication of *Issues and Insight* (Tr. 8443, 8524).

The committee on legislation is responsible for keeping abreast of legislative matters relating to health care (Tr. 8443; RNHX 139, pp. 12-13).

The program committee is responsible for planning the arrangements, dinner and speaker for the NHCMA annual and semi-annual meetings (Tr. 8443-44; RNHX 139, p. 13).

The nominating committee meets once a year to nominate a slate of officers to be voted upon at the NHCMA annual meeting (Tr. 8445; RNHX 139, pp. 13-15).

The committee on policy and procedure, composed of present and past officers, is concerned with long range planning and recommendations of future policy for NHCMA (Tr. 8445; RNHX 139, p. 15).

The insurance committee has responsibility with respect to the endorsement of health and accident insurance programs (Tr. 8446).

The finance committee supervises the formulation of the NHCMA budget and ensures that the budget is adhered to (Tr. 8447).

NHCMA formed a liaison committee with the Yale University Medical School in order to develop mutual cooperation between academic and practicing physicians (Tr. 8454; CX 995J).

### B. Income and Expenses

75. In 1975, NHCMA received gross income of $107,239. This amount included $95,845 annual dues payments from members; $1,268 from tickets to the NHCMA annual and semi-annual meeting; $2,816 interest on NHCMA reserves; $975 received from insurance companies for reviewing third-party payments questions ($25 per case reviewed); $1,598 revenue from advertising placed in the NHCMA publication, *Issues and Insight;* $4,011 reimbursement [94] from the New Haven County Foundation for Medical Care, Inc. for consultant's administrative services; $726 reimbursement from the Professional Standards Review Organization for administrative services and office equipment.

In 1975, NHCMA had expenditures of $95,027 (Tr. 8513-17; RNHX 138C). NHCMA expended $54,186 as Executive Office expenses, including salaries, pensions, health insurance and payroll taxes (Tr. 8517-18; RNHX 138C). NHCMA expended $12,952 to hold meetings of NHCMA (annual and semi-annual) and its committees. This amount included $9,077 to hold its annual and semi-annual meetings; $2,261 to hold Board of Governors meetings, Executive Committee meetings and special meetings; $524 to hold meetings of the NHCMA standing committees; $353 to hold meetings of the Board of

Censors; and $737 in secretarial, postage and printing costs of the credentials and orientation committee to consider membership applications and prepare certificates of membership (Tr. 8518-20, 8525; RNHX 138C). NHCMA expended $9,900 to retain an outside public relations consultant, and an additional $766 for expenses incurred by the consultant (Tr. 8520-24; RNHX 138C). NHCMA expended $3,454 in direct costs of publishing and distributing *Issues and Insight*, and expended $200 as an honorarium to its physician editor. The duties of the public relations consultant included aiding in the production and publication of *Issues and Insight*. NHCMA expended $788 in direct costs of publishing and distributing the NHCMA President's Newsletter to members. The duties of the public relations consultant also included aiding in the production and publication of the newsletter (Tr. 8524-25; RNHX 138C). NHCMA expended $997 to cover the Clerk's office equipment, cost of travel to meetings elsewhere in Connecticut, etc. and a $400 honorarium to the NHCMA President. NHCMA expended $340 as a miscellaneous reserve or "emergency" fund and $319 as a donation to the NHCMA Woman's Auxiliary to help defray the costs of holding the Auxiliary's annual scholarship dance (Tr. 8525-26, 8529; RNHX 138C). NHCMA expended $9,627 in maintaining its office, including the cost of rent, utilities, janitorial services, telephone and answering service, insurance, office equipment and supplies, printing and postage. NHCMA expended $600 for auditor's services and $120 for legal services (Tr. 8526-30; RNHX 138C). NHCMA expended $372 for the Executive Secretary's attendance at an AMA leadership conference in Chicago on current topical issues such as medical care for jail populations and the control of "the sick doctor" (Tr. 8527-28; RNHX 138C). NHCMA had a net excess for the year of $12,212 (RNHX 138C). [95]

### C. Public and Governmental Interface

76. NHCMA has sent representatives and advisors to several community-oriented health organizations such as the New Haven Alcohol Council, the Cancer Society and the American Heart Association. NHCMA sends a representative to the Health Systems Agency which is a federally mandated health-planning organization designed to determine and make recommendations concerning the adequacy of presently available medical care. NHCMA sent a representative to the South Central Connecticut Comprehensive Health Planning, Inc., which was the predecessor of the Health Systems Agency (Tr. 8452-57; CX 995I). In 1971, the NHCMA Executive Committee met with chiefs of staff of hospitals in New

Haven County to discuss topics of mutual interest (CX 447A-E). In 1972-73, NHCMA had an *ad hoc* committee on staff appointments at Yale-New Haven Hospital. This committee met with a committee of the New Haven city medical association to discuss three physicians' efforts to obtain staff privileges at Yale-New Haven Hospital (CX 442, 443, 445, 446A-C). In 1975, representatives of NHCMA met on two occasions with representatives of the New Haven County Bar Association in exploratory meetings aimed toward improving relationships between the two organizations (CX 995M). NHCMA does not have a physician placement service, but has endorsed plans covering major medical, hospitalization and disability insurance (CX 339, 1280, 1281, 323A-F, 324A-F, 327A-F, 328A-B, 329A-B; Tr. 8446-47).

## D. Publications

77. NHCMA publishes a quarterly periodical, *Issues and Insight,* which is a 10-12 page publication designed to keep the NHCMA membership and others informed as to current issues of interest regarding health care and physicians in New Haven County. *Issues and Insight* has a physician editor and is published in conjunction with the NHCMA public relations committee (Tr. 8457-58, 8524; CX 995H,J). *Issues and Insight* is available free of charge to members of NHCMA, and also to nonmembers upon request. The costs of publishing and maintaining *Issues and Insight* as an NHCMA publication exceed the revenues obtained from advertising, resulting in a loss to NHCMA of approximately $2,000 in 1975 (Tr. 8524-25; RNHX 138C).

## E. COMPAC

78. COMPAC is a voluntary political action committee registered with the Federal Election Commission (*see* F. 58, pp. 80-82; 607, p. 89). COMPAC is not a committee of NHCMA **[96]** and NHCMA granted no money, funds or property to COMPAC in 1975 and 1976, and provided no administrative services to COMPAC (Tr. 8574; CX 500A, 2599A, D). NHCMA members are not required to join COMPAC. As of the end of 1974, 94 members of NHCMA chose to belong to COMPAC. As of April 1975, 74 members of NHCMA had chosen to do so (CX 312, 996B, 1214B, 1712, 2599A). On occasion, a COMPAC member may make a brief oral statement to NHCMA or its Board of Governors regarding the purpose of COMPAC and the importance of participating in the electoral process. The phrase, "Join COMPAC," was printed on the back side of one NHCMA

meeting notice in 1973, one notice in 1975 and one meeting agenda in 1976 (Tr. 8570, 8573–74; CX 173C, 988C, 996B, 998D, 1221A, 1391A, 2599D).

## VIII. ACTIVITIES OF NHCMA WHICH HAVE PECUNIARY BENEFITS FOR ITS MEMBERS

### A. Background

79. NHCMA's bylaws commit NHCMA to an official purpose of defending and supporting the maintenance of reasonable and prevailing medical fees (CX 1404A; RNHX 139, p. 1). One of NHCMA's goals is to be an advocate for better working conditions for New Haven County physicians (CX 2422B).

NHCMA's adoption, dissemination and enforcement of its ethical principles restrains competition between and among Connecticut physicians, insulates NHCMA's physician members from competition and contributes to their economic benefit.

A key benefit of membership in NHCMA is that it makes the physician eligible to join CSMS and AMA (CX 991D) which, in turn, enables the physician to obtain the benefits of membership in CSMS and AMA (F. 23–49, pp. 38–59; 63–72, pp. 85–91).

NHCMA's total income in 1975 was $107,239, of which $95,845 (89.4 percent) was derived from membership dues (CX 1361C). Very little, if any, of NHCMA's income comes from contributions and grants from disinterested parties (CX 1361C).

### B. The New Haven County Foundation for Medical Care

80. NHCMA has promoted the economic interests of its members by organizing and sponsoring the New Haven County Foundation for Medical Care ("Foundation"). By definition, the Foundation is an organization of practicing fee-for-service physicians sponsored by the medical society, which offers medical coverage to the public on a prepaid basis (CX 2413A; Tr. 8549–50). [97]

In April 1971, the NHCMA third-party payments committee discussed medical care foundations and, in November 1971, the NHCMA long range planning and development committee meeting included a discussion of medical care foundations (CX 2415A-B, 2422A–B). At its 1973 annual meeting, NHCMA voted to establish the New Haven County Foundation for Medical Care. The Foundation was incorporated as a separate entity in May 1973 (CX 998C, 2424C; Tr. 8549). Following their incorporation of the Foundation, NHCMA's officers elected the original Board of Trustees (CX 2604D, 2428C, 2416, 443). Thereafter, NHCMA selected two members of the

Foundation's trustee nominating committee (CX 992E, 994D, 2428E). In 1975, every NHCMA officer and executive committee member also served on the Foundation's Board of Trustees (CX 994D; RNHX 2). NHCMA officials were the Foundation's chairman of the board, secretary and treasurer in 1975 (CX 994D; RNHX 2). Currently, the Foundation president is the NHCMA vice-president (Tr. 8550).

NHCMA has loaned the Foundation $4,999 on an interest-free basis (RNHX 138B; Tr. 8550). NHCMA, through its officers and its public relations committee, promotes membership in the Foundation (CX 2418, 2416D, 998G, 1276A–B; Tr. 8522–23, 8564). Until the Foundation's bylaws and articles of incorporation were amended in 1977, membership in the Foundation was limited to members of NHCMA and other county medical societies (CX 2428A, 2604B). Its membership meetings have been held at the same time and place as NHCMA membership meetings (CX 2428B, C). NHCMA and the Foundation still share the same building (Tr. 8550). The Foundation is now acquiring acceptance and getting final approval for operation, and has signed up 580 participating physicians (Tr. 8548; RNHX 152, 155; CX 994C, 998C, 2424B). Participating physicians will be compensated on a fee-for-service basis for services rendered to Foundation subscribers where the services are covered by the foundation health plan (CX 2416B, 2424B, D, G).

The Foundation is designed to serve as a spokesman for physicians by presenting a unified front in negotiations with third parties (CX 2414A, C, 2416A). It will require that third party carriers agree to follow fee guidelines based on physicians' usual and customary fees and on the 1971 CSMS *Relative Value Guide* (CX 2413A, 2424C). In addition, participating physicians will receive the advantage of direct payment, thereby reducing their collection problems (CX 2424D). [98]

The Foundation provides a means for NHCMA's primarily fee-for-service physicians to confront the competitive threat of closed-panel health maintenance organizations (CX 2415A, B, 2424D). NHCMA's early plans for the Foundation show this motivation:

> Currently, HMO's are springing up everywhere. The neighborhood corporations in New Haven will soon probably get a grant to create an HMO. At the moment, HMO's are approaching the doctors as individuals. What is needed is a foundation to give the physicians a unified roof to come under. A foundation gives the doctors a big voice in policy. HMO's gives [sic] doctors virtually no voice. (CX 2415A).

The Foundation is also designed to put its participating physicians "in a secure position to continue their current private fee for service practices" in the event Congress passes national health insurance legislation incorporating independent practice association HMO's

(CX 2424K). Through the Foundation, physicians participate in the development of standards for quality control and peer review, rather than having them "imposed from outside sources" (CX 2424D), thereby retaining "control of medicine's destiny in the hands of the practicing physician" (CX 2413A).

### C. Peer Review Activities

81. NHCMA's Board of Censors and the Third Party Payments Committee together comprise the NHCMA Peer Review Committee (Tr. 8442), which assists NHCMA's members by helping resolve disputes between physicians and third-party payers and between physicians and patients (CX 1354A, B, 2433, 995F, 429; Tr. 8442, 8467). With the possible exception of the NHCMA Executive Committee, the Peer Review Committee is by far the most active of NHCMA's committees (Tr. 8465). In 1975, the Committee received about 90 complaints; approximately two-thirds of the complaints were fee related (CX 429, 995F).

Pursuant to an official vote by the NHCMA membership that physicians should be reimbursed on the basis of their usual and customary fees (CX 1177C), the Committee handles the complaints of patients and of insurance companies that challenge physicians' charges (CX 1365, 995F). To resolve complaints that a physician's fees are too high, the [99] Committee has relied largely, at least through 1976, on the CSMS *Relative Value Guide* (CX 1354A, 2425, 2433, 1178; Tr. 8472) and a conversion factor geared to what NHCMA considers to be the usual and customary fees among its members (CX 1176A, B, 453; Tr. 8472-73). The Committee resolves the vast majority of its cases in favor of the physician where fees are concerned (CX 2425, 2433; Tr. 8535-36, 8546). As a rule, the Committee's suggested fee is usually at or near the maximum, according to the 1971 CSMS *Relative Value Guide* (CX 2425). According to the chairman of the NHCMA Peer Review Committee, the CSMS *Relative Value Guide* plays an important role in maintaining and solidifying loyalty among members of the medical profession (CX 1178B). The NHCMA membership adopted a resolution in October 1975, reaffirming its support of the CSMS *Relative Value Guide* and urged CSMS to print new copies and distribute them to all new CSMS members (CX 988D).

NHCMA members have been kept informed of the conversion factor used by the Committee (CX 455). When the Committee feels it is appropriate, the conversion factor has been adjusted upwards to accommodate for increases in the consumer price index (CX 995F, G, 1358). Patients who have submitted grievances about physicians' fees are not invited to Peer Review Committee meetings (RNHX 112A).

The Committee's 1974 annual report stated that the problems almost exclusively relate to medical fees and the majority of grievances stem from third-party payers. Further, the Committee stated, "The hour has come for forthright dialogue with insurance companies in regard to medical fees . . . The payor wants to call the tune but we continue to base our consideration of fees on the Connecticut *Relative Value Scale* adopted in 1971" (CX 1354).

### D. Efforts to Influence Government Action

82. NHCMA and its officials actively promote the economic interests of NHCMA's members through lobbying and legislative activities. In 1974, NHCMA wrote to Congress opposing extension of Economic Stabilization Act controls on physicians' fees, protesting that optometrists, opticians and psychologists were exempt from controls while opthalmologists, psychiatrists and other physicians were not exempt (CX 1277). NHCMA also protested that health maintenance organizations were being given special treatment [100] not available to private practitioners (CX 1277). The NHCMA Board of Governors wrote an official letter to nine state senators and 37 state representatives in 1974 urging repeal of the $150 annual physicians' license registration fee in Connecticut (CX 1276A, B, 1278, 441). NHCMA issued a newsletter, "Call to Action," urging its members to join the NHCMA leadership in a grassroots effort against continued price controls on physicians' fees and against the licensing fee of $150 (CX 1278).

In 1975, NHCMA maintained an active legislative program at the state level to resolve the malpractice crisis by seeking limits and ceilings on the liability of the practitioner (CX 995B, L, 674B).

In a 1972 letter to the Connecticut Commissioner of Insurance, NHCMA protested against Connecticut Blue Cross marketing efforts for a closed-panel HMO "in direct competition with the rank and file of taxpaying practitioners" (CX 962). In 1974, NHCMA urged the Department of HEW to deny extension of grant money to a closed-panel non-fee-for-service health maintenance organization (CX 966; Tr. 8569). NHCMA supported increased federal funding for a professional standards review organization sponsored by NHCMA and directed by a former NHCMA president (Tr. 8451; RNHX 2A, C; CX 440).

NHCMA's executive secretary urged the CSMS Councilor representing NHCMA to press the Connecticut Welfare Department to bring the Medicaid program up to "usual, customary and reasonable" levels and to make fee payments "acceptable to the average physician" (CX 448B). NHCMA's president urged its members to contact their state legislators in opposition to extension of a seven percent sales tax on professional services (Tr. 8567–68).

In its semi-annual report to NHCMA members issued in October 1975, the NHCMA Board of Governors reported on NHCMA's lobbying and legislative activities, stating: "Comments generally reflecting AMA policy continue to be directed to the Secretary of the Department of Health, Education and Welfare, and various Senators and Representatives. The NHCMA's voice is being heard in Washington and we believe it to be influential" (CX 995B). That same year, NHCMA's president reminded its members that because AMA had gone "to bat for all of us," there were improved Keogh Act benefits, but no price controls on physicians' fees, no national licensure and no precertification of hospital admissions (CX 247). [101]

## E. Other Activities

83. NHCMA operates an active public relations program (CX 1361C; Tr. 8562–67). NHCMA's public relations activities serve to enhance the image of physicians and NHCMA, to promote the New Haven County Foundation for Medical Care and to keep NHCMA members informed on legislative and economic issues affecting the private practice of medicine (CX 2418; Tr. 8564–65, 8566–67). Aside from executive office salaries, NHCMA spends more on public relations than it does on anything else (CX 1361C; Tr. 8562).

NHCMA sponsors valuable insurance programs for the benefit of its membership (CX 329A, 324B, 327A, B; 243A). These include income protection insurance (CX 995K, 329A), in-hospital insurance (CX 324A) and major medical and group protection insurance (CX 323A, 327).

NHCMA intervenes with local hospitals on behalf of local physicians to assist them in getting hospital privileges (CX 442, 443, 445, 446, 447).

The president of COMPAC, Dr. John Mendillo (RCX 68, p. 2; Tr. 8389), has served simultaneously as an NHCMA and Foundation official (CX 247, 323, 994D, 1391B, 2604D). He reports on COMPAC's activities at NHCMA meetings (CX 173C, 998D, 988C), urging NHCMA's members to support COMPAC and stressing the impact on physicians of legislation passed in Congress and the state legislature (CX 998D, 1391C, E).

## F. Federal Income Tax Status

84. NHCMA is exempt from federal income taxation under Section 501(c)(6) of the Internal Revenue Code (CX 1393. *See also* F. 50, pp. 60–61).

## IX. RESPONDENTS' ETHICAL CODE AND ITS ENFORCEMENT

### A. The Ethical Code

85. According to AMA publications, the earliest written code of ethical principles for medical practice was conceived by the Babylonians around 2500 B.C. That document, the Code of Hammurabi, set forth in considerable detail from that era of history the nature of conduct demanded of the physician. The Oath of Hippocrates, [102] conceived some time during the period of Grecian greatness, probably in the fifth century B.C., has come down through history and remained in Western Civilization as an expression of ideal conduct for the physician. The most significant contribution to ethical history subsequent to Hippocrates was made by Thomas Percival, a physician of Manchester, England, who published his *Code of Medical Ethics* in 1803 (CX 462E).

At the first real meeting of the AMA in Philadelphia, in 1847, a Code of Ethics based on Thomas Percival's Code was adopted. The language and concepts of this original Code have remained the same throughout the years despite revisions. In 1957, AMA's House of Delegates adopted a shortened version of the Code, known as the "Principles of Medical Ethics," consisting of 10 brief sections. This version, which remains in effect today, preserved the basic ethical principles of the earlier versions, eliminating only certain items dealing with professional manners and etiquette together with prolixity and ambiguity (CX 462E, F; RX 1, pp. 3–5). Promulgation and enforcement of this ethical code has been a significant function of the AMA since its inception (CX 959Z28).

The AMA Principles of Medical Ethics ("Principles") apply to all physicians, "be they group, clinic or individual and be they great and prominent or small and unknown" (CX 462I, 517B). The AMA Judicial Council stated, in 1971, that a physician "must be as scrupulous in observing his principles of ethics as he is in observing principles of law" (CX 519E). The Principles apply to the entire country—"[A] procedure unethical in one part of the country cannot be ethical under the same circumstances in another" (CX 461I, 517B).

The Judicial Council, a standing committee of AMA's House of Delegates (CX 990U), exercises the judicial power of AMA (CX 990X). Its five members are physicians nominated by AMA's president and elected by its House of Delegates (CX 990V, 1769A). The AMA Bylaws state that "[t]he [Judicial] Council shall have jurisdiction on all questions of medical ethics" (CX 990X). The Judicial Council's role is to interpret the Principles and to review and hear actions based on infractions of the Principles (CX 1769B, 486A, 462Z48-Z49). AMA publishes the Judicial Council's ethics interpretations periodically under the title, *Judicial Council Opinions and Reports ("Opinions and Reports")* (CX 462-67). Many of the ethics interpretations published in *Opinions and Reports,* including many of those governing advertising and contract practice, **[103]** have been adopted or approved by AMA's House of Delegates (*Compare* CX 462I, J, Z-5 through Z-15 *with* CX 463F, G, P-W). In December 1975, when the complaint in the instant proceeding was issued, the 1971 edition of *Opinions and Reports* was in effect (CX 462; Motion of Respondent American Medical Association for Reconsideration of Issuance of the Complaint in this Docket, filed January 14, 1977, at p. 9). A revised edition was issued in March 1977 (RX 1, Tr. 4335). AMA has distributed thousands of copies of both the Principles and *Opinions and Reports* to medical societies, individual physicians and medical students (Complaint and AMA, CSMS and NHCMA Ans. ¶ 7; Response of American Medical Association to Motion of Complaint Counsel to Determine the Sufficiency of its Responses to Request for Admissions, dated July 26, 1977, at p. 106, Request #19(a); CX 482, 667, 1774-76, 1779, 1788-89).

CSMS has widely distributed the AMA Principles and interpretations of them to its members. It has included copies of the Principles in the information packets supplied to new members (CX 202, 1748, 212; Tr. 3714-15), distributed copies of the Principles and interpretations of them directly to county medical associations, CSMS members, NHCMA members and others (CSMS Adm. 19(b), (c), filed June 20, 1977 and July 29, 1977), and published the Principles or interpretations of them from time to time in the CSMS publication, *Connecticut Medicine,* which is sent to CSMS members (CSMS Adm. 19(b), (c), filed June 20, 1977 and July 29, 1977).

NHCMA has distributed copies of the AMA Principles and interpretations of them to its members and others (NHCMA Adm. 19(d); filed June 20, 1977 and July 28, 1977), and has published these ethical pronouncements from time to time in the NHCMA publication, *Issues and Insights,* which is sent to NHCMA members (NHCMA Adm. 19(d), filed June 20, 1977 and July 28, 1977). In response to NHCMA's request, AMA has sent copies of its 1971 *Opinions and Reports* and and its guidelines for telephone directory listings to NHCMA (CX 1787, 672, 673).

AMA's 1974 *Report on Physician-Hospital Relations* (CX 959) contains most of AMA's ethical restrictions on physicians' contractual arrangements with third persons, some of which also are printed in the 1971 *Opinions and Reports* (CX 959Z63–Z64, 462Z12–Z13). The *Report on Physician-Hospital Relations*, approved by the AMA House of Delegates in 1974 and copyrighted in 1975 (CX 959B, C), was included in the Proceedings of the House of Delegates, summarized in *American Medical News* (distributed to every member of AMA), published separately in booklet form (over 5,000 copies distributed) and sent to each state and large [**104**] county medical society (Motion of Respondent American Medical Association for Reconsideration of Issuance of the Complaint in This Docket, filed January 14, 1977, at p. 7).

## B. The Ethical Code Enforcement Process

86. AMA, CSMS, NHCMA and most of AMA's other constituent and component medical societies have made adherence to the AMA Principles of Medical Ethics a condition of membership (CX 990I, 991D, 1404I). AMA's constituent and component societies have adopted bylaws which provide that the AMA's Principles of Medical Ethics shall govern the conduct of their members and that unethical conduct shall be grounds for expulsion (*see* Appendix A attached hereto). The AMA's House of Delegates has adopted a resolution making state medical societies' own ethical principles binding upon the respective association's members provided that the principles are not inconsistent or in conflict with the Constitution and Bylaws of AMA (CX 1435Z20). NHCMA's bylaws specifically provide that its members are governed by the AMA's Principles of Medical Ethics "as reflected in the [AMA] Judicial Council" (CX 1404I). AMA has declared it the duty and obligation of its local medical societies to initiate enforcement of AMA's ethical standards and to insure full compliance with the spirit and intent of the Principles of Medical Ethics (CX 462Z9 [Sec. 5, Op. 20]). AMA has frequently urged its constituent and component societies to fulfill this obligation (CX 462Z1 [Sec. 4, Op. 9], Z2 [Sec. 4, Op. 14], Z5–6 [Sec. 5, Op. 9], Z6 [Sec. 5, Op. 11], Z6–7 [Sec. 5, Op. 12], Z7 [Sec. 5, Op. 13], Z9 [Sec. 5, Op. 20], Z10 [Sec. 5, Op. 23], Z40 [Sec. 10, Op. 4], Z45 [Sec. 10, Op. 13], 26B, 54, 488B–C, 489, 662B–C, 673A, E, 845, 1392C, 1810). AMA has declared that when a physician disregards "local custom," as determined by the local medical society, he has acted unethically (CX 1439, 462Z9–Z10, 27). AMA advised one local society that compliance with AMA's ethical principles should be achieved through "education prospectively and disciplinary action retrospectively" (CX 662B). NHCMA

and other component societies of AMA frequently investigate alleged breaches of AMA's ethical standards and convey their concern to the physicians involved by letter, telephone or personal meeting (*see, e.g.*, F. 95, p. 119; 98-100, pp. 124-32; 103-07, pp. 135-43; 110-11, pp. 145-46; 112, pp. 147-48; 113-14, pp. 148-52; 117, pp. 154-56; 119, p. 160, 120-22, pp. 160-71; 123, pp. 172-73; 136-37, pp. 194-98). [105]

AMA acts as a clearinghouse to promulgate, interpret and enforce ethical restrictions by conveying its ethical policy statements to the state and local medical societies and by conveying statements of various local medical societies to other medical societies (CX 54, 91, 1287, 1435Z33, 2121; Tr. 4919, 4939); by referring complaints and inquiries to the appropriate constituent or component medical society for action (CX 23, 168, 667, 768B, 820B, 1293B-D, F, G, 1295, 1296, 1299, 1316, 1763, 1764, 1776); and by sponsoring national and regional conferences on medical ethics (CX 1769C, 1791, 1792, 1793, 1796, 1797, 1798). AMA constituent medical societies, including CSMS, provide ethics guidance, refer complaints to appropriate local societies and sometimes trigger local enforcement activity by filing complaints themselves (CX 718, 113, 114A-B, 976, 971A-B, 969A, 975A, 2572E, 825, 1868, 859A, 2563-65, 2544, 123, 127, 132A-B, 61, 62, 68, 723, 725, 2035, 8, 10, 848, 850).

If a physician persists in an alleged ethics violation or the conduct is considered serious enough, a local society can discipline the physician through formal proceedings (CX 662B, C, 1789A, B). If found guilty the accused physician has the right to appeal to the state medical society (CX 1764A). CSMS's bylaws provide for such appeals (CX 991L). If the state society's decision is also adverse and the accused physician is a member of AMA, then the physician may appeal to AMA's Judicial Council (CX 990K).

The Judicial Council has both original and appellate jurisdiction (RX 2, pp. 20-21). The Judicial Council has original jurisdiction in all disciplinary proceedings involving direct members of AMA (CX 990K) and in all controversies arising under the Principles to which AMA is a party (CX 990X). The Judicial Council also has discretionary power to investigate, and by request to the President, initiate formal proceedings regarding complaints or evidence of unethical conduct of greater than local concern (CX 990X, Y). A state medical society can request the AMA Judicial Council to institute disciplinary action against a physician who violates the Principles (CX 990K). The Judicial Council's decision is final (CX 990X, 1435Z27, B).

In the last 35 years, the only case brought under the original jurisdiction of the Judicial Council, *Matter of Earl F. Hoerner* (1965), involved a charge of plagiarism of a scientific paper presented at an international medical [106] association meeting (Tr. 4320–21; RX 275A–C). The appellate jurisdiction of the Judicial Council has been invoked in approximately one case per year over the past 35 years (Tr. 4325). Appellate review, which is initiated by the filing of an appeal from a decision of a state medical society, is limited to questions of law and procedure (Tr. 4326–27).

In the past 35 years, the Judicial Council has decided only one case touching upon the issues in this proceeding, *Matter of Ben E. Landess, M.D.* (1955) (Tr. 4328). At issue in *Landess* was the ethical propriety of two newspaper advertisements and a promotional brochure for H.I.P., a prepaid group medical plan which contracted with physicians to provide services for a fixed salary (RX 274A–B). The state and local medical societies had each concluded that, by continuing in association with H.I.P. despite knowing of the advertising in question, Dr. Landess had engaged in the "unethical solicitation of patients" (RX 274A). The Judicial Council of the AMA disagreed (RX 274C).

The Connecticut respondents have a system by which complaints are referred by local societies to CSMS in appropriate cases (CX 136B). For instance, in February 1977, NHCMA referred to CSMS the complaints of competing ophthalmologists that a New Haven opthalmologist's telephone directory listings were unethical (CX 136C–F, 137).

AMA also regularly engages in informal actions to apply and enforce its ethical code. The Judicial Council staff, including the former Department of Medical Ethics (CX 1769A, C, 1766A), works closely with state and local medical societies on ethics matters (CX 1766A, 1767A, 1769C, D). The Judicial Council and its staff frequently provide guidance, which includes suggesting specific courses of action to constituent and component medical societies who have requested advice on ethics issues. AMA responds to frequent inquiries from individual physicians and others as to whether a particular activity is ethical (CX 8, 23, 25, 109–10, 117, 119, 170A, 798–99, 814–15, 820, 830–31, 841, 868–69, 1196, 1349, 1753). In these opinion letters, AMA often refers the inquirer to the appropriate local society after indicating AMA's position on the activity in question, which is normally based on the Principles and the Judicial Council's *Opinions and Reports* (CX 23, 109, 667, 798, 820B, 830B, 1295, 1349, 1753B). Many of these letters were written by Edwin J. Holman, the long-time Secretary of the Judicial Council and Director of the Department of Medical Ethics (*see, e.g.,* CX 1768, 557A, 505A, 1475A, 1349). AMA Field Service representatives [107] have also been used to coordinate ethics enforcement on a nationwide basis.

87. The constitutions and bylaws of AMA, CSMS, NHCMA and most of AMA's other constituent and component medical societies provide for the disciplining of any member who violates the AMA Principles of Medical Ethics. Medical society disciplinary proceedings may culminate in reprimand, censure, suspension or expulsion; if the alleged ethics violator is not a member, then denial of any application for membership may be ordered (*e.g.*, CX 990K, X-Y, 991D, L-M, 1404I-J, 477L-P, 748N-O, 14H, L, 47G-I, M-P, 1825E-F, L-M, 473U, X-Z4, 472C-D, F-H, R, 475H, I, M-N, 474B, F-G, J-K, 1413A, 1418B-C, 1421, 1422, 1426; Tr. 1346-47). Expulsion or exclusion from a component medical society often leads automatically to exclusion from the state medical society and AMA because, generally, a physician must be a member of a local medical society in order to be a member of a state medical society, and a member of the state society in order to be a member of AMA (*see* F. 4, p. 6).

AMA and its constituent and component societies have exercised their authority under their respective bylaws to impose formal sanctions on their members with regard to many areas relating to medical practice, including those involving questions of medical ethics (*see* F. 99, pp. 130-31; 110, p. 145; 120, p. 160-66; 122, pp. 168-71; 148, pp. 211-12; CX 493, 511A-B, 515C-D, 518, 525C-D, 531D-F, 543B-C, 553A-B).

Constituent and component societies of AMA have taken formal disciplinary actions against members who allegedly have violated the restrictions on advertising and solicitation in the AMA Principles and the *Opinions and Reports*. (*See, e.g.*, F. 98-100, pp. 124-32; 110, p. 145; 112, pp. 147-48; 113-14, pp. 148-52; 120-22, pp. 160-71; 136-37, pp. 194-98; 148, pp. 211-12).

AMA and its constituent and component medical societies have frequently taken informal action to enforce AMA's ethical restrictions on advertising, solicitation, and contract practices (*see, e.g.*, F. 95, pp. 118-21; 96, pp. 122-24; 101, p. 133; 102-07, pp. 134-43; 109, p. 144; 111-12, pp. 146-48; 115-17, pp. 152-56; 118-19, pp. 157-60; 123, pp. 172-76; 132-33, pp. 187-91; 134, p. 192; 135, pp. 192-94; 137, p. 198; 138, p. 199; 148-49, pp. 212-21; 151, pp. 223-26).

The threat of disciplinary action by medical societies is extremely effective, for membership in the medical society is an important and valuable asset to the physician (CX 503M. *See also* F. 23-49, pp. 38-59; 62-72, pp. 84-91; 79-83, pp. 96-101). Actions to enforce AMA's ethical standards may deprive the disciplined physician of valuable rights and affect his or her reputation, professional status or livelihood (CX 462Z2, Z3 [Sec. 4, Op. 15]), including: [108]

(a) Possible loss of malpractice insurance (*see* F. 98, p. 129; 110, p. 145; 121, p. 167; 149, p. 221; CX 1328, 1331A; Tr. 5472-73);

(b) Withholding of claims reimbursement by health insurance carriers (*see* F. 113, pp. 148-50);

(c) Possible loss of referrals and other patronage (Tr. 5473. *See* F. 98, pp. 124-29; 100, pp. 131-32; 103-04, pp. 135-38; 106, pp. 140-41; 111, p. 146; 117, pp. 154-56; 120, pp. 160-66; 122, pp. 168-71).

(d) Possible loss of hospital staff privileges (CX 1977, 1907, 143, 1965G-I, L, 1965Z3, Z4, 1964M, 1963J; Tr. 5528-29, 5531, 286, 288-91, 1908. *See* F. 114, pp. 151-52; 122, pp. 168-71).

(e) Inability to deliver papers and display exhibits at professional society meetings (F. 120, pp. 164-65);

(f) Time spent away from practice and attorney expenses (F. 98, p. 129; 104, p. 138; 121, p. 168; 122, p. 169); and,

(g) Professional disgrace, embarrassment and humiliation (F. 99, pp. 130-31; 110, p. 145; 113, pp. 148-50; 121-22, pp. 167-71; 136, pp. 194-97; CX 73B, 123, 984, 975C; Tr. 1925, 1927).

Actions to enforce AMA's ethical restrictions on solicitation, advertising and contract practice have deterred reputable physicians from repeating the conduct which allegedly violated the restrictions (F. 98-100, pp. 124-32; 103-07, pp. 135-43; 110-11, pp. 145-46; 112, p. 147; 113-14, pp. 148-52; 117, pp. 154-56; 121, pp. 167-68; 123, p. 172; 132, p. 187; 135-37, pp. 192-98; 148, pp. 213-15). Most physicians abide by medical society ethics (CX 516D, 1392B, 1407; Tr. 9535, 554, 5787).

## C. State Medical Licensing Boards

88. Robert C. Derbyshire, M.D., Secretary-Treasurer of the New Mexico Board of Medical Examiners testified in this proceeding (Tr. 6723, *et seq.*). He has been president of the Santa Fe County Medical Society, the Bernalillo County Medical Society and the New Mexico Medical Society (Tr. 6725). He has also served as president of the Federation of State Medical Boards of the United States, [109] the association of state medical licensing and disciplinary boards (Tr. 6727-28). He has written extensively on the subjects of medical discipline, education and licensing, including a book entitled *Medical Licensure and Discipline in the United States* (Tr. 6730-31). In 1977, the Federal Trade Commission commissioned Dr. Derbyshire to prepare an analysis of the relationship between state medical

licensing boards and state medical societies, and the effectiveness of state regulation of medical disciplinary cases.

Dr. Derbyshire sent questionnaires to each of the state boards and prepared a report for the staff of the Federal Trade Commission (Tr. 6734-35), entitled "Functions of State Licensing Boards in the United States" (RX 80ZA-Z34; Tr. 6734-35). Dr. Derbyshire concluded in his report that members of state boards of medical examiners are selected in one of four ways. In three states, members are elected by the state medical society. In another 14 states, the governor appoints members from a list of physicians submitted by the state medical society. Members in the remaining states are appointed by the governor with or without the aid of a list provided by the state medical society, and occasionally subject to legislative approval. In 10 of these states, the governor is required to consider a list of candidates submitted by the medical society but is not bound by their recommendations (Tr. 6738; RX 802E-G).

The responsibilities of state medical licensing boards include issuing medical licenses either by endorsement or examination, administering examinations, monitoring the continuing education of physicians where state law so provides, publishing directories and exercising investigatory and disciplinary functions (Tr. 6741-42. *See* Appendix B, 310-12, *infra* [*State Statutes Regarding Physician Advertising and Solicitation*]). The most common problem with which state licensing boards must contend is narcotics addiction among physicians. Other primary concerns in the area of medical discipline include narcotics prescription violations, mental or physical incompetence, obtaining a license by fraudulent transfer, fraud, conviction of felony and alcoholism (Tr. 6742-44; RX 802Y-Z). State licensing boards have seldom taken disciplinary action against physicians for the dissemination of false or misleading advertising (Tr. 6744-45). **[110]**

Dr. Derbyshire testified that the funds and staff received by the New Mexico Board are sufficient to allow it to carry out its duties (Tr. 6749); however, 20 of the state boards which responded to Dr. Derbyshire's questionnaire stated that they lack adequate resources to enforce the laws within their jurisdiction. Dr. Derbyshire was of the opinion that medical society regulation of physician advertising would be of great assistance to state licensing boards (Tr. 6751-53).

## X. RESPONDENTS AND OTHERS HAVE RESTRAINED PHYSICIANS' SOLICITATION AND ADVERTISING

### A. Present Sources of Information about Physicians

89. The choice of a physician is an important decision for a consumer to make (RX 656, p. 5). There are differences among physicians and forms of medical care delivery (CX 718E); thus, consumers need as much information as possible on which to base this decision (Tr. 2370). Specific fee information is important to consumers in comparing and choosing among physicians (RX 267, p. 7; RX 666 inside front cover and pp. 1, 5; Tr. 9320–21, 5771–72, 2290, 2312, 2479, 2528–29, 2548, 2370). There are variations in physicians' fees for similar services (RNHX 149; RX 407, 666 Appendix C; Tr. 633-36, 1815).

Older citizens, who often live on fixed incomes, need to know whether or not a physician will accept Medicare reimbursements as payment in full for services rendered (Tr. 2479, 2481–84; RX 666, pp. 5-6). Numerous other items of information are helpful to consumers in choosing a physician, including (RX 267, 489, 526, 656, 666, 677; RNHX 149; Tr. 2479, 2289, 2312–13, 2548, 2528–29, 2370):

(1) Physician specialty;
(2) Solo or group practice;
(3) Physician age and number of years in practice;
(4) Medical school, internship, residency, and fellowships;
(5) Specialty board certification or eligibility; [111]
(6) Teaching positions;
(7) Hospitals to which physician admits patients;
(8) Office hours and after-hours coverage;
(9) Appointment required;
(10) Acceptance of new patients (any minimum or maximum age);
(11) Willingness to make house calls;
(12) Proximity of public transportation;
(13) Availability of free parking or other parking facilities;
(14) Availability of ramp, elevator, wheelchair; whether office access requires climbing stairs;
(15) Prescription of birth control devices;
(16) Performance in office of x-rays, electrocardiograms, blood tests, urine tests, pregnancy tests, throat cultures and pap smears;
(17) Prescription of drugs by generic names;
(18) Fees for particular services and tests;
(19) Acceptance of Medicare and Medicaid patients;
(20) Acceptance of Medicare reimbursements as payment in full;
(21) Acceptance of credit cards;
(22) Languages spoken; and
(23) Willingness to make patient's records available to the patient.
[112]

Hospital and business institutions, like individual consumers, need information about physician and other medical services. Hospitals, for example, need information on the comparative costs and other features of available pathology services (Tr. 295, 304). Many companies need information on occupational health programs to improve the working conditions of their employees (Tr. 2061, 2064-65, 1028-29, 1931-32, 9328).

90. Consumers lack access to sufficient information to make an informed choice of a physician (Tr. 5759; 5415-16, 2367-68, 2523; RX 267, p. 1, 489, p. 1a, 666, p. 1; CX 679F). Physicians generally do not advertise except for occasional announcements, in some localities, of the opening, closing or moving of an office, the addition of an associate to a practice or a physician's limitation of practice to a specialty (Tr. 9539, 5812, 7253, 7590, 5291-93, 5483, 5886-87, 9318).

Yellow Pages telephone directory listings of physicians provide only the name, address, telephone number and, in some locations, the specialty and office hours of physicians (Tr. 2368, 2526-27, 2492, 2551, 5760-61, 2291). Also, while the Yellow Pages may list physicians who have died, retired or moved away, it frequently fails to list physicians who have recently established practices (Tr. 2526-27).

Some medical societies have referral services which supply consumers with the names, addresses, telephone numbers and specialties of physicians from a rotating list. They generally do not provide information about the physicians' fees, education, hospital affiliations or accessibility. The limited information may not be adequate to satisfy all consumer needs (Tr. 2293-94, 2295, 2301-02, 2310-11, 2525-26, 2530, 2552, 2368, 8247-48; RX 296A-B).

Directories of physicians, such as AMA's *American Medical Directory* (RX 11-14) and the national *Directory of Medical Specialties* (Tr. 2368-70), provide general, although limited, information about physicians. Some of the information in these directories may be out of date—the current edition (Tr. 4000-01, 4003) of the *American Medical Directory* is based on 1973 data (RX 12, p. ii). At $125 a copy (RX 12, p. ii), the *American Medical Directory*, the only directory of all physicians in the United States, be they members or nonmembers of the AMA (Tr. 3997), is prohibitively expensive and impractical for most consumers. [113]

There is record evidence about several local directories of physicians which have been prepared and distributed in recent years. In each instance, there was a perceived need, usually by physicians and medical societies, for such a directory to provide consumers with information about physicians and medical care (Tr. 5759 [Pima County, Tucson, Arizona], 5415-16 [Lane County, Eugene, Oregon],

2367-70 [Catawba County, Hickory, North Carolina], Tr. 7566 [Northwestern Denver, Colorado], Tr. 5958 [Allegheny County, Pittsburgh, Pennsylvania], Tr. 9596 [New Haven, Connecticut]; RX 267, p. 1 [Hennepin County, Minneapolis, Minnesota], 489, p. 1a [Lane County, Eugene, Oregon], 666, p. 1 [Allegheny County, Pittsburgh, Pennsylvania]). Except in isolated instances (Tr. 5845-46, 5770-72, 5950; RX 666), physicians' directories sponsored by local medical societies frequently omit information relating to individual physicians' fees, acceptance of Medicare reimbursements as payment in full, special facilities, and other aspects of physician availability and services (RX 267, 489, 526, 656, 677). The directories may contain information which, because of publishing lag time, is out of date and possibly inaccurate (RX 407, p. 1, 489, p. 1a, 656, p. 5); publication of updated editions is not assured (Tr. 7556-57, 5470). In any event, these directories have received little attention from consumers in the service areas that they purport to cover. In the Denver metropolitan area, with a population of approximately two million people, only about 700 copies of a medical society-sponsored physician directory were sold to consumers in the first nine months after publication (Tr. 7551-53, 7573). Dissemination of other physician directories also has been minimal (Tr. 5774, 5779, 2398, 5468, 5888-89, 5987-90). Advertising that directories are available is needed (Tr. 9355).

Personally contacting a number of individual physicians' offices to obtain sufficient information about doctors is time-consuming and can be frustrating (Tr. 2311-12, 2145, 2526-27). The search time involved in finding a physician through a telephone canvass of physicians' offices is increased in communities where many physicians are not accepting new patients (Tr. 2311, 2145, 2484, 2527, 2535, 5811, 2719), or where a consumer is looking for a physician who offers a particular service in a particular georgraphic area (Tr. 2291-92).

Information on physicians obtained by word-of-mouth does not in itself provide an adequate basis for selecting a physician (Tr. 2525, 2552-53, 2292, 2297, 9319-20). [114] The small number of physicians a consumer can learn about from his friends and relatives may not provide the type of services that the consumer is seeking or be in a location convenient to the consumer (Tr. 2525, 2552-53). For a newcomer in a community of newcomers, word-of-mouth information may be largely unavailable (Tr. 2292, 2297). Moreover, word-of-mouth information spread from one consumer to another is anecdotal (Tr. 9537), reflects the speaker's personal preferences (RX 297, p. 1) and may prove faulty (Tr. 9320).

Information about health care systems is also needed by consumers, but sources and types of information are limited or lacking (Tr. 9318, 9354, 9409). Information that health care delivery systems can make available to consumers is limited by ethical restrictions (Tr. 478–81, 498–506, 520–29, 547–48, 846–52, 870–76, 1031–48, 1115–42, 1555–62, 1812–30, 2061–76, 9190–91). Dr. Ebert, former dean of the Harvard University Medical School (Tr. 9312–14), testified in regard to health care systems and consumers' need for information about such systems as follows:

> It is very hard, it seems to me, today for patients to know very much about how they get into that system. Obviously, one way is through advertising. When I say different systems, there are groups of physicians that provide a complete range of services on a fee for service basis and there are so-called medical foundations that do this on, to some extent, on a prepaid basis and there are the so-called HMO's and these all have certain qualities about them and it seems to me that advertising would permit a far greater access to information of the general public so it is for that reason I state I am in favor of it (Tr. 9318–19. *See also* Tr. 478–81).

Dr. William Davis, an AMA witness who testified about the preparation and publication of a directory of physicians in the Tucson, Arizona area, summed up the inadequacy of current sources of information on physicians when he testified that the greatest single problem in American medicine is that medicine is really not in the marketplace—that the consumer has no way to shop for health care and that consumers need to be able to identify health care providers (Tr. 5759). [115]

## B. AMA's Ethical Standards Restrict Advertising and Solicitation by Physicians

91. The AMA Principles of Medical Ethics ("Principles"), the 1971 AMA *Opinions and Reports* and other AMA medical society interpretations of the Principles prohibit solicitation of patients and severely restrict advertising and solicitation of patients by physicians. Section 5 of the AMA Principles of Medical Ethics states that a physician "should not solicit patients" (CX 462Z4; RX 1, p. 5).[4] Opinions 6, 11, 12, 13, 18, 23, and 29 of Section 5 in AMA's 1971 *Opinions and Reports* also contain absolute prohibitions on solicitation of patients or patronage, whether directly or indirectly, by a physician or by groups of physicians (CX 462Z5–Z11). For example, Opinion 6 states, *inter alia,* "Solicitation of patients, directly or indirectly, by a physician or by groups of physicians, is unethical"

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[4] Section 5 of the Principles of Medical Ethics reads as follows:

> A physician may choose whom he will serve. In an emergency, however, he should render service to the best of his ability. Having undertaken the care of a patient, he may not neglect him; and unless he has been discharged he may discontinue his services only after giving adequate notice. He should not solicit patients

(CX 462Z5). Opinion 12 states, *inter alia:* "The ethical principle remains: No physician may solicit patients. A physician may not do indirectly that which he may not do directly. He may not permit others to solicit patients for him" (CX 462Z7). In its 1971 *Opinions and Reports* (CX 462Z13) and 1974 *Report on Physician-Hospital Relations* (CX 959Z64), AMA defined "solicitation" as "to seek professional patronage by oral, written or printed communications either directly or by an agent." This definition has been adopted by the AMA House of Delegates (*Compare* CX 463V *with* CX 462Z13).

92. AMA's ethical ban on solicitation has included a ban on almost all advertising. Advertising, by its very nature, is a method of soliciting business (Tr. 9716-18). In 1973, the Assistant Secretary of AMA's Judicial Council (CX 512A) stated that, "The Principles of Medical Ethics strictly proscribe the solicitation of patients by physicians. This, of course, includes advertising" (CX 778A). [116]

AMA's 1971 *Opinions and Reports* confirms that a physician who advertises is in violation of the ethical ban on solicitation. Opinion 6 of Section 5 declares that the ban on solicitation "protects the public from the advertiser . . . by establishing an easily discernible and generally recognized distinction between him and the ethical physician" (CX 462Z5). Opinion 4 of Section 10 provides, *inter alia:*

> The refraining from or the employment of advertising is the clearly defined difference between a reputable physician and a quack . . . .
>
> * * * * * * *
>
> . . .[T]here is every reason why the medical profession shall keep up its barriers against the self-advertising of individuals for selfish purposes and no adequate reason why these barriers should be let down. (CX 462Z39-Z40).

Opinion 13 of Section 7 states that, "The medical profession must oppose any prepayment on postpayment program that might result in advertising or solicitation of patients by physicians. . ." (CX 462Z22).

93. In May 1975, the Chicago Medical Society's Ad Hoc Committee on Advertising sent draft guidelines on advertising to the Society's Council in a report, stating: "In its deliberations the committee recognized that there was no mention of the word, 'advertising,' in the Principles of Medical Ethics of the American Medical Association. The term, 'solicit,' however, does appear. It is a simple transition to suggest that advertising is one method of solicitation of patients" (CX 2121A).

Statements of a number of AMA's member societies further show the sweeping nature of the ethical prohibition of physician advertising. In 1972, respondent CSMS's executive director declared that, " 'Advertising' is prohibited by medical ethics" (CX 30, 31).

In October 1973, the Judicial Commission of the Michigan State Medical Society stated in an ethics advisory letter that "individual physicians or groups of physicians are not [117] permitted to advertise their services under the provisions of the American Medical Association Code of Ethics. . ." (CX 1602G). In May 1974, the Judicial Commission's members reiterated "[t]he ethical principle that physicians are not allowed to advertise under any circumstances. . ." (CX 1607B).

In May 1974, the Chattanooga and Hamilton County (Tennessee) Medical Society wrote to a physician that a particular "announcement in the newspaper should be so worded as to avoid the appearance of advertising, which, as you know, is unethical according to the AMA Code of Ethics" (CX 108).

The president of the Allegheny County Medical Society in Pittsburgh wrote, in December 1974, that "it is considered unethical for doctors to advertise or to compete for patients. . ." (CX 2182A, B).

In April 1975, the Tennessee Medical Association's House of Delegates adopted a resolution, "That the Tennessee Medical Association and its component county medical societies re-emphasize and insist upon the ethical practice of medicine, that physicians may not advertise their services individually or collectively" (CX 1868).

In May 1975, the minutes of the proceedings of the Massachusetts Medical Society reported that the chairman of its Committee on Ethics and Discipline stated, in response to a question, that it was unethical for a group of physicians to advertise just as it was unethical for an individual physician to advertise (CX 877A).

94. AMA's 1971 *Opinions and Reports* permits only limited exceptions to AMA's ban on advertising by physicians (CX 462Z6, Z9). AMA has issued ethics interpretations setting forth the parameters within which its component medical societies can judge physician advertising and has suggested specific courses of action for the medical societies to follow. Opinion 20 of Section 5 in AMA's 1971 *Opinions and Reports* declares:

> The component medical society must, in the final analysis, determine what practice is in accord with local custom, but in so doing, it should exercise great caution to insure full compliance with the spirit and intent of the Principles. The practice of medicine [118] should not be commercialized nor treated as a commodity in trade. Respecting the dignity of their calling, physicians should resort only to the most limited use of advertising . . . . (CX 462Z9).

In 1967, the Secretary of the AMA Judicial Council advised a component society inquiring about a large sign on a physician's lawn advertising certain medical treatments that it "suggest to the physician that this sign was, in the opinion of the Society, contrary to the honor and dignity of the profession and should be removed . . ." (CX 91).

In June 1975, AMA advised a component society that:

> Advertising of course, should be kept to an [sic] minimum. If permitted at all it should be permitted only under the most rigid requirements established by the county medical society. Some societies have adopted the position that a small dignified announcement . . . may be made on not more than two consecutive weekly occasions. (CX 54).

AMA's 1971 *Opinions and Reports* declares that when a physician disregards "local custom," as determined by the local component medical society, he has acted unethically and may be subject to disciplinary action (CX 462Z9 [Sec. 5, Op. 20], Z10 [Sec. 5, Op. 23], Z7 [Sec. 5, Ops. 13, 14], I–J [Preamble, Op. 4]).

## C. Restrictions on Dissemination of Information about the Price, Type and Availability of Medical Services

### 1. *Restrictions on Dissemination of Price Information*

95. In 1974, an organization in Bergen County, New Jersey, specializing in preventive medicine, submitted to the local medical society a proposal to send a form letter to the Mayors and Councils of the 72 communities in the county (CX 112B). The proposed form letter offered physical examinations for the communities' firemen, police [119] and volunteer ambulance corpsmen at $50 each (CX 112B). A local medical society official forwarded the proposal to AMA, commenting: "I question the ethics involved and feel that it borders on solicitation. However, in all fairness to the group, they do have a tremendous investment and do need to get their message out" (CX 112A). Edwin Holman, Director of AMA's Department of Medical Ethics, responded: "I agree with you that this letter is out and out solicitation of patients or patronage as proscribed by Section 5 of the Principles of Medical Ethics and Opinion 11 thereunder, a copy of which is enclosed" (CX 111).

In 1969, a Minnesota physician wrote to AMA stating that he was contemplating running a pap smear clinic for one week during which he would reduce his fee for a pap smear and pelvic examination by one-fourth. Stating that he wished to alert the community to the program through newspaper and radio announcements, the physician asked AMA for its opinion (CX 170A). The Assistant Secretary of the AMA Judicial Council (CX 524A) cautioned the physician against sponsoring the newspaper and radio announcements:

> The kind of public announcements which are necessary could be made by the local medical society but should not be made by individual practicing physicians. This should be a project open to all physicians in the community. Ethically you can notify only your own patients. Announcements to the general public should be made only by the medical society. (CX 170).

In 1972, respondent CSMS referred a complaint to the Fairfield County Medical Association, one of its component societies, about a physician's newspaper box advertisement stating that patients could attend two evening sessions at his smoking clinic for $35 (CX 78B, C). The county society then advised the physician to cease and desist from advertising in violation of accepted principles of ethics and sent him pertinent pages from the AMA's 1971 *Opinions and Reports* on the subject of advertising and clinics (CX 78A). The county society forwarded a copy of its informal opinion letter to CSMS (CX 78A). [120]

In 1972, CSMS's executive director advised a local Chamber of Commerce in Niantic, Connecticut, that " 'Advertising' is prohibited by medical ethics, and hence any public listing of physicians who had signed up for a '10% discount program,' however worthy in purpose, would be considered unethical" (CX 30). CSMS advised the president of the group considering the senior citizen discount program that "discounting, in general, is a *business* practice rather than a *professional* one. For this reason, it is contrary to the recommendation of the Judicial Council of the American Medical Association that physicians do not employ business practices in conducting their professional activities" (CX 30)(emphasis in original).

In 1975, a group of internists in Virginia asked AMA whether it would be ethical for them to include their fee schedules in a brochure describing their practice that was designed strictly for the patients being seen by the group (CX 110). In response, the Secretary of the AMA Judicial Council stated he was "negative" on the proposal, since it "might very well be interpreted or looked upon by your colleagues . . . as a suttle [sic] and indirect form of solicitation[,]" that "[T]here might be some question as to weather [sic] or not a brochure such as this is in keeping with the traditions and ideals of the medical profession" and "it might very well be thought of as a commercialization of the profession" (CX 109A-B).

At a meeting of an ad hoc committee of the Chicago Medical Society charged with preparing guidelines on physician advertising, it was mentioned that fees should not be listed in physician announcements (CX 2117A, B). The guidelines subsequently issued by the Chicago Medical Society in 1975 omitted fees from the list of items of information which a physician or health plan could include in newspaper announcements (CX 2122B, C; 2121). Edwin Holman, Director of the AMA Department of Medical Ethics, attended meetings of the ad hoc committee as an AMA consultant and approved the committee's final report (CX 2121; Tr. 4919, 4939).

The Illinois State Medical Society drafted "Guidelines for Consumer Information Materials (Physician Directories)" in 1975 for its component medical societies to apply in their communities (CX 718). Quoting the AMA Judicial Council's 1974 opinion on physician directories, which [121] forbids inclusion of "self-aggrandizing" statements in directory listings (CX 718B, 507B, D; F.134, pp. 191–92), the Guidelines stated that a physician directory "should not be a comparison of fees" (CX 718B). The Guidelines also declared that "ISMS does not recommend publishing individual physician's fees" (CX 718G). Other AMA member societies have opposed the inclusion of fee data on individual physicians in community directories (CX 2178C, 2179A, 680, 2035, 2186A, D, 2303B, 2304; RX 887; Tr. 2383–84, 2410, 5460–63).

Mount Auburn Hospital, in Cambridge, Massachusetts, placed a full-page advertisement in the February 26, 1976, edition of a Cambridge newspaper (CX 880B, C). Subsequently, the Massachusetts Medical Society's Committee on Ethics and Discipline met with the hospital's executive director "concerning the appropriateness of the newspaper advertising" (CX 882). With respect to the same advertisement, the chairman of the Ethics and Discipline Committee advised a Boston area health maintenance organization in August 1976 that it was "not acceptable to include reference to . . . amounts of charges . . . in any sort of publication of this type" (CX 882).

The Santa Clara County (California) Medical Society approved a policy on physician advertising and promotional activities in February 1976, stating that, "[a]dvertising for the purpose of self-aggrandizement or solicitation of patients is prohibited. This pertains to . . . statements regarding. . . cost. . ." (CX 751A, E).

In August 1976, the state medical society in Maryland published a compendium of ethical pronouncements which begins with the AMA Principles of Medical Ethics (RX 308, pp. 27–66). One such pronouncement, citing the AMA Judicial Council as authority, stated that "[p]rofessional notices are permissible, provided they do not carry listing of fees or any other material not in keeping with the dignity of the medical profession" (RX 308, p. 31).

In numerous instances, physicians have been admonished by their local medical societies for sending out brochures and letters which included fee or billing information among other things (F. 99, pp. 130–31; 110, p. 145; 112, pp. 147–48; 136, pp. 194–97).

Physicians establish "usual" fees for the services, procedures and tests they perform (F. 40, p. 51; Tr. 7726–30; RX 267, pp. 7–8; CX 2186D, 705H; RX 407, p. 5; RX 526, p. 7; RNHX 149C; CX 738, 979C, 4A, 1866C–E; RX 251B). [122] These services, procedures, and tests are identified and coded in standardized terminology and relative value guides used by physicians, respondent medical associations, insurance companies and governmental agencies (F. 40, p. 52; 63, pp. 85–86; 81, pp. 98–99; RX 18, pp. 155–71; Tr. 7729–30). During the period of federal price controls in the 1970's, federal regulations required all medical practitioners to post a sign in their facilities announcing the availability for public inspection of a schedule showing their customary prices for those services which accounted for 90 percent of their aggregate annual revenues (CX 2602). From this evidence, it is concluded that physicians' fees are readily capable of being publicized in a nondeceptive manner.

### 2. *Restrictions on Dissemination of Other Information on Individual Physicians' Services*

96. In 1969, two obstetrician-gynecologists in St. Paul, Minnesota, drafted a five page office brochure describing their facilities, hours, office procedures and hospital affiliations (CX 114B–G). The physicians planned to distribute the brochure to new patients who came to their office and not through the mail. They wrote to the Minnesota State Medical Association for clarification of any possible ethical problems before using the brochure (CX 114B). The Medical Association's executive director sent the brochure to the Director of the AMA's Department of Medical Ethics with a request to "give your opinion and advise me so I can inform the physicians" (CX 114A). The AMA official replied:

> In 1954 and at other varies [*sic*] times since then the Judicial Council has reviewed drafts like this. It has expressed the opinion that they are contrary to the spirit of the Principles of Medical Ethics. The brochure extols the facilities, qualifications and services of individual physicians and in the opinion of the Judicial Council this amounts to advertising which is comparable to the advertising of commercial services (CX 113).

In June 1972, a physician in San Francisco wrote to an insurance company offering to perform medical examinations for it. The letter briefly described the physician's [123] services and facilities and invited a representative of the insurance company to inspect his office (CX 25B). A claim analyst at the insurance company sent the letter to the AMA's Department of Medical Ethics for its opinion (CX 24, 25A). AMA responded that the physician's letter constituted solicitation in violation of Section 5 of the Principles of Medical Ethics (CX 23). AMA also urged the claim analyst to send a copy of the physician's letter to the San Francisco County Medical Society for whatever action would be considered appropriate (CX 23).

In 1973, the president of the Erie County (Ohio) Medical Society wrote to AMA regarding the ethics of a small advertisement that a board certified thoracic surgeon had placed in newspapers and distributed by mail (CX 51C). The announcement contained only the doctor's name, address, telephone number and the statement that he was opening "a laboratory for Cardio-Pulmonary and Heart Catheterization diagnosis and office for the practice of Thorasic-Cardiovascular [*sic*] Surgery and Internal Medicine and Cardiology on July 1, 1973" (CX 53). The Secretary of the AMA Judicial Council responded by enclosing a copy of the 1971 *Opinions and Reports* and calling the local society official's attention to Opinions 16 and 17 of Section 5 (CX 52, 462Z8). He stated in his letter that:

> [A]ccepted practice would be for a committee of the local medical society to call this physician and politely advise him that his advertising is not in keeping with the custom of the local medical society, and ask him if he would refrain from advertising in such a way in the future. (CX 52).

In August 1975, the Director of the AMA's Department of Medical Ethics responded to a letter from a St. Louis physician asking how he could ethically notify industry of an increase in his office hours. The AMA official indicated it would be acceptable for the physician to advise patients currently on his active list of the increase in his office hours. However, the AMA official stated: "A physician may not solicit patients. To the extent that a notice to industry is considered solicitation by one's peers in the county medical society it is ethically unacceptable." A copy of this letter was sent to and received by the St. Louis County Medical Society (CX 1349). [124]

Further instances of action taken by local medical societies that restricted the dissemination of information on individual physicians' services may be found at F. 133-35, pp. 187-94).

### 3. *Restrictions on Dissemination of Information about Innovative and Alternative Forms of Medical Care Delivery*

97. AMA's 1971 *Opinions and Reports* provides that AMA's ethical principles, including those restricting advertising and solicitation, apply to medical clinics and groups as well as individual physicians (CX 462I, J, K, Z5, [Preamble, Ops. 2, 6, 8; Sec. 5, Op. 8]),

and that contractual arrangements between a physician and any health care organization that seeks professional patronage by oral, written, or printed communications are unethical (CX 462Z12, Z13 [Sec. 6, Ops. 2, 3]). In December 1974, the AMA's House of Delegates adopted a resolution declaring unethical any advertising by a prepaid medical care plan or a health maintenance organization which identifies any physician providing services to the plan's members or subscribers (CX 951). These ethical restrictions have been applied, *inter alia*, to prepaid group health plans, including health maintenance organizations, medical clinics offering specialized services and preventive medicine programs.

### a. Innovative Clinics and Preventive Medicine Programs

### Dr. Joseph LaDou-Peninsula Industrial Medical Clinic ("PIMC")

98. At least up to the trial of this proceeding, the Santa Clara County (California) Medical Society ("SCCMS"), an AMA component society, was prohibiting an industrial medical clinic from seeking new client companies through mailings or other direct contacts with company executives. As authority, SCCMS cited restrictions on solicitation and advertising in AMA's Principles and the 1971 *Opinions and Reports*. SCCMS's actions were prompted by complaints from competing medical clinics supplying similar medical services in the same area. SCCMS's actions have limited the growth of industrial medical clinics and hindered the potential extension of occupational health and safety services to hundreds of companies. [125]

There is increasing recognition that the workplace frequently creates health hazards for workers (Tr. 2053-54), a problem which Congress acknowledged in passing the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 (a)(1970). Occupational medicine is the practice of caring for and preventing worker injuries. It includes industrial hygiene, health physics and safety (Tr. 2052). "We have learned in the last 30 to 40 years that the workplace creates a great deal of disease, and a specialty of medicine has developed to attempt to control the amount of exposure to stress and to toxic materials" (Tr. 2053). The occupational specialist works on "in-plant consultation, setting up programs of prevention of injuries in the first place, advising industry on how to monitor the health and safety of their workers and then to provide a treatment program for the injuries if they occur" (Tr. 2054).

Many small companies have failed to develop in-plant health and safety programs for employees (Tr. 2061, 2064-65). They have given little attention to preventive programs and have relied largely on hospital emergency rooms for the treatment of injuries (Tr. 2061-62, 2065-66). Emergency rooms provide virtually no follow-up care (Tr. 2061). Santa Clara County, California, is a growing industrial community with a large number of small companies (Tr. 2057, 2061). It is estimated that only five percent of local industry has in-plant occupational safety and health programs (Tr. 2063).

PIMC was founded in 1969 by Dr. Joseph LaDou and three other physicians (Tr. 2054). It offers a package of services to local industry, *i.e.*, in-clinic services of preventive medical exams, care for worker injuries and illnesses and in-plant consultative and educational programs. PIMC, located in Sunnyvale, California, has on its staff four physicians in general medicine with an interest in emergency room care, three orthopedic surgeons, a neurologist, psychiatrist, dermatologist, cardiologist, radiologist and five physicians from Stanford University who operate an evening shift (Tr. 2055). It also has a group of para-professionals. The whole staff consists of about 80 persons. PIMC has 1200 active clients representing about 70,000 workers (Tr. 2056). Potential clients include about 10,000 employers in the immediate area that have no such program. PIMC is one of only three clinics offering local industry a comprehensive package of occupational health services; [126] the other clinics which compete with PIMC are the Sunnyvale Medical Clinic and the Palo Alto Medical Clinic (Tr. 2055, 2057-59, 2063).

PIMC's medical director, Dr. LaDou, who testified in this proceeding, is a board certified specialist in preventive medicine who has studied occupational medicine at the Stanford Research Institute (Tr. 2047-52, 2064-65). Dr. LaDou is a member of SCCMS and AMA (Tr. 2051).

In 1969, shortly after the founding of PIMC, Dr. LaDou was visited by a member of SCCMS's Ethics Committee (Tr. 2066). The official informed him that a physician member of Sunnyvale Medical Clinic had expressed concern at high levels in the Medical Society that PIMC's initial success at caring for local companies might cause some harm to Sunnyvale's occupational health program and to its physicians' private medical practices (Tr. 2067). The official reviewed with Dr. LaDou a suspicion that he was soliciting business, and directed his attention to the provisions in AMA's Principles and the 1971 *Opinions and Reports* dealing with the definition of unethical behavior and the solicitation of patients by physicians and clinics (Tr. 2067).

As a result of this contact by the SCCMS, Dr. LaDou felt it necessary to obtain the Medical Society's guidance on promotional matters (Tr. 2066). Consequently, in August 1973, Dr. LaDou wrote to SCCMS for comments on a PIMC plan to send a general mailing to newly established companies in the area offering them a program of comprehensive occupational medical services (CX 758). SCCMS responded to PIMC's letter by stating that a general mailing to nonphysicians soliciting business was not acceptable (CX 757). This response effectively prevented PIMC from obtaining access to the vast majority of smaller companies in PIMC's service area which may have been in need of PIMC's services (Tr. 2070-71).

In October 1974, Dr. LaDou complained to the SCCMS that a clinic which competed with PIMC was soliciting lay executives of Santa Clara area firms in a manner which the Medical Society had told PIMC was impermissible in 1973 (CX 760). Dr. LaDou stated that if the Medical Society allowed the competing clinic to continue this solicitation, it would only be fair to permit PIMC to do the same (CX 760). The Medical Society responded by calling Dr. LaDou and the medical director of the competing clinic to a meeting of its Professional Standards [127] Committee (Tr. 2072-73). The Committee reviewed specific passages from the AMA's 1971 *Opinions and Reports* and gave the two physicians copies of the *Opinions and Reports,* with several provisions referring to restrictions on solicitation and advertising underlined (Tr. 2973-74).

In an April 1975, letter to Dr. LaDou, the SCCMS's Professional Standards Committee announced guidelines prohibiting outside industrial physicians from making any direct contacts with companies through personnel officers or other executives (CX 759). In a July 1975, letter to Dr. LaDou, the Medical Society's Professional Standards Committee stated that the guidelines also applied to nonphysician sales agents of industrial physicians (CX 1751). The letter quoted in full Opinion 6 of Section 5 of AMA's 1971 *Opinions and Reports,* entitled *"Solicitation of Patients, Direct or Indirect"* (CX 462Z5), and stated that the Committee "trusts that you will conform to the ethical standards of our medical community" (CX 1751).

Dr. LaDou interpreted the 1975 Medical Society guidelines to prohibit PIMC from talking to lay people about occupational health and safety programs and to deny PIMC totally the opportunity to expand occupational safety and health coverage in smaller industry in its area (Tr. 2076). Dr. LaDou and PIMC have abided fully by the guidelines with respect to nonclient companies (Tr. 2077). The only lay representatives PIMC has dealt with directly were the approximately 50 existing client companies of PIMC; Dr. LaDou testified that he deals frequently enough with them such that he knows there will be little likelihood of his being reported to the local medical society (Tr. 2077). Due to fear of disciplinary action against him, Dr. LaDou has never made the general promotional mailing to Santa Clara area companies which he proposed in his August 1973, letter to the Medical Society (Tr. 2077-78).

In July 1976, the Santa Clara County Health Department asked PIMC to participate in the national Swine Flu Immunization Program by contacting both client and non-client companies in the county about PIMC providing immunizations to their employees (CX 762). PIMC accepted the invitation and mailed an announcement of immunization services to a number of area companies (Tr. 2083; CX 763). Physician members of the Palo Alto Medical Clinic and the [128] Sunnyvale Medical Clinic complained to SCCMS about PIMC's Swine Flu Program announcement (Tr. 2057-58, 2084-85). In October 1976, Dr. LaDou was called to a meeting at which three SCCMS officials informed him of the complaints against PIMC and again showed him a copy of AMA's *Opinions and Reports* (Tr. 2085-86).

In November 1976, SCCMS's Professional Standards Committee wrote Dr. LaDou regarding his involvement in the Swine Flu Program:

> While the Committee agreed that in the particular instance in question you exercised poor judgment, they did concur that your actions were not unethical to such a degree that disciplinary action would be justified at this time. They felt most strongly that, should the Committee learn of your involvement in any future incidents even *suggestive* of solicitation, they will be obliged to take more definitive action. (CX 765)(Emphasis in original).

Dr. Melvin Britton, chairman of SCCMS's Professional Standards Committee and author of the November 1976, letter, quoted above, is a partner in the Palo Alto Medical Clinic, which competes with PIMC (CX 765; Tr. 2057-58, 88). Upon inquiry, Dr. Britton informed Dr. LaDou that copies of the letter of reprimand had been sent to both the Palo Alto and Sunnyvale clinics (CX 766; Tr. 2092). Dr. LaDou expressed concern that the two complaining clinics could use the Medical Society letter to his detriment, both professionally and in business (Tr. 2091-92). Specifically, Dr. LaDou feared the impact which the letter might have on potential clients of PIMC:

> I find the client companies relying heavily on the local medical society. They call it the AMA. They say when they are looking for a new source of medical care, they will call the AMA and find out who is legitimate and who they would recommend. What they are in fact calling is the Santa Clara County Medical Society, [129] which is what the telephone operator would give you if you asked for the AMA. Under the circumstance like that, to show a letter, a stern warning to me for unethical behavior

to a potential industrial client would be very damaging in a competitive situation. (Tr. 2094).

Dr. LaDou wrote to Dr. Britton and requested that the letter be retracted because it was so damaging. To Dr. LaDou's knowledge, the letter has never been retracted (Tr. 2095). As a result of the SCCMS's actions, PIMC has reduced its marketing activity (Tr. 2077-78) and largely curtailed its in-plant consultative program both with large and small industry (Tr. 2097-98). It is estimated that PIMC's growth rate has been cut in half due to the Medical Society's restrictions (Tr. 2097-98).

The SCCMS's actions have also harmed Dr. LaDou. They have consumed a great deal of his time and have adversely affected him financially by drastically altering the way in which PIMC operates (Tr. 2096). The Medical Society's actions also have caused him a good deal of concern regarding his career in occupational medicine (Tr. 2096). Dr. LaDou particularly feared expulsion from SCCMS, which Dr. Britton told him had been considered in connection with the Swine Flu Program letter (Tr. 2096). Dr. LaDou testified that:

> [Expulsion] would be a terrible black mark in the career of a physician in my field . . . . In Santa Clara County, it is an impossibility in my specialty to buy malpractice insurance unless you buy it through the County Medical Society which controls the negotiation for its purchase. I am not at all sure I could practice without my membership in the Santa Clara County Medical Society (Tr. 2096-97).

The SCCMS's restrictions on the marketing activities of PIMC and other industrial medical groups have hurt consumers of occupational medical services in Santa Clara County. The Medical Society's actions have perpetuated an environment in which many industrial firms continue to have virtually no occupational safety and health programs for their employees (Tr. 2098). [130]

### Dr. James Warren

99. James Warren, M.D., head of the Department of Obstetrics and Gynecology at Washington University Medical School, St. Louis, Missouri, testified in this proceeding. In his capacity as Department head, Dr. Warren is also medical director of the Washington University Center for Outpatient Gynecological Surgery ("Center"), which is staffed by members of the Department who perform various surgical procedures such as tubal ligations and pregnancy terminations on an outpatient basis (Tr. 721-23). In January 1975, to publicize the Center, assist its patients and clarify the guidelines under which pregnancies were being terminated, Dr. Warren prepared a brochure describing its facilities, services, specific fees

and office and billing procedures (CX 979A–E; Tr. 723, 725). At that time, the Center was unique among facilities performing abortions in St. Louis in that it was immediately adjacent to a complete hospital (Tr. 726–27). This enabled the Center to transfer quickly to a hospital operating room any patient developing complications in the course of outpatient surgery (Tr. 726). The brochure was distributed to physicians in the St. Louis area using the St. Louis Medical Society's facilities and mailing list; it was not distributed to the lay public (Tr. 724).

Several staff members at the Washington University Hospital objected to the brochure. They complained to Dr. Warren that the brochure implied that the clinic and its pregnancy termination procedures were sponsored by the entire medical school. Others told him that the mailing of a brochure was "low class" (Tr. 742–43). Dr. Warren, having "heard noises" (Tr. 744), on February 12, 1975, sent a letter addressed "To All St. Louis Area Physicians" apologizing for any misunderstanding the brochure may have caused and further stating that the brochure was not intended to imply that the clinic, the medical school or the hospital was taking a stand on abortion (Tr. 742–43, 764; CX 984). This letter was sent to approximately two-thirds of the physicians on the mailing list of the St. Louis Medical Society (Tr. 766).

In early February 1975, the Council of the Missouri State Medical Association passed a resolution providing, with respect to the Center's brochure, that "Washington University was to be reminded by the . . . Council that advertising and solicitation of patients was unethical" (CX 976). A week later, on February 14, 1975, the Council wrote to the dean of the Washington University School of Medicine declaring that the brochure "constitutes a breech [*sic*] of medical ethics regarding solicitation" (CX 971A). The letter referred to, and enclosed copies of, Opinions 6, 7, 8, 11 and 12 of Section 5 of AMA's [131] 1971 *Opinions and Reports* (CX 971A-B, 462Z5–Z7). At a meeting on February 14, the Ethics Committee of the St. Louis Medical Society considered the brochure and Dr. Warren's apology, and decided that the brochure was "patently unethical" advertising and solicitation (CX 969A). The Committee recommended that the Medical Society censure Dr. Warren (CX 969A).

In April 1975, the chairman of the Medical Society's Censors Committee wrote to Dr. Warren to inform him of the ethical charges of solicitation (Tr. 730–33). He enclosed a copy of AMA's Principles of Medical Ethics (Tr. 732–33; CX 982). At a meeting with Dr. Warren later that month, the Medical Society official told him that the controversy over the Center brochure could be put to rest if Dr.

Warren wrote a second apology letter (Tr. 737-42). In May, Dr. Warren sent a letter to the Censors Committee chairman apologizing for his actions and assuring the members of the Medical Society that he would not repeat them (CX 975C). Characterizing Dr. Warren's letter as one "in which the physician recants, repents and promises in the future not to repeat this action," the Censors Committee reported to the Medical Society's Council that the matter had been resolved (CX 975B). In early June 1975, the president of the Medical Society sent a form letter to all Medical Society members enclosing copies of Dr. Warren's letter of apology and the Censors Committee Report (CX 975A).

The medical clinic with which Dr. Warren is associated has never again put out a brochure about its activities (Tr. 754-55).

### Dr. Richard Hansen

100. Richard A. Hansen, M.D., who testified in this proceeding, is the medical director of the Wildwood Sanitarium and Hospital, a rural hospital sponsored by the Seventh Day Adventists located on the outskirts of Chattanooga, Tennessee. Sometime in 1973, the hospital instituted a program at the local YMCA for residents of the Chattanooga area. The program, under the direction of a board certified internist specializing in cardiology, consisted of various tests to assess a patient's risk of experiencing a heart attack or other coronary disease (Tr. 1810-14). In the fall of 1973, the hospital's former medical director attended a meeting of the Chattanooga and Hamilton County (Tennessee) Medical Society to seek the Society's endorsement of the program (Tr. 1838). While the Society generally approved of the program, it declined to endorse it (Tr. 1839-40; RX 262). [132]

The program, called "Operation Heartbeat," charged each patient $25 for the package of tests, approximately half of what a hospital or private doctor in the area would have charged to administer the same tests (Tr. 1813, 1815). It received free publicity on radio, television and in the newspapers, and local stores placed posters announcing the program in their windows (Tr. 1812, 1815-16). Some of the printed publicity carried the name and picture of the program's cardiologist (CX 2005; Tr. 1816, 1821). The program was held three or four times in the fall and winter of 1973-74 (Tr. 1818). In 1974, the Medical Society summoned Dr. Hansen to a meeting of the Society's Board of Governors to inform him that the inclusion of the cardiologists' name and picture in Operation Heartbeat's publicity violated an AMA *Opinions and Reports* section on advertising (Tr. 1822-23). Dr. Hansen was told by a Medical Society official that it was cardiologists in the area who had raised the objections about the program's publicity (Tr. 1820-21). After the meeting, the Medical Society sent Dr. Hansen a letter recommending that, if the program were held in the future, a physician licensed in Tennessee should conduct the program and that any future announcements of Operation Heartbeat should be worded so as "to avoid the appearance of advertising, which, as you know, is unethical according to the AMA Code of Ethics" (CX 108). Dr. Hansen dropped the program shortly after receiving the letter (Tr. 1829).

About a year later, Dr. Hansen sought the advice of the AMA as to whether the Operation Heartbeat advertising program was ethically permissible (CX 107). The AMA answered Dr. Hansen's inquiry and noted that "it is virtually impossible to evaluate a specific local program from the national level" (CX 106). It was suggested that Dr. Hansen seek the advice of his local medical society, which could "fully evaluate *all* the information in accordance with local practice . . ." (CX 106)(emphasis in original).

In 1977, the program was reinstituted but, because of the problems with the Medical Society in 1974, they have used no paid radio, television or newspaper advertising (Tr. 1833, 1835-36). The 1977 program is attracting only one-fourth to one-third of the enrollment averaged by the 1973-74 program (Tr. 1836). The lower enrollment may be attributable to the fact that the program has not been promoted (Tr. 1837). [133]

101. In November 1972, the Executive Director of the AMA component society in Toledo, Ohio, directed an ethics inquiry to AMA regarding circulation of physicians' names:

> Recently the Medical College of Ohio at Toledo sent a list of all of their specialists to all physicians in Northwestern Ohio. It is the feeling of the physicians in our community that this is a type of solicitation in that it was sent out to all physicians asking for referrals.
>
> Is there anything in the AMA Code of Ethics that covers this point? (CX 1752).

The Director of the AMA Department of Medical Ethics replied in December 1972:

> As you know, Section 5 says that the physician should not solicit patients. It is axiomatic that a physician may not do indirectly that which he cannot do directly. The mere fact that the College solicits patients on behalf of the specialists does not change the nature of the act.
>
> This is a situation that has occurred infrequently in several widely scattered college communities. Experience has very definitely indicated that beyond question that the best way to resolve situations like this is to convince the College that its practice is in

derogation of medicine's long established ethical principle, and demeaning to the profession as a profession and is unacceptable to physicians as individuals (CX 768).

Further instances of action taken by local medical societies resulting in restrictions on the dissemination of information about innovative and preventive medicine programs may be found at F. 111, p. 146; 112, pp. 147-48; 114, pp. 150-52; 115, pp. 152-53; 117, pp. 154-56. **[134]**

### b. HMOs and Other Prepaid Group Practice Plans

102. Prepaid group practice plans, such as health maintenance organizations ("HMOs"), compete with the traditional fee-for-service system of delivering medical services, including private physicians and health insurance carriers (F. 28, p. 54; Tr. 484, 550). Advertising is important to HMOs in their early years as they try to build enrollment and reach a financial break-even point (Tr. 482-84).

AMA has promulgated several restrictions on prepaid group practice plans' advertising and solicitation activities, in addition to extending the ban on solicitation to physician groups and clinics and prohibiting contract medical practice involving solicitation (*See* F. 97, p. 124). AMA's 1971 *Opinions and Reports* declared that "[t]he medical profession must oppose any prepayment or postponement program that might result in advertising or solicitation of patients by physicians. . ." (CX 462Z22 [Sec. 7, Op. 13]). In 1973, and again in 1974, the AMA Judicial Council ruled that although a health maintenance organization could advertise its payment or insurance aspects, it could not ethically solicit patients (CX 512C-D, 510B-C). The Council noted that where one practice ends and the other begins may require astute investigation of the facts of the particular case (CX 510C).

The AMA House of Delegates addressed the issue of health plan advertising in a December 1974 resolution, declaring:

> It is not unethical for a physician to provide medical services to members of a prepaid medical care plan or to members of a health maintenance organization which seeks members (or subscribers) through advertising its services, facilities, charges or other non-professional aspects of its operation as long as such advertising does not identify, refer to or make any qualitative judgment concerning any physician who provides service to the members or subscribers (CX 951).

Constituent and component medical societies of AMA which require their members to abide by the AMA Principles of Medical Ethics have issued further ethics interpretations restricting advertising **[135]** and solicitation by HMOs and other group prepaid health plans. The Tennessee Medical Association adopted a resolution, in April 1975, stating that "affiliation by physicians with health maintenance organizations or other medical or pseudo-medical facilities from which they receive patients by referral or for which they diagnose and/or treat patients for a consideration of any sort is unethical if the facility solicits or advertises in any way. . ." (CX 1869).

In February 1976, the Santa Clara County (California) Medical Society adopted guidelines for health plan advertising which prohibited public disclosure of the names of individual physicians, hospitals, university clinics or other facilities (CX 751D). The guidelines also included a provision stating:

> Physicians contracting for services with a health care plan should include a contractual statement to the effect that "both parties agreed that any requirements under this contract shall not jeopardize compliance with the American Medical Association's Code of Ethics or local Medical Society guidelines on advertising and solicitation of patients." (CX 751D-E).

Similar standards adopted, in mid-1975, by the Chicago Medical Society in consultation with Edwin Holman, the Secretary of the AMA Judicial Council, contained an almost identical provision (CX 2122B-C; F. 95, p. 120).

## Florida Health Care Plan

103. Throughout the 1970's, the Florida Medical Association ("FMA") and one of its components, the Volusia County Medical Society ("VCMS"), have opposed the marketing activities and contract practice arrangements of the Florida Health Care Plan ("FHCP"), a federally qualified HMO in Daytona Beach, Florida (*See* F. 149, pp. 220-21). They have cited as authority for their actions various AMA pronouncements, including the Principles of Medical Ethics, which both medical societies have adopted as governing standards for their members (CX 2543K, 1916K; F. 149, pp. 220-21).

Medical society opposition to FHCP's operation has made it almost impossible for FHCP to recruit full-time staff physicians from the local pool of doctors (F.149, pp. 220-21; Tr. 9182, 9239). The necessity of hiring out-of-town physicians has interfered with FHCP's marketing because some potential subscribers have been reluctant to join an HMO whose staff physicians were unknown locally (Tr. 9182-83). Interference with FHCP's marketing has altered its cash flow to the point [136] that it has had difficulty hiring any new physicians. Trying to balance the number of staff physicians with the number of enrollees has caused financial problems for FHCP (Tr. 9182-83).

Dr. E. D. Davis, President, Chief Operating Officer, Chairman of the Board and Medical Director of FHCP, testified in this proceeding (Tr. 9146, *et seq.*). In the spring of 1973, he discussed FHCP at a local meeting of the Rotary Club (Tr. 9187). In May, VCMS sent Dr. Davis an FMA Judicial Council opinion on HMO patient solicitation which stated:

> A physician who has any connection whatever with a health maintenance organization should take all reasonable steps at this [sic] disposal to prevent the use of his name, either directly or indirectly, in a manner which might influence the decision of any individual or group of individuals to subscribe to the services of the HMO (CX 2554, 2587).

VCMS advised Dr. Davis not to personally promote enrollment in the Florida Health Care Plan, Inc., and alerted him to the potential for formal disciplinary action against him on the basis of the FMA ethics opinion (CX 2587).

As a result of the VCMS letter, Dr. Davis gave no further talks on FHCP, regardless of the circumstances, and forbade other FHCP doctors from taking part in public discussions concerning HMOs (Tr. 9190). Since that time, FHCP physicians have not participated in the marketing efforts of the plan because they did not want to incur the displeasure of VCMS or FMA. The VCMS admonition put a damper on FHCP's marketing efforts. Having a physician involved in marketing activities would help FHCP establish credibility with subscribers and provide a source of answers to the technical questions which potential subscribers ask (Tr. 9191).

FHCP placed an advertisement in a newspaper at the time it received federal certification in 1975 (Tr. 9193-94). Since then, FHCP has not advertised or placed a listing in the Yellow Pages of the telephone directory because it could not get any clarification on the ethics of advertising in Volusia County and did not want to incur the displeasure of the state or local medical societies (Tr. 9194). As [137] required by federal law, FHCP has printed a list of its staff physicians and a brochure, but it never mails them out to the general public (Tr. 9192-93).

FMA has also challenged the ethics of FHCP's contractual arrangements with physicians (F. 149, pp. 220-21). As a result of the ethical restrictions on its marketing activities and contractual arrangements, FHCP has experienced increased operating costs and its development has been hampered (Tr. 9211-12).

## Arizona Health Plan

104. The Maricopa County Medical Society, the AMA component organization in Phoenix, Arizona (CX 1568E), has hindered the

marketing efforts of two local HMOs through the application of ethical restrictions based on AMA's 1971 *Opinions and Reports*. The Arizona Health Plan ("AHP"), a state-certified HMO in Phoenix, supplies physician, hospital and other health services to approximately 40,000 subscribers on a flat-prepayment, non-fee-for-service basis (Tr. 78–79, 84). The Maricopa County Medical Society opposed AHP's early development, in 1970 and 1971, because it felt that the Plan was no different than a Kaiser-type closed panel system and was "unacceptable" to organized medicine (CX 1569, 1570A–B; Tr. 91-92). The Medical Society wanted the efforts to promote AHP terminated, in part to prevent it from competing with the Medical Society's own Maricopa Foundation (CX 902; Tr. 96–98). The Maricopa Foundation offers subscribers a plan for financing medical services obtained from privately practicing physicians on a fee-for-service basis (Tr. 97–99). The Foundation stated, in a December 1976 letter to its over 1200 participating physicians, that it is a "competitive alternative" to HMOs in Maricopa County and that it seeks to keep patients in the private practice sphere (CX 933).

The Maricopa County Medical Society has limited AHP's advertising and solicitation efforts. In 1972, the Medical Society issued a "Radio-Press and TV Code," which restricts individual physicians' and health plans' dissemination of information on their services (F. 120, pp. 160–66). In late 1972, after reviewing the AMA *Opinions and Reports* and the Medical Society's code, AHP's medical director, Dr. David F. Schaller, who testified in this proceeding, issued a set of guidelines limiting AHP sales representatives' distribution of the Plan's list of staff physicians in their marketing activities (CX 905; Tr. 105–07). AHP's marketing staff abided by these restrictions (Tr. 109). The restrictions impeded AHP's marketing efforts because potential subscribers frequently asked about AHP's physicians at sales presentations (Tr. 109–10). [138]

In 1974, the Medical Society adopted "HMO Guidelines," which prohibit most dissemination of HMO physician lists and forbid the inclusion of names or addresses of physicians or physician groups in HMO advertising (CX 898H–J). The Guidelines also require preclearance by the Medical Society of all HMO brochures, advertisements, sales talks and other sales materials, and generally prohibit HMOs from holding open houses for potential subscriber-patients (CX 898I–J).

The Medical Society's 1974 HMO Guidelines have handicapped AHP in its marketing efforts (Tr. 129, 142, 272). AHP has refrained from distributing lists of its staff physicians to potential subscribers (Tr. 114–15). The restriction on the holding of open houses has made the recruitment of federal employee subscribers difficult for AHP (Tr. 130–31). Compliance with the advertising pre-clearance requirement has been time consuming and has hindered the scheduling of AHP's advertising program (Tr. 131–32).

Throughout the fall of 1975, the Medical Society sent letters to AHP declaring that certain aspects of its limited newspaper and radio advertisements violated the HMO Guidelines (CX 911, 913-16, 1966). Several of these communications were prompted by complaints about AHP advertising received from the chairman of the board of Blue Shield of Arizona, which owned another group prepaid health plan in Phoenix competing with AHP (CX 915B; Tr. 135). Complaints were also received from a private physician in Phoenix, who wrote the Medical Society:

> It [AHP] is in direct, open competition with me and every other private practitioner in the valley. The inevitable result of such advertising is that the group involved will gather more and more patients, getting stronger and stronger . . . . I frankly do not see why I shouldn't advertise. If they are permitted to . . . . While I think it better if no one did, I will not allow these people to have this advantage over me (CX 916B-D).

In a letter to AHP's medical director following up on both complaints, the Medical Society stated that the advertisements (CX 916D, 917E) "virtually disregard" the Society's HMO Guidelines (CX 1966). [139]

## ABC–HMO

105. The Maricopa County Medical Society has also restricted the marketing efforts of the other group prepaid health plan in Phoenix, ABC–HMO, sponsored by Arizona Blue Cross-Blue Shield. In November 1972, several years after the founding of ABC–HMO, the Medical Society complained to the head of the physician group which staffs the health plan that two of its newspaper advertisements (CX 918B-C) "were definitely not in keeping with the professional ethics of the Maricopa County Medical Society" (CX 918A). The Society's letter quoted from its 1972 Radio-Press and TV Code (F. 118, p. 158) and from Opinion 8 of Section 5 of AMA's 1971 *Opinions and Reports*, restricting advertising and solicitation by physician groups (CX 462Z5, 918A). The Society underlined on the enclosed advertisements as objectionable certain references to the name of the HMO's physician group and the number of physicians participating in the plan (CX 918C). In response to the Society's complaint, the head of the HMO's physician group, Dr. Joseph Marcarelli, stated that "we have no desire or need to act contrary to the Society's code" (CX 920B).

In August 1975, two local physicians complained to the Maricopa County Medical Society about ABC–HMO newspaper advertisements which described the health plan's benefits and supplied the addresses and phone numbers of its five facilities (CX 924B–E). One of the complainants stated that physicians supplying the same type of medical care as ABC–HMO, but on a fee-for-service basis, could not advertise in the same fashion, and he called ABC–HMO's advertisements unfair (CX 924B). The chairman of the Medical Society's Professional Committee forwarded the complaints to Dr. Marcarelli and to Dr. John Foster, president of Blue Cross-Blue Shield of Arizona, for their comments (CX 922, 925). The Society official stated in a cover letter that the inclusion of the addresses of the HMO's facilities in its ads violated the Society's HMO Guidelines (CX 922). He noted that the HMO ads' emphasis on what the plans offer, particularly regular physical examinations, health education and immunizations, was something that physicians in private practice could not advertise (CX 922). In response, Dr. Foster stated that ABC–HMO had attempted to be very cautious in what it said in the ads and had had the ads reviewed by the County Medical Society staff before inserting them in the papers (CX 925). The Medical Society reiterated that its ethics guidelines prohibited inclusion [140] of the addresses of HMO facilities in advertisements (CX 927). Dr. Foster responded that ABC–HMO would see to it that its advertising did not include the addresses of its medical center locations (CX 928).

## Harvard Community Health Plan

106. The Massachusetts Medical Society ("MMS") has restricted the advertising of the Harvard Community Health Plan ("HCHP"), an HMO in the Boston area, since the Plan's founding in 1969. When HCHP opened its doors to the public that year, its facilities and staff were equipped to serve 10,000 subscribers; yet, the health plan had enrolled only 88 subscribers (Tr. 450–51). The public was totally unfamiliar with HCHP's method of financing medical services (Tr. 478). Advertising could serve to familiarize the consuming public with HCHP's services and to help build enrollment (Tr. 478, 482–84). Blue Cross/Blue Shield and other fee-for-service health insurance carriers with which HCHP competes (Tr. 484–86) had long advertised their benefits regularly in the media (Tr. 486–87). Such advertising gave them a competitive advantage (Tr. 487).

In 1970, Blue Cross, with which HCHP was then affiliated (Tr. 451), placed several advertisements in the news media to promote the new health plan (Tr. 454–55). MMS received a number of letters from physicians complaining that the HCHP advertising was attracting patients away from private practitioners (CX 2148, 2151B, 2153) and was unethical (CX 2147-51). The Society's Ethics and Discipline Committee discussed the complaints with HCHP and expressed concern over the ethics of pursuing advertising and widespread solicitation through the newspapers, television and radio (CX 2133). In 1971, HCHP agreed to refrain from advertising in the future (CX 2139-40) and instructed Blue Cross not to advertise on its behalf (Tr. 460).

Other MMS pronouncements in the next few years continued to restrict the content of HCHP's promotional materials. In response to an inquiry from the Secretary of AMA's Judicial Council in 1973, the MMS reported that HCHP had never distributed a list of its staff physicians to the general public (CX 874A). The Society stated that its Committee on Ethics and Discipline had stood firm in its belief that the names of participating physicians should not appear in any advertisements, whether in the newspaper or over the radio, and that HCHP was cooperating with this restriction (CX 874B). [141]

In 1974, HCHP's president, Robert Biblo, who testified in this proceeding, tried to persuade HCHP's physicians to authorize an advertising campaign (Tr. 466). The basic reason that no advertising was placed was because HCHP physicians refused, some feeling that "they did not need any hassle with the Massachusetts Medical Society" — that is, they did not want to experience a letter exchange with MMS and the bad publicity that would result, and a possible Society vote of condemnation (Tr. 468).

In May 1975, MMS printed in its own Council proceedings AMA's December 1974, resolution restricting HMO advertising (CX 877; F. 102, p. 134). Later in 1975, the Society's ethics committee objected to certain items in an HCHP brochure which HCHP subsequently removed (CX 879). In August 1976, MMS informed HCHP that "it was not acceptable to include reference to individual physicians' names, amounts of charges and references to the quality of care in any advertisements" (CX 882, 880-81).

In late 1976, the HCHP physicians, taking into consideration the instant FTC proceeding among other things, reversed their position and authorized the health plan to advertise in the media (Tr. 474-75). The medical director of HCHP proposed guidelines for the advertising which incorporate the AMA and MMS restrictions on HMO advertising (CX 883C, 877, 880A; F. 102, p. 134). The guidelines declare that HCHP advertisements should avoid qualitative statements about the professional staff and/or services offered and should not mention the names of staff physicians or the medical schools or hospitals at which they trained (CX 883B). Prospective subscribers sometimes telephone HCHP to ask whether a particular physician is on HCHP's staff (Tr. 547). HCHP does not give out such information because giving out the names of staff physicians to nonsubscribers is "an unethical form of advertising" (Tr. 547-48). Mr. Biblo, HCHP's president, would like to see a "less bland" advertising approach, one which discusses the differences between HCHP's services and costs and those of fee-for-service physicians (Tr. 478-79, 481). HCHP does not do this sort of advertising today because it would prompt ethical objections among HCHP's physicians based partly on their feelings about how the Ethics and Disciplinary Committee of the MMS would react (Tr. 479, 481).

## Metro Health Plan

107. Two private physicians complained to the Michigan State Medical Society, in April 1973, that Blue Cross-Blue Shield advertisements on behalf of its HMO in Detroit, the [142] Metro Health Plan ("MHP"), constituted unethical solicitation of patients (CX 1598, 1596). The physicians' letter asked the Medical Society to join them "in condemning this method of solicitation which is an attempt to drive the private practitioner and individual physician out of private practice in a very noncompetitive and ruthless style" (CX 1598). The Medical Society wrote to Blue Shield (Michigan Medical Service) about the ethics complaint (CX 1494), and Blue Shield submitted copies of its MHP advertisements for the Society to examine (CX 1583).

After reviewing MHP's advertisements, the Society's Judicial Commission notified Blue Cross-Blue Shield and the complaining physicians in October 1973, that:

> [S]ince individual physicians or groups of physicians are not permitted to advertise their services under the provisions of the American Medical Association Code of Ethics, neither is advertising in their behalf ethically acceptable, regardless of who is sponsoring or financing the advertising.
>
> Therefore the Commission adopted the following motion: "That the printed and spoken advertising for participation in the Metropolitan Health Plan of Michigan Medical Service is in fact advertising by physicians and that such advertising is in violation of the ethics of the American Medical Association and the Michigan State Medical Society" (CX 1602G-I).

The latter motion was published in the Michigan State Medical Society's November news bulletin (CX 1731A). Blue Shield asked the Medical Society to identify those references in the HMO's advertising—newspaper or radio—which it found disturbing (CX 1602K). The

Society responded that it was not the specific wording of the advertisements that was in question, but rather the entire concept that physicians were advertising (CX 1602L).

In March 1974, the Medical Society's Judicial Commission wrote to MHP, noting that MHP had not stopped advertising (CX 1602E). The Judicial Commission expressed its hope that MHP would stop advertising so that the Judicial Commission would not be forced to consider ethical charges against the [143] specific doctors participating in the Plan (CX 1602E). Following a Judicial Commission meeting attended by MHP representatives, the Judicial Commission, in June 1974, reaffirmed its earlier opinion that advertising by both physicians and HMOs was unethical and could lead to disciplinary action against the physicians involved (CX 1602B). The Judicial Commission relied for authority on AMA's Principles of Medical Ethics and Opinions 6 and 8 of Section 5 of AMA's 1971 *Opinions and Reports* (CX 1602B, 462Z5). In October 1974, the Medical Society's Judicial Commission reported that, as far as it was able to determine, MHP's unethical advertising had ceased (CX 1605).

### D. Restrictions on the Methods Physicians Can Use To Advertise and Solicit Patronage

108. AMA and its constituent and component medical societies have restricted the methods physicians can use to seek patronage, including announcements, form letters and brochures (F. 109-12, pp. 143-48), newspaper advertising (F. 113-15, pp. 148-53), radio and television advertising (F. 116-17, pp. 153-56), publicity in the news media (F. 118-22, pp. 156-71), Yellow Pages listings (F. 23, pp. 171-76), business and consumer directories (F. 131-35, pp. 186-94), direct contact with institutions and physicians (F. 136-37, pp. 194-98) and others (F. 138-39, pp. 198-99).

### 1. *Announcements, Form Letters, and Brochures*

109. AMA and its constituent and component medical societies have severely restricted physicians' use of announcements, form letters and brochures to publicize their practices and the services they offer.

Opinion 16 of Section 5 of AMA's 1971 *Opinions and Reports* declares: "Announcements of the opening of an office should not be mailed indiscriminately to all persons in the community, nor should commercial mailing lists be utilized" (CX 462Z8).

Opinion 11 of Section 5 of AMA's 1971 *Opinions and Reports* permits "dignified" announcements, provided they do not amount to solicitation, which is a question of fact to be determined locally by the local medical societies. Opinion 11 limits the content of such announcements to name, type of practice, location of office, office hours and the like (CX 462Z6).

Opinion 14 of Section 5 permits a doctor to send announcements regarding the need for follow-up care only to his own bona fide patients (CX 462Z7). The interpretation further provides: [144]

> They should be in good taste and should not serve to advertise the doctor or extol his abilities. Certainly no ethical physician would wish to use this device as a subterfuge for solicitation of patients, nor would he wish to engage in this practice if it were considered contrary to local customs and usages (CX 462Z7).

Opinion 17 of Section 5 provides that an announcement concerning the opening or removal of a physician's office is ethical if it is in keeping with the ideals of the profession and is a simple statement of fact without undue embellishment (CX 462Z8).

Opinion 20 of Section 5 declares that disregard of local medical society custom regarding circulation of professional cards violates AMA's own ethical standards. This Opinion states that physicians should resort only to the most limited use of advertising (CX 462Z9).

Constituent and component societies, which have adopted the AMA Principles of Medical Ethics as their code of ethics (*see* Appendix A, pp. 306–09, *infra*), have issued their own interpretations of AMA's ethical restrictions on physicians' announcements. In 1975, the Chicago Medical Society published guidelines on advertising, formulated in consultation with Edwin Holman, Director of the AMA Department of Medical Ethics (F. 95, p. 120). The guidelines quote Opinion 17 of Section 5 of AMA's 1971 *Opinions and Reports* regarding the permissible form and contents of announcements (CX 2122A-B, 462Z8). The guidelines restrict the distribution of new physician announcements to colleagues and pharmacists, specifically prohibiting distribution of them in or by pharmacies (CX 2122B).

The Hartford County (Connecticut) Medical Association has adopted "guideposts" permitting announcements to be sent only to friends, physicians, allied professionals and patients of record, and prohibiting any use of announcements as paid advertisements in the public press or any other media (CX 79A–D). The guideposts declare that the Hartford County Medical Association is governed by the AMA Principles of Medical Ethics and the *Opinions and Reports* of the AMA Judicial Council (CX 79C).

In numerous instances, the AMA and local societies have invoked the ethical restrictions on advertising resulting in the restraint of member physicians' distribution of announcements, form letters and brochures (F. 110-12, pp. 145-48), even to other physicians (F. 110, p. 145; 112, pp. 146-47). [145]

### Dr. Charles Arnold

110. In January 1973, Dr. Charles Arnold of Tacoma, Washington, sent a form letter to other physicians in Washington, Oregon, and Idaho, announcing the availability of his clinic to perform abortions (CX 126B-C, 126A, 122, 124). The form letter reported the clinic's hours and fees and enclosed a set of instructions for patients (CX 126B-C). Shortly thereafter, local medical societies in Oregon and Idaho wrote to Dr. Arnold and the Washington State Medical Association ("WSMA") to question the ethics of the form letter, which they termed "advertising" (CX 126A) and "solicitation" (CX 124), specifically noting that the cost was not excessive.

In March 1973, the Ethics Committee of the Pierce County Medical Society ("PCMS"), the AMA component society in Tacoma (CX 135A, B, 475H, K) of which Dr. Arnold was a member (CX 123), reported to the Society's president that the form letter was clearly an unethical practice and that the physician should be censured (CX 122). The next month, an official of the WSMA telephoned Dr. Arnold to discuss the matter (CX 123, 127). Dr. Arnold responded in writing that he regretted sending the form letter very much and would never do such a thing again (CX 123).

In December 1973, the Board of Trustees of PCMS charged Dr. Arnold with violating the Principles of Medical Ethics (CX 129). The Society accused him of mailing the form letter, permitting publication of an article describing his clinic and its fees in a local newspaper, and writing a letter published in a nationally distributed magazine complaining that the telephone company had refused to list his specialty (CX 129B-G). In charging Dr. Arnold with a violation of the Principles, PCMS quoted Opinion 6 of Section 5 in AMA's 1971 *Opinions and Reports*, entitled "Solicitation of Patients, Direct or Indirect" (CX 129B, 462Z5).

The PCMS Board of Trustees heard evidence on the charges and, on January 15, 1974, notified Dr. Arnold that the charges of unethical conduct were sustained and that the Board had recommended that he be expelled from PCMS (CX 131).

In January 1974, in response to a telephone call from Dr. Arnold, WSMA stated that, if PCMS revoked his membership, he would also lose his membership in WSMA and in AMA (CX 132B). WSMA also noted that Dr. Arnold would not be eligible to renew the WSMA Professional Liability Insurance Program sponsored by the Aetna Insurance Company if he lost his membership in the county and state societies (CX 132B). In June 1974, Dr. Arnold withdrew his membership in PCMS (CX 133). [146]

## Anthropometrics

111. Anthropometrics, Inc., a New Jersey firm based in the greater Philadelphia metropolitan area, operates a heart clinic and other medical facilities for the diagnosis and treatment of cardiac problems (Tr. 1020, 1022–27). In 1974, Anthropometrics established an Executive Fitness Control Center to provide comprehensive physical examinations and follow-up therapy to corporate executives in the Philadelphia area (Tr. 1028–29, 1031). To market the program, Anthropometrics placed three advertisements in the *Wall Street Journal* in July 1975, and mailed form letters to the presidents of 50 to 60 corporations (Tr. 1032; CX 744B, C). Included on the letterhead (CX 744B), but not in the advertisements (RX 368–70), were the names of the physicians who would be administering the program; this was done to establish the credibility and reputation of the program and show that it was "not just a health spa" (Tr. 1047–48). Anthropometrics' president, John J. Aglialoro, testified in this proceeding (Tr. 1017, *et seq.*).

In September 1975, the Philadelphia County Medical Society sent Anthropometrics a letter declaring that the form letters constituted unethical solicitation (CX 740). Two other AMA component medical societies in the metropolitan area, the Camden County Medical Society and the Gloucester County Medical Society, wrote Anthropometrics to request removal of the physicians' names from the firm's letterhead on ethics grounds (CX 741, 743). All three medical societies have adopted AMA's Principles of Medical Ethics as their codes of ethics (CX 756A, 747R, 1736A, B, 1889 O–P. *See also* Appendix A, pp. 307–09, *infra*).

In response, Anthropometrics stated that it would remove the physicians' names (CX 742), which it subsequently did (Tr. 1047). Anthropometrics also decided not to continue promoting the executive fitness program directly to corporations due to concern that the medical societies might censure the physicians associated with it (Tr. 1048). After receiving the letters from the medical societies, the firm phased out the program, partly because of the opposition of the medical societies to physician "solicitation" (Tr. 1051–52). Anthropometrics relies on referrals from local physicians for its patients (Tr. 1025).

## Other Incidents

112. In 1971, AMA advised the Pennsylvania Medical Society that a physician who had recently acquired new specialized skills could not ethically publicize the fact by sending out form letters to other physicians (CX 120–21). [147]

In December 1972, the AMA's Department of Medical Ethics advised the Academy of Medicine of Toledo and Lucas County that a medical school's sending of a list of its specialists to physicians in the area constituted solicitation in derogation of medicine's long-established ethical principles (CX 768).

In March 1975, a radiologist serving as both an associate CSMS Councilor representing NHCMA and as the Secretary of the Radiological Society of Connecticut (CX 784A, 782), filed with the NHCMA Executive Committee a letter that had been sent by a radiology group practice to other physicians (CX 784A, B). The letter was intended to eliminate some of the questions that patients had had in the past concerning bills from the group's office (CX 784B). . .The NHCMA Executive Committee questioned the "medical ethics involved" and forwarded the letter to the NHCMA Peer Review Committee for review (CX 784A). The Peer Review Committee could find no strict interpretation applicable in AMA's *Opinions and Reports* (CX 786), and the Committee's chairman wrote to the AMA Medical Ethics Department for an opinion (CX 785). AMA responded in April 1975, that if the radiologists' letter constituted solicitation of business by means of seeking referrals from other physicians it was objectionable (CX 783A). Relying on the AMA letter as "substantive for our guidance," the NHCMA Peer Review Committee ruled that because the letter had been sent only to physicians who had already referred patients to the radiology group, it was not improper, but that such letters would be "faulted" as "advertisement" if sent to non-referring physicians (CX 781, 782).

In June 1975, NHCMA's Executive Secretary advised a physician that the NHCMA Executive Committee had voted unanimously to limit newspaper announcements of physician office openings and relocations to one day only (CX 81, 82). After receiving the NHCMA letter, the physician in question attempted to reduce from three to one the number of times his newspaper announcement was to appear (CX 82). He was unable to stop the second printing but succeeded in eliminating the third insertion (CX 82).

In 1975, a San Antonio, Texas, clinic specializing in treating athletic injuries, published a brochure describing its hours, services, office procedures, and billing arrangements (CX 2070). The Bexar

County (Texas) Medical Society's Board [148] of Censors summoned the clinic's physician to a meeting to discuss whether or not medical ethics had been violated by the brochure (CX 2070A). After the meeting, the Chairman of the Board of Censors wrote the physician:

> The Board of Censors is of the opinion that the folder, regardless of your fine intentions in publishing it, borders on advertising and is, therefore, contrary to the principles [sic] of medical ethics of the A.M.A. We realize that you intended for it to merely notify the patients of office procedures, etc., but it is our opinion that pamphlets of this nature invariably fall into the hands of the general public and then become solicitation of patients as frowned upon in Section 5 of the *Opinions and Reports of the Judicial Council of the A.M.A.* (CX 2071).

The letter then quoted Opinion 8 of Section 5 in AMA's 1971 *Opinions and Reports* (CX 462Z5), and ended by stating that the brochure should be recalled and not distributed (CX 2071).

In 1976, Innervisions, Inc., a mental health clinic in the Detroit area approved by Blue Cross, Medicare and Medicaid, published a brochure describing its facilities, services and staff (CX 1727B–S). In response to an inquiry from the Michigan Psychiatric Society (CX 1727A), the Judicial Commission of the Michigan State Medical Society ("MSMS") declared that this material did not appear to be in conformity with principles laid down by AMA and MSMS (CX 1726).

Further instances of actions taken by the AMA and local medical societies which have resulted in severe restrictions on physicians' use of announcements, form letters and brochures to publicize their practices may be found at F. 95, p. 120; 96, pp. 122, 123; 99, pp. 130–31.

### 2. *Newspaper Advertising*

### Dr. Cyril Lundvick

113. In 1975, two medical societies in Washington State (CX 474B, 475H, K) relied on AMA's 1971 *Opinions and Reports* in an ethics action to stop a physician, new to the area, [149] from advertising in the newspaper. In late 1974, an ophthalmologist from Tacoma, Washington, Dr. Cyril Lundvick, moved his office to Kitsap County, Washington, and applied for a transfer of his medical society membership to the Kitsap County Medical Society ("KCMS") (CX 58–60). In January 1975, the ophthalmologist's name, specialty and address appeared in a one-inch space at the bottom of an optical dispensary's advertisement in the local newspaper (CX 61B). Early the next month, the physician, who chaired the local hospital's Department of Ophthalmology, wrote to the Executive Director of the Washington State Medical Association ("WSMA") stating that the advertisement might be a breach of professional ethics (CX 61A).

In February 1975, the Executive Director of WSMA wrote to the Executive Secretary of KCMS regarding the physician complaints about the ophthalmologist's advertisement (CX 62). The WSMA official called KCMS's attention to Opinion 6 of Section 5 of AMA's 1971 *Opinions and Reports* and stated that Dr. Lundvick's ad appeared to be contrary to it (CX 62).

The Kitsap Physicians Service is the local medical services insurance carrier (CX 838B, E). The Kitsap Physicians Service accepts as participating physicians only members in good standing of KCMS or other component medical societies of WSMA (CX 838E). In 1975, the Secretary-Treasurer of the Kitsap Physicians Service, Michael B. Merwick (CX 56A), was also the Executive Secretary of KCMS (CX 62). The President of KCMS, Dr. Michael Gass (CX 69), was a Director of Kitsap Physicians Service (CX 56A). Dr. Thomas Schubert, the partner of the physician who had filed the advertising complaint against Dr. Lundvick (CX 61A), was the President of Kitsap Physicians Service (CX 56A). On February 25, 1975, the Board of Directors of the Kitsap Physicians Service voted to withhold payment of Dr. Lundvick's patient insurance claims until the medical society completed its study of the ethics question regarding the advertising (CX 56B, 63).

KCMS determined that Dr. Lundvick's advertising was unethical (CX 64–65), and WSMA wrote to Dr. Lundvick to call his attention to the Principles of Medical Ethics, as they appear in the AMA's 1971 *Opinions and Reports* (CX 68). In its letter, WSMA quoted Opinion 20 of Section 5 in AMA's 1971 *Opinions and Reports*, which reads in part: "The practice of medicine should not be commercialized nor treated as a commodity in trade. Respecting the dignity of their calling, physicians should resort only to the most limited use of advertising. . ." (CX 68, 462Z9). [150]

The original complainant and a second ophthalmologist sent new complaints to KCMS about Dr. Lundvick's advertising in April 1975 (CX 66–67). The KCMS Ethics Committee summoned Dr. Lundvick to a meeting in May, at which time he stated that he would stop all advertisements placed by himself or the optician (CX 70). Dr. Lundvick submitted a letter to KCMS apologizing for "the entire affair" and stating that "this situation will never happen again" (CX 73B). Kitsap Physicians Service then stopped withholding payment of, and again began processing, Dr. Lundvick's patient insurance claims (CX 72).

### Dr. Ralph Robinson

114. In 1976, a local medical society in Knoxville, Tennessee,

prohibited physicians from affiliating with clinics which advertised in the public media. The ruling, based on the advertising restrictions in AMA's 1971 *Opinions and Reports*, led a reputable abortion clinic in Knoxville to curtail its advertising efforts.

In the latter half of 1975, several abortion clinics, including the Volunteer Medical Clinic, were operating in Knoxville, Tennessee, and advertising in the Knoxville newspapers (Tr. 690, 652-53, 7598, 7600). The Volunteer Medical Clinic, staffed by Drs. Ralph Robinson and Catherine Gilreath (Tr. 636-37), was receiving referrals from Planned Parenthood (Tr. 7632) and the county health department (Tr. 640). The Clinic had not been the subject of any substantiated complaints regarding the quality of care it provided (Tr. 7630-31, 7676). A wholly unrelated facility (Tr. 7600), the Volunteer *Abortion* Clinic, was raided by the police, in August 1975, for performing "abortions" on women who were not pregnant (Tr. 7609-10). The local district attorney has since obtained felony convictions against several staff members of the Volunteer Abortion Clinic (Tr. 7617-18, 7625-26).

In August 1975, a Knoxville orthodontist complained about abortion clinics in a letter (CX 39) to the chairman of the Ethical Relations Committee of the Knoxville Academy of Medicine, the local AMA component society (Tr. 7648; CX 47A, Z2, Z3). The orthodontist wrote: "Since at least one of the physicians involved with the local abortion clinics (Dr. Catherine Gilreath of the Volunteer Medical Clinic) is a member of the Knoxville Academy of Medicine, cannot pressures be brought to bear upon your own society members which would help solve some of these problems?" (CX 39). [151]

At a meeting to discuss abortion clinic advertising on November 18, 1975, the Knoxville Academy's Judicial Council adopted a motion announcing that it "strongly supports" Opinions 6, 7, 8, 9 and 12 of Section 5 of AMA's 1971 *Opinions and Reports* relating to solicitation and advertising (CX 40A, 462Z5 - Z7). On January 20, 1976, the Academy's Judicial Council voted to go on record as being opposed to any member of the Knoxville Academy of Medicine performing medical or surgical procedures with any organization that advertises or solicits patients in the nonmedical media (CX 41). By letter of February 3, 1976, the chairman of the Judicial Council conveyed the January 20th motion to Drs. Gilreath and Robinson of the Volunteer Medical Clinic and to other physicians associated with Knoxville abortion clinics (CX 1932, 49, 41). That same day, Dr. Gilreath resigned from the Volunteer Medical Clinic, sending carbon copies to the Knoxville Academy and to Baptist Hospital (CX 43A).

Dr. Gilreath's resignation hindered the Volunteer Medical Clinic's operation. Complications are rare with first trimester abortions (Tr. 633); however, it sometimes becomes necessary to hospitalize a patient undergoing such a procedure (Tr. 650). Dr. Gilreath's resignation left no physician on the Clinic's staff with admitting privileges at any Knoxville hospital (Tr. 716-17, 657). The Clinic could get other doctors to admit its patients to hospitals, but this method was not preferred since it might result in unnecessary surgery if the patient was referred to a doctor who was not familiar with the case (Tr. 650-51, 716).

In early 1975, Dr. Robinson had applied for staff privileges at Baptist Hospital, partly to be in a position to hospitalize complicated cases from the Volunteer Medical Clinic on his own (Robinson 650). Dr. Robinson, who testified in this proceeding, is a board certified obstetrician-gynecologist, a consultant to several pharmaceutical manufacturers and the State of Kentucky and a twice elected president of his own Bell County (Kentucky) Medical Society (Tr. 625-28). The hospital rejected his application in late 1975 (Tr. 651-52), stating in a letter to him:

> [W]e understand your practice in this community will be largely related to one of the abortion clinics. Our Executive Committee questions the propriety and ethical considerations of the daily newspaper ads. Our concern is based upon the *Judicial Council Opinions and Reports* of the American [152] Medical Association; namely, on pages 24-25 [CX 462Z6, Z7] and I quote: 'The ethical principle remains: no physician may solicit patients. A physician may not do indirectly that which he may not do directly. He may not permit others to solicit patients for him.' Our By-Laws clearly state that any member of our staff must abide by the Code of Ethics of the American Medical Association (CX 48).

The Volunteer Medical Clinic receives approximately one-third of its patients through referrals from local physicians (Tr. 705). The Clinic has curtailed its marketing efforts due to concern about agitating doctors in the community (Tr. 640-42). Fearing that its activities would be considered advertising by the medical profession, the Clinic has refrained from distributing its newsletter or brochures to the general public (Tr. 639-42, 716), and has omitted fee information and the names of the Clinic's staff physicians from its newsletter (Tr. 643, 646). In June 1977, the Clinic stopped advertising in the newspapers and other mass media because of objections of local physicians and the opinion by the Knoxville Academy of Medicine that it was unethical (Tr. 671-73, 675).

In the absence of the ethical prohibition against advertising, the Volunteer Medical Clinic would like to advertise its services and fees in newspapers and on radio and television (Tr. 644-45, 674). An abortion performed at a Knoxville hospital costs between $450 and $600; an abortion performed at the Clinic costs $175 (Tr. 634-36).

## Additional Newspaper Advertising Incidents

115. In late 1974, the Secretary of the Medical Society of the County of Chautauqua, New York, wrote the Chairman of the AMA Judicial Council to ask whether or not a government funded, not-for-profit health clinic, sponsored by the county health department and designed to provide screening services and general practice medical care in a rural setting, could ethically post notices in the public media listing services, hours, telephone numbers, etc. (CX 770). The Secretary of the AMA Judicial Council responded that, under the AMA's Principles of Medical Ethics, a physician may not solicit patients, directly or indirectly (CX 769). The AMA official stated that the only proper announcement regarding this clinic from the ethical point of view would be an announcement by the medical society itself advising that such services are available for the type of clientele entitled to use the facility (CX 769). [153]

In 1973, the Travis County (Texas) Medical Society sent to the Texas Medical Association a copy of a small advertisement by a company performing physicial examinations which had been published in a local newspaper (CX 725). The medical society stated that the ad was soliciting medical examinations and was a violation of the ethics of the American Medical Association (CX 725). Noting the "ethical implications of this solicitation practice," the Texas Medical Association referred the complaint to one of its district councilors to resolve the matter with the medical director of the organization which had placed the advertisement in the newspaper (CX 723).

Acting on a referral from respondent CSMS and relying on AMA's *Opinions and Reports*, the Fairfield County Medical Society advised a physician in 1972 to cease and desist from running a newspaper box advertisement that patients could attend his smoking clinic sessions for $35 (F. 95, p. 119).

In March 1976, the Chairman of the Massachusetts Medical Society's ethics committee announced that a hospital's newspaper advertisement of its facilities and services would be unethical if done by doctors (CX 880-81).

As of early 1978, the Maricopa County Medical Society in Phoenix would not permit advertisements announcing even the opening of a physician's office (Tr. 7254).

AMA and various of its member medical societies have also restricted the newspaper advertising of health maintenance organizations and other group prepaid health plans during the 1970's (F. 103-07, pp. 135-43).

### 3. *Radio and Television Advertising*

116. AMA and local medical societies have restricted physician advertising on radio and television. In 1969, a physician wrote to AMA asking whether it would be ethical to announce on radio and in the newspaper his plan to sponsor a "pap smear clinic" to promote preventive medicine. The physician and his associates proposed to offer pap smears and pelvic examinations at a reduced fee for a week (CX 170A). The AMA Department of Medical Ethics responded that the kind of public announcements which were necessary should not be made by individual practicing physicians, and that ethically the physician could notify only his own patients (F. 95, p. 119). [154]

### James Martin

117. In 1973, Medi-Call, Inc., a firm in Johnson County, Kansas, near Kansas City, Missouri, initiated a commercial physician house-call service (Tr. 1546-47). James Martin, President of Medi-Call, testified in this proceeding. He stated that, for an annual fee of $50, Medi-Call offered to residents of northeastern Johnson County up to two night house-calls by a physician, when needed, at no charge, and subsequent visits for $25 each (Tr. 1548, 1550). Medi-Call hired physicians to provide the coverage (Tr. 1554). Before Medi-Call launched its house-call service, a resident of northeastern Johnson County needing medical attention at night generally had to go to the area's one hospital emergency room. Overcrowding there made for long waits and the emergency room's charges were usually greater than Medi-Call's fees (Tr. 1549-51). Private physicians in the area generally did not make house calls (Tr. 1550).

Medi-Call officials decided that extensive advertising would be needed to get the enterprise started (Tr. 1556). To avoid antagonizing local doctors, Medi-Call officials contacted the Johnson County Medical Society to make sure the advertising would be ethical (Tr. 1556-58). The medical society replied that the advertising would be ethical as long as it included no physicians' names (Tr. 1558). Medi-Call started an advertising campaign in July 1973, to promote the house-call service through radio, television, newspapers and billboards (Tr. 1558-59). Medi-Call did not identify physicians in the advertising and refrained from giving the names of participating physicians to persons over the telephone (Tr. 1559-60).

In August 1973, Medi-Call's attorney received a letter from the

Area Medical Council declaring that the firm's advertising was not only unethical but illegal (CX 737D–F). The Area Medical Council consisted of the top officers of four AMA component medical societies, including the Johnson County Medical Society (CX 2020A, L), Jackson County (Kansas City) Medical Society (CX 1908A, D; Tr. 1561) and two additional physician organizations in the region (CX 737A). In 1973, the Jackson County Medical Society was the largest contributor of operating funds to the Area Medical Council; the Society staffed the Council and the Society's immediate past president was the Council's chairman (Tr. 5717–21). The Jackson County Medical Society was the first group to object to Medi-Call's advertising and encouraged the Area Medical Council to send the letter to Medi-Call (CX 2163B–C, 2154B, 2155A, B). The Society based its position on the Principles of Medical Ethics and the possibility that the activity might violate state statutes (CX 737C, 2154B). [155]

The Area Medical Council simultaneously sent to all hospitals in the Greater Kansas City Area copies of its letter to Medi-Call (CX 737E). The Council wanted the hospital administrators to be able to place copies in the hands of each resident and intern for their information and appropriate action if they were affiliated with Medi-Call (CX 737E). Upon receipt of the Area Medical Council's letter, Medi-Call ceased all advertising. The decision was based on the letter's assertion that Medi-Call physicians were putting their professional careers in jeopardy if Medi-Call continued to advertise (Tr. 1563, 1564).

In response to an inquiry from Medi-Call, the Attorney General of Kansas issued an opinion declaring that the firm's operations and advertising were legal (CX 737I–K). The Kansas Board of Healing Arts subsequently sent Medi-Call a letter also stating that its "operation is not considered in violation of the law" (CX 2158).

At a meeting with Medi-Call representatives in October 1973, the Area Medical Council was informed of the Kansas Attorney General's opinion but the Council declared that Medi-Call's advertising was nonetheless unethical (CX 2156B, E, L; Tr. 1566, 1569, 1576). Dr. C. Y. Thomas, President of the Jackson County Medical Society (CX 737F), stated at the meeting:

> [T]he legal opinions of Vern Miller [the Attorney General of Kansas, CX 737K] . . . [have] nothing to do with our Canons of Ethics, [and] the threat of professional boycott to your client [Medi-Call] I think is significant and most assuredly will occur . . . .
>
> Now listen here you are legal but we are still declaring you unethical . . . . [I]f you continue advertising, I will continue to believe that you are unethical. The fact that you are legal doesn't influence me at all . . . . Now if you want to criticize the system

> that brought me up to believe this, criticize it . . . . Your client didn't know the Canons of Ethics and that's that. He needs the book read to him and that's what we're doing. You understand that? (CX 2156 A, B, E, L). [156]

In November 1973, the Area Medical Council wrote to the Secretary of the AMA Judicial Council to obtain an opinion on Medi-Call's advertising (CX 737). The letter enclosed a copy of the Kansas Attorney General's opinion (CX 737I–K). The AMA official responded, in relevant part: "Physicians may not solicit patients according to traditional and accepted ethical standards . . . . One need not, indeed should not, abandon true ethical principles because of some new, legally permitted practice" (CX 736).

The Area Medical Council considered the AMA letter along with advisory letters from several osteopathic associations at its meeting of December 5, 1973, and voted to advise Medi-Call that, despite the legal approval of their operation, the Area Medical Council still considered their advertising practices unethical (CX 2160B). The council sent a letter containing this opinion to Medi-Call (CX 2161).

Medi-Call resumed marketing its house-call service in July 1974, but only through direct-mail promotions (Tr. 1597–98; CX 738). It did not resume radio advertising because of the Area Medical Council's continued opposition (Tr. 1635). The opposition of the medical societies interrupted Medi-Call's promotion of its house-call service for almost a year (Tr. 1635). This long interruption caused Medi-Call to lose momentum and depleted its financial resources (Tr. 1600–01). The action of the societies contributed in part to the financial failure and termination of Medi-Call's physician house call service (Tr. 1600–01, 1635–36).

### 4. *Publicity in the News Media*

### a. General Restrictions on Media Publicity

118. AMA and its constituent and component medical societies have restrained, and acted to restrain, physicians from inducing or permitting unpaid publicity about their practices in the news media. AMA's 1971 *Opinions and Reports* contains a number of restrictions on physician publicity.

Opinion 6 of Section 5 states: "Among unethical practices are included the not always obvious devices of furnishing or inspiring newspaper or magazine comments concerning cases in which the physician or group or institution has been, or is, concerned" (CX 462Z5). [157]

Opinion 13 of Section 10 prohibits "self-exploitation" by means of physician publicity and requires physicians to clear certain publicity with their local medical society in advance (CX 462Z44). The Opinion states, in part: "Photographs of physicians in connection with civic or social affairs, not related to medical news or the care of patients, may be published unless the frequency of such photographs bespeaks self-exploitation. This applies also to magazine articles. Physicians should clear such publicity, whenever possible, with their county society" (CX 462Z44). The 1977 *Opinions and Reports* contains a similar provision (RX 1, p. 35).

Opinion 13 declares that "adherence to the Principles of Medical Ethics" is "expected" of any physician when appearing on TV or radio programs, or in other media of public information, such as newspapers and magazines (CX 462Z44). With respect to physicians' articles in national lay magazines and newspapers, Opinion 5 of Section 10 urges inclusion of a footnote stating "that the article as written had the approval of the county or state, or both, medical societies" (CX 462Z40). Opinion 6 of Section 10 states that, "[i]t is not improper for physicians, *not in active practice,* to write health columns for lay readers" (CX 462Z40) (emphasis added).

Several AMA constituent and component medical societies have issued guidelines interpreting AMA's ethical restrictions on physician publicity. The Los Angeles County Medical Association, seeking to aid the physician in upholding the Principles of Medical Ethics, published a "Press, Radio and Television Code of Cooperation" in 1967, which discouraged personal publicity or advertising (CX 179). Citing a provision of Section 5 of the AMA Judicial Council's 1964 *Opinions and Reports,* the Code cautions physicians that "repeated appearances in the news media or . . . appearances which are obviously planned for the purpose of publicizing the physician will be considered as advertising, which is unethical" (CX 179C). The Code also requires physicians to obtain medical society clearance for all medical appearances except in special circumstances (CX 179C), and prohibits individual physicians from calling press conferences (CX 179E).

In 1975, the Chicago Medical Society adopted guidelines specifying the limited types of information which a physician may include in a news item in a neighborhood newspaper to announce the opening of his practice (CX 2122B; F. 95, p. 120). [158] The guidelines state that telephone numbers are not considered appropriate (CX 2122B). Edwin Holman, Director of the AMA Department of Medical Ethics, participated in the writing and approval of the guidelines (F. 95, p. 120).

In February 1976, the Santa Clara County (California) Medical

Society published guidelines prohibiting promotional statements which are considered self-aggrandizement or solicitation (CX 751C).

The August 1976 compendium of ethics rulings published by the AMA constituent society in Maryland cites the AMA Judicial Council as authority for the ethical policy that only physicians not in active practice should author newspaper columns (RX 308, p. 31).

The Maricopa County Medical Society, an AMA component society in Phoenix, Arizona, which requires its members to abide by the AMA Principles of Medical Ethics (CX 1568C, E), published a "Radio-Press and TV Code" in 1972 (CX 1415B–E, 898). The Code declares, in relevant part:

> A physician shall not be the subject . . . of any form of advertising or publicity nor shall he (or she) knowingly seek or encourage publication, filming, or other presentation of reports through lay channels . . . which shall be of such character as to invite attention to him (or her) of his (or her) professional position, qualifications, achievements, attainments, specialties, appointments, associations, affiliations (hospital, foundation, clinic group or institute) or honors which are of such a character, or in such manner, as would ordinarily result in aggrandizement, or as may reasonably be interpreted as seeking it. To do so, constitutes unprofessional conduct (CX 898D).

The Code contains provisions which discourage the use of physicians' names in media publicity (CX 898D) and label as unprofessional conduct the printing of physicians' addresses or telephone numbers in programs or articles of general public medical information (CX 898F). The Code condemns as unprofessional conduct any regularly appearing radio broadcast, television appearance, or signed column by a physician in active practice, which is not specifically authorized by the Medical Society (CX 898G). In drafting the "Radio-Press and TV Code," the Medical Society was influenced by AMA's 1960 *Opinions and Reports* provisions relating to advertising and solicitation (CX 1919S–U). [159]

b. Incidents Involving Physician Publicity

119. In 1967, an AMA component medical society (CX 1979C, E, 475H, K) asked AMA to comment on a physician's article on heart care published in *Seattle* magazine (CX 145A). In reply, AMA sent copies of Opinion 4 of Section 10 of the 1964 *Opinions and Reports* (CX 465Z11, 462Z39, Z40) and the media guidelines which AMA included as Opinion 13 of Section 10 of its 1971 *Opinions and Reports* (CX 462Z42–Z45, 145A). AMA also offered a standard for the local society to apply in determining whether the physician had acted improperly:

> If it finds that the article was instigated by a particular physician for his own self

aggrandizement or finds in its preparation an attempt of a particular physician to aggrandize himself, then perhaps the Media Relations Committee might want to present this matter to the Ethics Committee for further consideration (CX 145A).

A 1971 article published in the *New York Times Magazine* concerning the physician for the Jets football team included a footnote stating that permission to do the article had to be obtained at considerable delay from the Medical Society of the County of New York. The Society's executive director sent a copy of the article to the Secretary of the AMA Judicial Council (CX 177). The AMA official wrote back to commend the county medical society "for the manner in which this feature story was handled" (CX 175, 516E).

The Knoxville Academy of Medicine, an AMA component society (F. 114, p. 150), asked AMA in 1972 whether it would be ethical for a dermatologist to write a column for a local newspaper (CX 184). The Director of the AMA Department of Medical Ethics responded with a copy of the 1971 *Opinions and Reports* and the advice that Opinion 6 of Section 10 (CX 462Z40) suggests that it is inadvisable for physicians in active practice to write health columns for lay readers (CX 183).

In 1973, the Bergen County (New Jersey) Medical Society sent AMA a local chamber of commerce publication containing an article by a former president of the Medical Society, entitled "Preventive Medicine-Its Importance to Business and Industry" (CX 36, 1747). The Medical Society asked whether the article was a "questionable case as far as [160] advertising is concerned" (CX 36). In its reply, AMA referred the Medical Society to Section 10 of the 1971 *Opinions and Reports* (CX 462Z38 - Z45) and commented, "[I]f one physician extols his own services, facilities, competence, etc. what is to prevent another physician from doing likewise and then what is the need of a medical society at all?" (CX 1747).

In June 1974, a member of the CSMS Council, the executive body of CSMS (F. 11, p. 9), filed a formal complaint with NHCMA concerning alleged advertising by an NHCMA member physician who practiced acupuncture (CX 701A). The NHCMA Board of Censors considered the charges at a June 24, 1974, meeting attended by the accused physician (CX 701A, B). The Board indicated that a newspaper article based on an interview with the physician on "the medical approach to acupuncture . . . left a feeling like it was advertising" (CX 172A). The Board consulted Opinion 4 of Section 10 in AMA's 1971 *Opinions and Reports* (CX 701B, 462Z39-Z40); it warned the physician never again to discuss this subject with the daily papers (CX 172A) and to disseminate information through recognized medical journals in the future (CX 701A). The Board decided not to take further action largely because the physician had granted the newspaper and television interviews in question as chairman of the official CSMS Ad Hoc Committee on Acupuncture (CX 172A, 701A, B). After hearing a report from the Peer Review Committee, the NHCMA Board of Governors decided to furnish transcripts of the NHCMA proceedings on the matter to the CSMS Council (CX 173A, B).

## Dr. Edward Diethrich

120. In the early 1970's, the Maricopa County (Arizona) Medical Society ("MCMS") denied membership in the society to Dr. Edward Diethrich, a cardiovascular surgeon and director of the Arizona Heart Institute, on grounds of unethical advertising and publicity based on the Society's "Radio-Press and TV Code" and the AMA Principles of Medical ethics. The MCMS, the AMA Judicial Council and other professional medical societies participated in the actions against Dr. Diethrich because of the alleged unethical advertising and publicity. Dr. Diethrich testified in this proceeding that these actions by the MCMS and the AMA had adversely affected the Arizona Heart Institute.

Dr. Edward Diethrich is a board certified cardiovascular surgeon practicing in Phoenix, Arizona (Tr. 1262). He has won a number of awards for his achievements in medical education, research and practice, including two major scientific awards from AMA (Tr. 1264, 1265, 1270-71, 1280-81). He trained under, and later worked closely with, the noted cardiovascular surgeons in Houston, Drs. Michael DeBakey and Denton Cooley (Tr. 1265-67). In addition to performing [161] over 1,000 heart operations a year in Houston, he was an assistant professor of surgery at the Baylor College of Medicine and conducted research (Tr. 1266-70). During this period in which Dr. Diethrich was an active member of AMA, he frequently attended conventions and presented papers and scientific exhibits (Tr. 1274). He testified that he valued his AMA membership for the opportunity it gave him and his associates to present their scientific work to the medical world, for the assistance it provided him in applying for research grants and obtaining patient referrals and for the prestige it accorded him (Tr. 1274-76).

In 1971, Dr. Diethrich and a team of physicians moved to Phoenix and established the Arizona Heart Institute for the study and treatment of cardiovascular problems (Tr. 1281-83). The Institute, which occupies a specially constructed wing of a hospital, brought the latest diagnostic and treatment procedures to Phoenix (Tr. 1283-

91). The Institute also charged fees which were often less than those of competing cardiovascular surgery practices (Tr. 1357-58).

In the spring of 1971, the Arizona Heart Institute held a press conference to publicize its establishment and the programs it would be introducing (Tr. 1294). In May 1971, the President of MCMS wrote Dr. Diethrich that:

> The physicians in this area have traditionally adhered to the code of ethics regarding all publicity and have cleared news releases, public speeches, T.V. appearances and other public contacts through the Society.
>
> I would request that public relations efforts regarding the institute be kept strictly within acceptable ethical bounds so that all physicians in this city will be fairly regarded (CX 1407).

On March 6, 1972, the chairman of the Medical Society's Professional Committee wrote to the director of public relations at the hospital with which the Arizona Heart Institute was associated. He thanked the hospital's public relations staff for attending a meeting with the Professional Committee, and expressed his feelings that the Institute was a superb facility with an unusually qualified director and his hope that the public relations department of the hospital and the Professional Committee would work with one another. He also [162] expressed concern that unusual publicity for any one group of physicians usually creates antagonism in other physicians (CX 1408A). In April 1972, the chairman of the Professional Committee complained about Dr. Diethrich's "self aggrandizing" publicity in a letter to the chief of staff of the hospital with which the Arizona Heart Institute was affiliated (CX 1409). The letter stated that Dr. Diethrich was not a member of the Medical Society so that the Society did not have jurisdiction over his activities, but the letter noted that the chief of staff of the hospital could remind the hospital staff and the hospital board of trustees that Dr. Diethrich's constant publicity has become self-aggrandizing. The letter also referred to possible loss of referrals as a result of continued publicity: "[The publicity] has antagonized many physicians in Phoenix against the Institute. It would be a shame that a facility like the Arizona Heart Institute would find no support among referring physicians and other physicians" (CX 1409).

In June 1972, the Medical Society's Professional Committee invited Dr. Diethrich to a meeting to question him about his recent network television appearances on the Johnny Carson and Dick Cavett Shows (CX 1410; Tr. 1299-1300). Dr. Diethrich did not attend the June meeting. At a meeting of the Society's Board of Censors in September, Dr. Diethrich was told he would have to abide by the

Society's Radio, Press and TV Code. Dr. Diethrich stated that he could not abide by the Society's Code (CX 1413A-B) and still raise enough funding for the continued development of the Institute (Tr. 1303-06). As a result, the Board of Censors voted to table his application for membership in the Medical Society (CX 1413A; Tr. 1306).

Prior to the meeting, the Board chairman told Dr. Diethrich that the Society's opposition to the Institute's publicity was due to some members' feeling that the publicity was "unfair economic competition" (Tr. 1308).

Shortly thereafter, *Life Magazine* published a highly complimentary article on Dr. Diethrich and his Arizona Heart Institute (CX 2010). On October 12, 1972, the MCMS wrote to AMA enclosing a copy of the article and seeking AMA's advice: "The members of our Board of Censors feel that this is an example of blatant self-advertising and is not in accordance with the AMA code of ethics. We would like to have your opinion as to what might be done to curb Dr. Diethrich's endeavors to publicize himself" (CX 1415). The Secretary of the AMA Judicial Council responded by referring the Medical Society to the *Opinions and Reports* relating to solicitation, advertising and publicity, and commenting that "[i]t seems to me you are following the dictates of fair practice . . ." (CX 1416). [163]

On October 18, the Medical Society asked Dr. Daniel Cloud, a Phoenix physician who was then a member of the AMA House of Delegates (CX 2014H) and who, since 1974, has been a member of the AMA Board of Trustees (CX 1535A,-D), to chair a committee to study the Arizona Heart Institute's publicity and make recommendations "concerning replies" to it (CX 2013). Dr. Cloud met with Edwin Holman, secretary of the AMA Judicial Council, in late October to discuss the issue of Dr. Diethrich's publicity (CX 1417A).

In an October 31, letter to the MCMS referring to the meeting, Mr. Holman stated: "Two ethical concepts, of course, are applicable: solicitation of patients and upholding the dignity and honor of the profession" (CX 1417A). Noting that it might be difficult for the Medical Society to prove sufficient intent to solicit on the part of Dr. Diethrich "to support a charge of unethical conduct," Mr. Holman stated, "as there are several ways to skin a cat there are different ways to handle this problem" (CX 1417A). One suggestion by Mr. Holman was counter publicity and an editorial to be published in the medical society's bulletin, with copies left in hospital waiting rooms for public access (CX 1417B).

In his report to MCMS in November, AMA delegate Cloud noted his meetings with the AMA staff, including two AMA staff attorneys, and concluded that the Arizona Heart Institute's publicity "appears to have violated medical ethical concepts with respect to advertising, solicitation of patients, and the boasting of cures and extraordinary success and ability" (CX 1418A). Dr. Cloud recommended that the Medical Society take final action on Dr. Diethrich's application for membership and consider other actions, including the publishing of a general statement "on the malethics of physician advertising" based on "excerpts from the reports of the Judicial Council of the AMA" (CX 1418B–C).

In December 1972, Dr. Diethrich informed MCMS that he would abide by its code of ethics, and the Society's Board of Censors voted to accept him for probationary membership (CX 1421). A month later, a group of Medical Society members, including Dr. Arthur Nelson, a cardiovascular surgeon whose group performed large numbers of the same type of surgical procedures as the Arizona Heart Institute (Tr. 7336, 1293), petitioned the Society's Board of Directors to reverse the Board of Censors' decision to admit Dr. Diethrich to membership (CX 1422). One of the items which Dr. Nelson objected to was a February 1973, newspaper photograph of a Motorola Corporation representative presenting Dr. Diethrich [164] with a check for $5,000 for the Arizona Heart Institute in recognition of its contributions to the advancement of heart surgery (CX 1424B, 1423C; Tr. 7331–32). In March 1973, the Board of Directors reversed the earlier decision admitting Dr. Diethrich and denied his application for membership due to his advertising (CX 1426). Dr. Diethrich has attempted three times since late 1971 to join AMA directly, but his applications were returned to him because he was not a member of the AMA component society in Phoenix (Tr. 1277, 1346–47).

The President of the Allegheny County Medical Society in Pittsburgh wrote to the Secretary of the AMA Judicial Council, in January 1973, to complain about the article in *Life Magazine* as "yet another example of a gross breach of basic medical ethics on a grand scale" (CX 167A). The AMA official responded that he had been told that the medical community in Phoenix, including the local medical society, "is active in its efforts to persuade the individual to cease these practices" (CX 168B). He further commented:

> Your letter seems to me to point out that there will always be someone out of step, either innocently or deliberately. Lawyers are disbarred. Clergymen are unfrocked. Human nature remains. The LIFE article is notorious but it is not being overlooked. What voluntary, permissible actions within organized medicine can be taken, are being taken (CX 168B).

In June 1973, MCMS wrote to the American College of Surgeons ("ACS") for advice as to the ethics of the publicity surrounding Dr.

Diethrich (CX 1429). ACS, of which Dr. Diethrich had been an active fellow (Tr. 1365-67), endorses the AMA Principles of Medical Ethics as standards to govern the conduct of their physician-fellows (CX 1911B). In response to the Medical Society's inquiry, ACS referred the Medical Society to Opinion 6 of Section 5 of AMA's 1971 *Opinions and Reports*, stating that, "solicitation of patients directly or indirectly, by a physician, or by groups of physicians is unethical" (CX 1430A, 462Z5). ACS subsequently brought its own disciplinary proceeding against Dr. Diethrich and put him on three years' probation for solicitation of patients, which included a ban prohibiting Dr. Diethrich from presenting scientific papers or exhibits to the College (Tr. 1371-72). Dr. Diethrich received the same penalty from [165] another specialty society to which he belonged, the Society of Thoracic Surgeons (Tr. 1387-89). That Society's bylaws require its members to adhere to the AMA Principles of Medical Ethics (CX 1981, p. 96).

Since 1973, the Arizona Health Institute has become less visible and more restrictive in bringing its programs before the public (Tr. 1343). It has experienced difficulty in raising funds because of an inability to bring its program to the public (Tr. 1346). The Institute has also been stigmatized in the eyes of potential patients (Tr. 1349), and has suffered a dramatic decrease in the number of patients referred to it (Tr. 1346). These problems are attributable, at least in substantial part, to the actions of AMA, MCMS, ACS and the Society of Thoracic Surgeons against Dr. Diethrich (Tr. 1342-49, 1375-78, 1394).

AMA also correctly points out that the *Life Magazine* article (CX 2010) was in some respects flamboyant (Tr. 7280), and that Dr. Diethrich himself found it distasteful and was disturbed by the overall impression that it left (Tr. 1312, 1433; RX 382). The *Life* article may imply to some that the Institute's facilities and Dr. Diethrich's skills were unique and of extraordinary quality (Tr. 7280-81). More specifically, the article contains the statement that Dr. Diethrich is one of the world's best heart surgeons (CX 2010), a statement which would be difficult to justify (Tr. 7281-82). A group of eminent cardiac surgeons concluded that Dr. Diethrich's competency in certain areas, particularly mitral valve surgery, was below the national standard (Tr. 7282, 7289-90).

The *Life* article (CX 2010) quotes Dr. Diethrich as claiming that his team can identify in advance 90% of all likely heart attack victims. The *Life* article indicates that Dr. Diethrich can prevent most heart attacks in those who have been discovered to be potential victims by doing a coronary bypass and that he performs bypass operations on patients who are in the midst of a heart attack (CX 2010). The article claims that Dr. Diethrich will perform bypasses on those with hearts already too far gone for most surgeons to touch (Tr. 7298). The article indicates that it took Dr. Diethrich only 90 minutes to do a coronary bypass on one identified patient and 70 minutes to do another such procedure (CX 2010). The *Life* article notes that Dr. Diethrich may do 10 operations per day. These statements, and others in the article, may imply to some that Dr. Diethrich possesses unique, special skills, and that the Arizona Heart Institute has equipment and performs tests and procedures not utilized by others, when such is not the case (Tr. 7291-7310). **[166]**

The *Life* article indicates that, when Dr. Diethrich was 16, an obliging general surgeon let him do one side of a vasectomy. The article states that Dr. Diethrich's technology threatened to make obsolete the methods of practitioners in Phoenix with 40 years' expertise in reading resting EKGs. The article concludes with Dr. Diethrich disparaging a surgeon who would walk into a patient's room the night before an operation and say, "I'm not sure we'll be able to do the job tomorrow. You've got a bad heart, bad arteries, you might have a stroke and the blood pump might break down." These statements might, in fact, constitute a reasonable assessment of the probability of success and the degree of risk involved (Tr. 7315). In short, the article in question (CX 2010) is flamboyant, and could be deceptive and possibly disparaging of other physicians.

In 1974, under the provisions of the Arizona Medical Practice Act (RX 378, 389), the MCMS filed information with the Arizona State Board of Medical Examiners which had led the Society to conclude that the publicity efforts of Dr. Diethrich might constitute advertising in violation of state law (Tr. 1400; RX 387). The State Board admonished Dr. Diethrich for his participation in the publicity practices of the Arizona Heart Institute, which were "looked upon with disfavor" (Tr. 1403; RX 387, 388).

Dr. Diethrich is now a member in good standing of the American College of Surgeons and the Society of Thoracic Surgeons (Tr. 1385-89). Further, some of the decline in patient referrals at the Arizona Heart Institute can be attributed to the admonition of the Board of Medical Examiners (RX 387, 388) and to the stories appearing in the press at that time about malpractice actions pending against Dr. Diethrich (Tr. 1478-79). Dr. Diethrich's nonmembership in MCMS has not affected his ability to obtain malpractice insurance or to hold hospital staff privileges (Tr. 1408). Dr. Diethrich continues to receive referrals from throughout the United States (Tr. 1418-19), and from members of the AMA and the Medical Society (Tr. 1408-09). Dr.

Diethrich has also delivered several medical papers to scientific assemblages and has published a number of articles in respected peer-reviewed medical journals (Tr. 1412–13). He has participated in scientific exhibitions and has had his exhibits reviewed by his peers (Tr. 1413–14); and, he has produced and distributed several movies both to medical and lay audiences (Tr. 1414–16). [167]

## Dr. Leon Zucker

121. Dr. Leon Zucker, an ophthalmologist in Waterbury, Connecticut, is an NHCMA and CSMS member who testified on behalf of complaint counsel (Tr. 1709–11).

In April 1976, a newspaper article discussing an operation performed by Dr. Zucker appeared in both the *Waterbury Republican* and the *Waterbury American,* entitled, respectively, "John Leahy sights his future with hope after eye operation" and "He Eyes Chance to See Again After Rare Triple Operation" (Tr. 1716, 1759; CX 692; RNHX 91). The article described the operation, which involved cataract removal, corneal transplant and lens implantation, as "rare" and "unusual" (CX 692). The article was based on the reporter's interviews with the patient and Dr. Zucker (CX 692; Tr. 1718). The reporter had expressed an interest in the eye operation when, as a patient of Dr. Zucker, she had been in his office and Dr. Zucker had mentioned that the operation was a "fairly rare" one (Tr. 1718). Dr. Zucker is a board-certified ophthalmologist in Waterbury, Connecticut, who taught ophthalmology as a clinical instructor at Yale Medical School from 1964 to 1969 (Tr. 1709–12).

Dr. Zucker testified that he participated in the interview that resulted in the article because he thought the public had a right to know that such procedures are possible and that they are being done and can be done (Tr. 1720). At the time Dr. Zucker performed the operation, it was a rare triple operation in the sense that it was not performed very often by physicians in the area (Tr. 1719, 1755–57).

In early May 1976, Dr. Jerome K. Freedman, in his capacity as Vice President of CSMS, wrote to NHCMA to request an investigation of the newspaper article on Dr. Zucker (CX 2006A). Dr. Freedman, a New Haven ophthalmologist, stated that Dr. Zucker's "ophthalmic colleagues are not pleased with the articles which they regard as publicity" (CX 2006A; Tr. 1731). Shortly thereafter, the ophthalmologist-president of the Connecticut Society of Eye Physicians also wrote to NHCMA to complain about the newspaper article and to urge NHCMA "to take whatever action is necessary to discourage continued use of the local press for personal aggrandizement" (CX 2006B–C; Tr. 1732).

The Chairman of the NHCMA Board of Censors, Dr. Samuel Climo, wrote to Dr. Zucker in early June 1976, informing him of the two complaints and requesting his appearance before the Board of Censors at its next meeting (RNHX 92; Tr. 1720). Dr. Zucker believed that a disciplinary proceeding was being instituted against him that could result in expulsion from the society, and that expulsion would be the "death knell" of his professional life in Connecticut because malpractice insurance was obtainable only through NHCMA and CSMS (Tr. 1721-23; CX 1328). [168]

Dr. Zucker met with the NHCMA Board of Censors in July 1976, accompanied by his attorney (Tr. 1723-24; CX 695C). At the meeting, the Board presented the two ophthalmologists' complaint letters and noted that they raised a question of ethical behavior and self-aggrandizement (CX 695C; Tr. 1724). A major concern expressed at the meeting related to a statement in the newspaper articles, in which Dr. Zucker is quoted as saying, "He [the patient] was told he'd never see again, but we made them out to be liars." Some members of the committee stated that they understood the quotation to mean that Dr. Zucker was stating that other physicians who had previously seen or treated the patient were liars. Dr. Zucker testified that he thought the above-noted quotation was susceptible to misunderstanding, and that the phraseology of the statement as reported in the article was inaccurate (Tr. 1719, 1766-67; CX 692; RNHX 91). Another concern expressed at the meeting was that the article's headline was misleading to the public because it stated that the operation performed by Dr. Zucker is "rare" when, in fact, it is more accurately described as fairly rare or uncommon (Tr. 1718, 8483). Dr. Zucker said that he was sorry about the newspaper article (CX 695C). The chairman of the Board of Censors asked Dr. Zucker whether it wouldn't have been less embarrassing if the article had come through hospital sources (Tr. 1724-25). Dr. Zucker agreed to allow the publicity department of his hospital to write and handle future releases (CX 695C, 696, 697E).

Dr. Zucker was notified a few days after the meeting by receipt of a letter, written by the Chairman of the Board of Censors/Peer Review Committee to the NHCMA Executive Director, stating that no action need be taken. Upon receipt of the letter, Dr. Zucker believed that the matter had been concluded (Tr. 1767-68; CX 296). NHCMA's action made Dr. Zucker very circumspect about communicating any information to anyone (Tr. 1725). He was disturbed by the stigma associated with even being charged with unethical behavior and by the resulting impression of at least one of his fellow ophthalmologists in New Haven that he had been censured (CX 136C; Tr. 1745-

46). The NHCMA action also was expensive to Dr. Zucker, causing him to incur attorneys' fees and to spend time away from his practice (Tr. 1746–47).

## Dr. Lee Hirsch

122. In March 1975, an article was published in a Springfield, Massachusetts, newspaper describing a local ophthalmologist's performance of eye surgery through an [**169**] accepted cataract removal technique called "phacoemulsification" (CX 161Z69, Z70; RX 281; Tr. 4206, 4252, 830–36, 7813, 7883, 1714–15). At the time the article was published, the ophthalmologist Dr. Lee Hirsch, and his associate, Dr. Krawiec, were the only physicians in western Massachusetts performing eye operations by use of the phacoemulsification procedure (Tr. 892; CX 161H). In response to complaints from other Springfield ophthalmologists who did not perform this surgical procedure (CX 152–53; Tr. 874–75, 892) and action of the local AMA component medical society in Springfield (Tr. 868–74; CX 1838, 1990B, E, 885S, Y, 153), the Massachusetts Medical Society ("MMS") formally censured Dr. Hirsch in early 1977 for the newspaper article and subsequent newspaper publicity (CX 159, 150, 161; RX 277, 278, 280, 281). The MMS ruled that Dr. Hirsch had violated the prohibition on solicitation in the AMA's Principles of Medical Ethics (CX 150A, D, 159). As a result of the medical societies' proceedings against him, Dr. Hirsch incurred substantial legal expenses, lost practice time and patients, was temporarily removed from a hospital's emergency room roster, experienced difficulty in obtaining membership in the American College of Surgeons and suffered much aggravation (Tr. 892–93, 862; CX 161Z80, Z81, 1862). In general, the newspaper articles which appeared described. phacoemulsification and very favorably compared phacoemulsification to the more traditional intracapsular technique of cataract removal (RX 277, 278, 280, 281).

Phacoemulsification was developed by Dr. Charles Kelman in 1967 (Tr. 835). In this procedure, the surgeon breaks up the nucleus of the cataract with an ultra-sound needle vibrating 40,000 times per second, and then sucks out the emulsified material (Tr. 835–36). Nevertheless, the intracapsular method is the most widely accepted method of cataract removal (Tr. 833, 7840). In this procedure, the surgeon removes the entire cataract through an incision (Tr. 836–37). Dr. Hirsch took the Kelman course in phacoemulsification in 1974 (Tr. 830–31), and his practice since that time has been limited almost exclusively to the removal of cataracts by phacoemulsification. Since 1974, Dr. Hirsch has performed about 1,450 phacoemulsification operations and about 50 intracapsular extractions (Tr. 838–39). Dr.

Hirsch owns two Cavitron machines, the device which he uses to perform a phacoemulsification procedure (Tr. 839), each of which costs approximately $25,500 (Tr. 939). In late 1974 and early 1975, Dr. Hirsch apparently was seeking publicity of some kind (CX 150E, G, 161 O, 271, 273).

Dr. Hirsch testified in this proceeding as a witness for complaint counsel (Tr. 825, *et seq.*). **[170]**

Shortly after publication of the first article, entitled "Eye Surgery Goes Ultrasonic" (*Springfield Republican*, March 3, 1975) (RX 281), Dr. Hirsch was censured by and expelled from the Greater Springfield Ophthalmological Association for engaging in advertising and personal publicity without Association clearance, conduct which the Association found to be "reprehensible" (Tr. 855, 860; CX 161Z78–79). This Ophthalmological Association is not affiliated with the AMA (Tr. 903).

Two days after publication of the article (RX 281), Dr. Hirsch was asked by the Hampden District Medical Society to appear for a meeting (Tr. 871; CX 1838). At the meeting, which took place on March 13, 1975 (Tr. 873), it was decided to refer the matter to the MMS. The bylaws of the MMS provide that members shall be guided by the AMA's Principles of Medical Ethics (CX 1990E). At MMS, the Committee on Ethics and Discipline advised Dr. Hirsch that it believed the article in question was not in the best interests of the community in that it did not give a fair evaluation of the technique such as would enable a consumer to make an intelligent choice (Tr. 878, 5586, 5589). The Committee took the position that one who publicizes a new technique such as phacoemulsification should make sure that the public understands all aspects of the general situation (Tr. 5590). On the basis of its proceedings, the Committee concluded that the article was misleading (Tr. 5591).

The Committee suggested to Dr. Hirsch that he write to the *Springfield Republican* to try to have an explanation published to give the general public a more accurate description of phacoemulsification, and that he explain to physicians in the District Society what had happened and straighten the problem out at the local level (Tr. 5587; CX 1852). Dr. Hirsch did neither (Tr. 5587–88; CX 1852). The Committee recommended that Dr. Hirsch be censured and be suspended for one year. It advised him of his right to appeal to the Judicial Committee of MMS (Tr. 881, 5588, CX 161Z67). Dr. Hirsch did appeal to the Judicial Committee (Tr. 5588; CX 161Z68) and, after notice and a hearing (RX 375A–G; CX 161A–Z66), the Judicial Committee, on February 22, 1977, censured Dr. Hirsch for unethical conduct but did not suspend him from membership (Tr. 865, 5588; CX

159). The Judicial Committee stated that it censured Dr. Hirsch because the particular publicity at issue was "misleading to the average person" (CX 150D-E), and that Dr. Hirsch had done nothing "to attempt to correct the one-sided slant of the article" (CX 150G-H). The Judicial Committee of MMS, in censuring Dr. Hirsch, cited with approval the *Opinions and Reports* of the Judicial Council of the AMA concerning advertising and solicitation, including the 1976 revision of the *Opinions and Reports* (CX 150A-D, I). [171]

The March 2, 1975, article in question (RX 281) sets forth the purported advantages of the phacoemulsification technique without any discussion of the possible complications of the procedure (Tr. 4212, 4213, 4270) or the contraindications to the procedure (RX 288C). It leaves the distinct impression that phacoemulsification is superior to intracapsular surgery as a procedure for cataract removal (RX 281) when, in fact, such often is not the case (Tr. 7812-17, 7830, 7837; RX 288C, 293). The article emphasizes what the patient can do immediately after surgery (RX 281); however, the real measure of success of an operation is long term results (Tr. 4224, 4229, 7856-57).

In recent years, phacoemulsification procedures for cataract removal have been used less often than they once were (Tr. 7812-13, 7838). It is to be considered an adjunct to, and not a replacement for, older procedures (RX 288C). Dr. Robert C. Troutman, an extremely expert and talented ophthalmologist who testified in this proceeding, stated that only one-half of one percent of the cataract operations currently being performed at Manhattan Eye and Throat Hospital, where Dr. Troutman is surgeon director, are phacoemulsification procedures (Tr. 7812-13). It has been determined recently that complications of phacoemulsification obviated some of the earlier results claimed for the procedure (Tr. 7814). Dr. Troutman prefers the intracapsular procedure for cataract removal, which he described as "a good technique that is applicable on a worldwide basis and has a minimum of complications and particularly late complications" (Tr. 7840). Dr. Troutman is of the opinion that phacoemulsification should not be used on patients who are over 40 years of age (Tr. 7837), and that the procedure is seldom a procedure of choice in cataract removal operations (Tr. 7838).

### 5. *Yellow Pages Listings*

123. AMA and its constituent and component medical societies have restricted the form and content of physicians' listings in the telephone directory Yellow Pages. The American Telephone and Telegraph Company asked AMA, in 1965, to establish a national

policy governing the listing of physicians in the Yellow Pages (CX 535D). In June 1966, the AMA Judicial Council adopted and distributed to all state and county medical societies a set of "Guidelines for Telephone Directory Listings" by physicians (CX 534C-D, 533K, 673B-I). The AMA House of Delegates approved the Guidelines (CX 663). The AMA Guidelines proscribe the use of display or box advertisements by physicians and physician groups or clinics (CX 673D). They require uniformity of size and face of type (CX 673D). They declare that the name of a physician should not be listed in a telephone directory of a locality where he or she does not have an office, residence or hospital affiliation (CX 673E). They limit a physician to separate listings under no more than two specialties or subspecialties, which must be on the list [172] approved by AMA (CX 637D). The examples of acceptable Yellow Pages listings published in the Guidelines contain only the physician's name, address, phone number, specialty, if-no-answer phone number, residence address and phone number and office hours (CX 673G).

The AMA Judicial Council intended the Guidelines, among other things, to maintain the dignity of the medical profession and assure uniformity of practice from community to community (CX 637C). The Guidelines declare that it is incumbent on the county medical society to implement them for the local medical community (CX 673E), and the local medical societies' standards implementing the Guidelines may vary only to the extent that they do not allow a significant inroad on the general prohibition against solicitation (CX 669A).

In March 1975, AMA advised a professional corporation of psychiatrists who practice in Virginia and North Carolina that, under the Guidelines, the physician is expected to confine his listings to the area in which he maintains his principal practice (CX 663-64).

AMA has distributed the Guidelines and interpretations of them to physicians and member medical societies (CX 663-70, 672-73, 1646-47, 501E), and constituent and component medical societies of AMA have applied the AMA restrictions on telephone directory listings.

In 1969, the Hartford County Medical Association, a component society of respondents CSMS and AMA (CX 991D, 1657A, G, Q), wrote to respondent NHCMA, stating that certain New Haven area physicians were violating the Hartford Society's policy that physicians should not be listed in a telephone book (in this case the Bristol directory) unless they reside, have an office or have a hospital appointment in the area served by the phone book (CX 1822) [this is the ethical policy set forth in the AMA Guidelines for Telephone

Directory Listings (CX 673E)]. The Hartford County Society advised NHCMA that it had asked its members to comply with the requirement with respect to Yellow Pages outside Hartford County, and that it hoped NHCMA would do the same with respect to its member physicians (CX 1822). NHCMA informed the physician in violation of the policy that he should delete his listing from the Bristol phone book (CX 1821). The physician then asked the telephone company to remove his name from the Bristol directory and NHCMA passed this news on to the Hartford County Medical Association (CX 1820). [173]

In April 1975, a telephone company representative asked NHCMA whether NHCMA had any policy regarding telephone directory listings, and specifically inquired about the listings placed by a Dr. Henri Schapira of New Haven. The NHCMA Executive Secretary wrote to Dr. Schapira about the inquiry, and stated that NHCMA policy was that it is ethical for a physician to list himself in telephone directories in areas where he resides, has an office or has hospital privileges, and noted that NHCMA was going to seek advice from the Connecticut Psychiatric Association regarding aspects of Dr. Schapira's listings. The letter states that it is to inform Dr. Schapira of the matter and is a notice of NHCMA's existing policy (CX 677).

In June 1975, NHCMA wrote to AMA's Judicial Council for specific guidelines on these ethical issues, stating that NHCMA had been having problems in the telephone directory listings area (CX 672). In its reply, AMA enclosed a copy of its Guidelines for Telephone Directory Listings and advised NHCMA that "the county medical society . . . must assume a strong leadership role and insist that the guidelines be followed" and that "[i]t is incumbent on the county society to implement these guidelines. . ." (CX 673A). Before this response was received from the AMA, NHCMA's Executive Secretary again wrote to Dr. Schapira, stating that the NHCMA Executive Committee reaffirmed its previously stated policy; the letter set forth an opinion of the Connecticut Psychiatric Society about the contents of psychiatrists' telephone directory listings which concurred with NHCMA's policy. AMA's guidelines and NHCMA's policy are the same (CX 672, 673A-I, 678).

At the time of trial, Dr. Schapira was listed in the Yellow Pages of six telephone directories in areas in and around New Haven. In each of these directories, Dr. Schapira is listed under "Adolescent and Adult Psychiatry Center" as well as under "Schapira Henri J." The listings under Adolescent and Adult Psychiatry Center state "Emotional Sexual & Alcohol Disorders" and "Marital and Family

Therapy." All directories list the two addresses and telephone numbers where Dr. Schapira has offices, New Haven and Wallingford. It can be determined at a glance in all the telephone directories that the doctor's offices are located in New Haven and Wallingford. Dr. Schapira's listings in the 1977 New Haven, Connecticut, telephone directory Yellow Pages, printed after the above-noted correspondence from NHCMA, are identical to his listings in the 1974 New Haven directory that was printed before the above-noted correspondence (RNHX 125A-D, 126A-D, 127A-E, 128A-C, 129A-D, 130A-D, 131A-D). [174]

In February 1977, the Executive Director of the Multnomah County Medical Society in Portland, Oregon, stated in a "Third Warning on Bold Face Listings," that the Society had decided in 1975 that:

> [I]t is "inappropriate and unethical for a physician, clinic, group or professional corporation to use a bold face listing in the Yellow Pages or White Pages of the Portland Telephone Directory." To do so goes beyond acceptable informative advertising, which is permissible, and becomes "solicitation of patients," and presents an advantage to some physicians. (CX 1815A).

This warning appeared in the *Portland Physician* magazine. At about this same time, the Multnomah County Medical Society also sent a form letter to the 30 medical clinics and others who had inserted bold face listings in the 1977 Portland Yellow Pages, specifically calling their attention to the Society's position and requesting compliance with that policy in the future (CX 1815A, B, 1733). The letter states that use of bold face listings borders on solicitation of patients and quotes from the statement of the AMA Judicial Council in its 1971 *Opinions and Reports* that, "No physician member of a clinic may permit the clinic to do that which he may not do. Each physician must observe all the Principles of Medical Ethics" (CX 1733A, 462K).

In May 1975, the Committee on Ethics and Discipline of the Massachusetts Medical Society urged that:

> he names of physicians in telephone directories be uniform as to size and style of type without the use of bold face letters. The display box advertisements for individual physicians, groups of physicians or clinics is not in keeping with the dignity of the rofession and should not be used (CX 877B).

These restrictions parallel the AMA Guidelines (CX 673D).

The August 1976 compendium of ethics determinations of the state medical society in Maryland contains detailed limitations on the form and content of Yellow Pages listings, including the following restrictions which directly parallel the AMA Guidelines: [175]

> B. Listings may include the following *ONLY:* Name, address, and phone number, office hours, an 'if no answer' number, physician's or surgeon's home address and telephone number.
>
> C. Listings may be made *ONLY* as follows: 'Practice limited to . . .' (using only those specialties approved by the American Medical Association or as modified and approved by a special liaison group to be named by the Faculty to work with the C&P Telephone Company).
>
> D. Listings must be uniform in size and type face.
>
> E. Display or box advertisements are strictly prohibited. (RX 308, p. 34; CX 673D, E).

In October 1971, the Washington State Medical Association ("WSMA") informed Pacific Northwest Bell Telephone Company that, based on AMA's Principles of Medical Ethics and *Opinions and Reports,* it would be unethical solicitation for physicians to list the word "abortions," or related terminology, in addition to their regular medical specialty in the Yellow Pages (CX 637A). The WSMA asked the telephone company to report to it any physician who requested such a listing (CX 637A). In May 1973, in response to an inquiry from WSMA, the Director of the AMA Department of Medical Ethics sustained the State Association's ethics interpretation, stating: "The Principles of Medical Ethics provide that he [the physician] should not solicit patients. A statement in the Yellow Pages 'Practice Limited to Pregnancy Termination' seems clearly to be solicitation of patients" (CX 640B).

In November 1973, Pacific Northwest Bell wrote to the WSMA to ask whether any of a long list of physicians' services were approved and recognized by the State Association as medical specialties (CX 643). The list included "diseases of skin and skin cancer," "internal medicine and arthritis" and "pediatric and adolescent allergy" (CX 643). In accordance with additional advice from the AMA Department of Medical Ethics (CX 642), WSMA's Board adopted a resolution, in January 1974, that only those specialties approved by AMA or the State Association should be used by physicians in Yellow Pages listings (CX 644, 658F). The list of approved specialties attached to WSMA's letter included none of the physician services mentioned in the telephone company's letter (CX 644B, 643). [176]

In April 1976, the WSMA sent a letter to Pacific Northwest Bell indicating that its January 1974, resolution on physician directory listings was still applicable (CX 658A). The letter stated that the resolution was based on, and derived from, the Principles of Medical Ethics of the AMA (CX 658A). The letter referred specifically to the ban on solicitation in Section 5 and to Opinion 11 of Section 5, "Solicitation of Patients or Patronage," in AMA's 1971 *Opinions and Reports* (CX 462Z5-Z6), and enclosed copies of these provisions (CX 658).

In a 1976 letter to a Washington State physician, a WSMA official underscored the active regulatory nature of the Association's interest in physicians' Yellow Pages listings: "In the final analysis, we have found the 'management' of Yellow Page telephone directory listings is an ongoing proposition and one that seems to need constant scrutiny and surveillance from year to year as new directories come out" (CX 650).

### 6. *Business and Consumer Directories*

#### a. Dissemination of Consumer Information by State and Local Medical Societies

AMA contends that ethical considerations have not prevented services from being made available to consumers and, in support of this contention, AMA presented several witnesses to testify about the preparation and distribution of consumer directories.

#### Hennepin County Health Coalition

124. LuVerne M. Pearman, Executive Director of the Hennepin County Health Coalition ("Coalition"), a non-profit organization in Minneapolis composed of diverse interest groups in the health care field, testified in this proceeding (Tr. 5259, 5261-62, 5268). The Coalition was created in 1974 to improve primary health care in the county (Tr. 5260). Fifty percent of its funding comes from the county government, with the remaining funding coming from private donors, including hospitals and the Hennepin County Medical Society (Tr. 5261). Among the projects undertaken by the Coalition was the preparation of a directory of primary care physicians in Hennepin County (Tr. 5259, 5267; RX 267). Published in 1974 (Tr. 5269), this directory was prepared from responses to questionnaires sent to all area primary care physicians (Tr. 5284). A representative of the Hennepin County Medical Society helped review drafts of the questionnaire (Tr. 5273-75). The directory had a response rate from physicians of approximately 80 percent (Tr. 5285). [177]

The directory included information on the nature of each physician's practice, reimbursement mechanisms used, continuing medical education programs undertaken, teaching appointments held, hours of service, waiting periods for routine visits, house calls, location and accessibility of office, special services offered, procedures done in office, credit practices, prescription practices and a variety of other information (RX 267; Tr. 5277-79). Information on fees was published in aggregate form giving fee ranges existing in the community (Tr. 5280-82). Eight thousand copies of the directory were ultimately distributed to public libraries, referral areas and hospital waiting rooms (Tr. 5289).

The Hennepin County Medical Society did not oppose the development, preparation or dissemination of the directory, nor did it declare physician participation in the project to be unethical (Tr. 5271, 5276, 5283). Ms. Pearman testified that the Medical Society was "positive and supportive," both behind the scenes and publicly (Tr. 5272, 5283). It provided $5,000 annually for three years to help fund the Coalition (Tr. 5263, 5283-84) — between five and six percent of its total operating budget. At the time the directory was published, there was no physician advertising in the community and the only directory of physicians available covered a small area of the county (Tr. 5291-93, 5300).

### Whatcom County Medical Society

125. Kenneth L. Culver, Assistant Executive Secretary for the Whatcom County Medical Society (covering the northwestern corner of Washington State), testified in this proceeding (Tr. 5819, *et seq.*). Among the projects undertaken by the Medical Society under Mr. Culver's supervision was the preparation of a directory of physicians (Tr. 5821). In June 1974, several member physicians had received questionnaires from a local college (Tr. 5826; RX 402). At that time, the Medical Society sent a bulletin to its members asking them not to complete the questionnaire (Tr. 5827, 5830-31; RX 404). A special board meeting of the Society was then convened to discuss the subject of a physician directory (Tr. 5833). The Medical Society authorized its staff to contact the school, Fairhaven College, in order to coordinate a joint publication effort (Tr. 5832-33), and, subsequently, met with students from the college on several occasions to draft a questionnaire (Tr. 5837; RX 403A, 405). The questionnaires were sent to the members of the Whatcom [178] County Medical Society along with a Society bulletin requesting prompt completion and return. More than 90 percent of those physicians solicited responded with completed questionnaires (Tr. 5888). Fairhaven College students compiled the data, and Medical Society personnel reproduced the booklet (Tr. 5862, 5888). The directory (RX 407) was published in June 1975 (Tr. 5864). Information in the directory

included facts about acceptance of walk-in and new patients, office location and accessibility to public transportation, after-hours coverage, languages spoken, prescription of generic drugs, availability of information on preventive medicine, prescription of contraceptives and minimum fees for office visits (RX 407). Of the 500 copies of the directory printed, half were given to the Medical Society and half to the College for their own distribution (Tr. 5864-65). The Medical Society distributed its 250 directories to its members, public agencies and the general public at no charge (Tr. 5865; RX 408).

There are 120 physicians in Whatcom County who belong to the local medical society; less than six physicians do not belong to the society (Tr. 5886). Although the Medical Society stated to its members that the directory would be kept up-to-date through future editions (RX 405A; Tr. 5890-91), the Society withdrew its support when the college proposed, and ultimately prepared, an updated directory (Tr. 5893-95). At the time the directory was published, there was no physician advertising in Whatcom County (Tr. 5886-87).

### Pima County Medical Society

126. The Professional Guild of Arizona ("Guild") is a registered labor union of physicians created in 1974 to deal with the hours, wages and working conditions of practitioners of contract medicine (Tr. 7554). It enforces health care contracts and collects unpaid benefits from insurance companies or government agencies through group action claim review (Tr. 5757-58). The local medical association in Tucson is the Pima County Medical Society. In 1977, the Guild published a directory of physicians for the Tucson area (Tr. 5758; RX 526). The president of the Guild, Dr. William A. Davis, testified about the preparation of the directory (Tr. 5758, *et seq.*).

The Guild first prepared a questionnaire which was designed to elicit information to help a new resident choose a physician. The questionnaire was sent to every [179] physician and osteopath in Tucson, and the responses were reviewed for accuracy (Tr. 5762). The Guild did not consult with the Pima County Medical Society, the Arizona Medical Society or the AMA regarding its decision to publish the directory (Tr. 5763-64). However, after the questionnaire was distributed, the Guild contacted the Pima County Medical Society about the ethics of the directory project. The Society expressed the opinion that the project was ethical and stated no objection (Tr. 5765; RX 527). The Medical Society suggested to the Guild that one question on medical specialties be altered to restrict areas to those supported by a recognized board (Tr. 5765; RX 528).

The Guild agreed and modified the directory accordingly (Tr. 5765; RX 529).

The Pima County Medical Society had no direct role in the publication and distribution of the directory (Tr. 5789). Its secretarial staff was instructed to advise the numerous callers to the Society (Tr. 5786) that the directory was going to be published, it was not unethical and participation was a matter of individual choice (Tr. 5766, 5790; RX 527). The directory, which is divided into sections by geographical region and specialty (Tr. 5768-70), includes information on each physician's specialty, patients treated, medical school and other training, board certification, hospital affiliations, language spoken, office location and hours, accessibility by bus and fees for office visits and certain special procedures (Tr. 5770-72; RX 526). Fifty-five percent of the area physicians responded to the questionnaire and were listed in the directory (Tr. 5772-73). Four thousand copies of the directory were published, and more than 2,000 were distributed through drugstores and physicians' offices (Tr. 4773-74).

## The Lane County Medical Society

127. Bruce S. Strimling, M.D., a pediatrician practicing in Eugene, Oregon, is a member of the Lane County Medical Society, the Oregon Medical Association, the AMA and other professional societies (Tr. 5400-01). In 1974 and 1975, Dr. Strimling was Chairman of the Public Health and Low Income Care Committee of Lane County Medical Society (Tr. 5403-04). As part of its goal of promoting maximum access to health care (Tr. 5405, 5407-16), the Committee developed a consumer directory of physicians in Lane County, Oregon (Tr. 5409). The idea for a directory was prompted by articles in *American Medical News* (RX 462) and a local newspaper concerning a directory of physicians in Prince Georges County, Maryland (Tr. 5410-13). Dr. Strimling testified in this proceeding as a witness for AMA (Tr. 5400, *et seq.*). **[180]**

The directory concept was presented to the Medical Society membership as a means of acquainting consumers with the available facilities in the community, including information about the Society's referral system, emergency care in the area and how to use it (RX 463B). The project was first discussed at a general meeting of the Society (Tr. 5415-16; RX 463); the directory project was approved at a subsequent meeting (Tr. 5420). The Medical Society initially sought a consumer organization that would be willing to assist in management of the project and to publish it in conjunction with the Medical Society (Tr. 5428-29). When no offers were forthcoming, the Medical Society began preparation of the directory in conjunction with other interested organizations including CARES, an agency of the County Health Department (Tr. 5434).

The committee first accumulated information about prior directory projects to aid in drafting an appropriate questionnaire (Tr. 5420–23; RX 464, 466, 369, 475, 476). Due to concern that a directory might violate state law or medical ethics (Tr. 5426–27; RX 465), the committee wrote for guidance to the State Board of Medical Examiners (Tr. 5435; RX 468; CX 2125), the Oregon Medical Association (Tr. 5437–38; RX 470) and the AMA (Tr. 5441). The State Board of Medical Examiners concluded that publication of such a directory was a proper function of the society but requested the opportunity to review it prior to publication (Tr. 5436–37; RX 472). The ethics committee of the Oregon Medical Association found no ethical problems relating to the medical society, but also requested the opportunity to review the directory prior to publication (Tr. 5436, 5437; RX 472). The AMA referred the Medical Society to the *American Medical Directory* as to the types of information and specialty designations that should be used in community directories (Tr. 5441; RX 473).

A questionnaire was ultimately developed by all interested parties (Tr. 5450–52, 5460; RX 482H–J, 488). At the suggestion of various Society members, a question about areas of special interest was deleted (Tr. 5457, 5459, 5487–88; RX 478; CX 2129). The final questionnaire (CX 2132) listed 35 specific questions, but did not request fee information. "Almost all" physicians in the area are members of the local society (Tr. 5470). Of the 290 members of the Society, 244 elected to participate in the directory (Tr. 5471; RX 489). The information on the returned questionnaires was summarized by CARES (Tr. 5464–65), and 1,000 copies of the directory were published at county expense (Tr. 5468–69). The directory (RX 489), published in January 1976 (Tr. 5467), includes [181] information about a physician's specialty, type of practice, medical school, internship, residencies, fellowships or other training, board eligibility or certification, hospital staff appointments, personnel and facilities, special services provided, languages spoken, office location and hours, after-hours coverage, acceptance of new patients, treatment of welfare patients, wait for appointments, time for an office visit, payment arrangements and handling of complaints; however, it provides no fee information (RX 489). The directory also includes an introduction that gives the background of the directory as well as physician participation, information on medical education and credentials, advice on how to find a physician, a list of medical resources in Lane County and a short note explaining the doctor-patient relationship (RX 489).

## The Clear Creek Valley Medical Society

128. The Clear Creek Valley Medical Society is a local society covering the northwestern metropolitan areas of Denver (Tr. 7528-29). In April 1975, the Society organized its Consumer Directory Publication Committee (Tr. 7530), chaired by Dr. Joel M. Kaplin, who testified about the directory effort (Tr. 7526 *et seq.*). The Committee was formed because the members of the Society believed that a consumer oriented directory of medical care would be both beneficial to the public and a good public relations effort for the physicians (Tr. 7530; CX 2303A).

The first step taken by the Committee was to contact the local and state medical societies and the AMA to determine if medical ethics or state law would be violated by the publication of a directory (Tr. 7531). The Committee also contacted the Consumer Research Council in Washington, D.C., a Ralph Nader organization, for guidance and for a sample questionnaire (Tr. 7532). This questionnaire was modified and sent to all area physicians and osteopaths (Tr. 7536). The questionnaire included 22 specific inquiries concerning the physician's practice, education, appointments and affiliations (RX 656X). The Medical Society deleted questions relating to acceptance of Medicaid or Medicare patients (Tr. 7532–33). Requests for fee information were also omitted (Tr. 7533). In order to achieve a good response rate, the Society called physicians who did not initially respond to the questionnaire (Tr. 7537). The overall response rate was 76 percent of Medical Society members and 45 percent of nonmembers (Tr. 7551–52). [182]

In March 1976, the Judicial Council of the Colorado Medical Society approved publication of the directory. The state medica society also recommended that information on fees and on accep tance of Medicaid and Medicare patients be excluded (Tr. 7550; CX 2304). The local society was aware that physician directories wer not contrary to AMA ethical principles from articles published in th *American Medical News*, an AMA newspaper (CX 2301, 2300).

The directory was published in March 1977 (Tr. 7551). Broke down by specialty, it includes information about a physician's area practice, education, teaching positions, affiliations with hospital and medical societies, location of offices, waiting time for appoin ments, hours, office personnel, special services provided, language spoken and payment and billing practices (RX 656). Also included a section on public programs offered by the Medical Society, a sectio on private health insurance companies to give the public an idea of what to look for in obtaining health insurance and a section on how to use the directory (Tr. 7540–41; RX 656). Five thousand copies of the directory were published at a cost of $11,000 (Tr. 7551, 7554–55). Despite excellent media coverage (Tr. 7552, 7554) and an adequate distribution network, fewer than 2,000 copies of the directory were sold (Tr. 7552–53).

## The Allegheny County Medical Society

129. The Free Clinic of Pittsburgh is an organization funded from private foundation and government grants. It provides care to indigent persons (Tr. 5913–14). At the end of 1974, the Free Clinic invited the Allegheny County Medical Society to participate in the publication of a consumer directory of physicians in Pittsburgh (Tr. 5916). The Allegheny County Medical Society has approximately 2,450 members of the 3,100 licensed physicians in Allegheny County. Of these 2,450, 80 percent are members of the AMA (Tr. 5912). The Medical Society concurred with the Free Clinic that there was a community need for such a physician directory, and agreed to cooperate and contribute to the format and content of the directory (Tr. 5958–59; CX 2179). H. David Moore, Jr., Executive Director of the Medical Society, testified about the preparation of the directory (Tr. 5910, *et seq.*). [183]

In the summer of 1975, officers of the Free Clinic and the Medical Society met to discuss the idea of a directory and to develop a questionnaire (Tr. 5916, 5919–20). Draft questionnaires (RX 675; CX 2180) were supplied by the Free Clinic, and certain modifications were made (Tr. 5916, 5919–20). The Medical Society suggested deletion of certain questions (Tr. 5921–24); some of the suggestions of the Medical Society were followed and some were not (Tr. 5921–24). It was the Medical Society's initial position that there would be "no mention" of specific fees (CX 2303B). There was a continuing controversy between the Free Clinic and the Medical Society over publication of fee information (Tr. 5975). The questionnaire was mailed to all licensed physicians providing primary care within the city of Pittsburgh, including both members and nonmembers of the Medical Society (Tr. 5737, 5739).

The questionnaire was distributed in July 1975 (Tr. 5939). Approximately 60 percent of the physicians surveyed responded (Tr. 5940). The information received from responding physicians was compiled; printing costs were divided between the two groups (Tr. 5941; RX 671). The directory (RX 666) was published in February 1977 (Tr. 5942). It is prefaced by a letter to the reader, signed by officers of the

best copy available

Medical Society and the Free Clinic, identifying the organizations involved and describing the scope of the directory. This material is followed by a table of contents and a list of groups contributing to the directory. These groups helped the Free Clinic pay for its portion of publication costs (Tr. 5947). An introduction explaining the purpose and form of the directory appears next, along with information on how to use the directory, what to look for in a medical check-up and a position on physician-patient communications. These sections were all reviewed and approved by the Medical Society before they were included in the directory (Tr. 5947-48).

The body of the directory is divided into five sections: family practitioners, general practitioners, gynecologists, internists and pediatricians. Individual listings include information on a physician's location, type of practice, age, years in practice, specialty, treatment of new patients and walk-ins, house calls, age limits on patients, after hours coverage, affiliation with specific hospitals, office hours, acceptance of Medicare or Medicaid patients, billing practices, prescription of contraceptives, itemization of bills, average waiting time for appointments and tests performed at the office (RX 666). Some individual [184] listings also include fee information (RX 666). Physicians could choose to provide specific fees, a range of fees or indicate from whom this information might be secured (Tr. 5950). An appendix to the directory includes the letter and questionnaire mailed to physicians, a family guide to immunizations, a table of fees providing the average fees and fee ranges for each of six specialties and 16 specific procedures and an index of physicians listed by zip code (RX 666).

Five thousand copies of the directory were published and were divided equally between the two organizations for distribution (Tr. 5952, 5954-95). The cost to the Medical Society of its participation in the directory project amounted to approximately $13,000, including printing costs and staff time (Tr. 5958).

### New Haven Medical Directory

130. In 1975, Dr. Hans Neumann, the Medical Director of the New Haven Health Department, decided that it would be useful for the city health department and various social agencies to have a directory of physicians that could be used to refer patients for primary care (Tr. 8595-97, 8622). Dr. Neumann testified about the preparation and publication of the directory (Tr. 8590, *et. seq.*).

The city health department staff discussed the idea of a directory and decided that it should be limited to primary care physicians. They concluded, in the interest of time and the desire for a large response rate to the questionnaires, to include in the directory only essential information about physicians and their practices. Due to financial constraints and the fact that the original purpose of the directory was as a patient referral aid, the health department staff planned to publish only about 50 copies of the directory and distribute them to senior citizen centers, housing projects, the visiting Nurse Association and other social agencies (Tr. 8598-8602).

The city health department staff prepared a questionnaire to send to physicians requesting information as to the physician's name, address, telephone number, section of city, type of practice, office hours, hospital affiliation, acceptance of Medicare assignment, acceptance of Medicaid patients, acceptance of new patients for primary care and basic fees for a first visit and a follow-up visit. The staff included on the questionnaire a statement that, while it may seem awkward to state a standard fee, such information would be useful, and noted that fees vary according to circumstances. The staff added this statement to the questionnaire to indicate recognition of the fact that fees depend on the treatment required (Tr. 8603-08; RNHX 143). [185]

Thereafter, Dr. Neumann initiated communication with the New Haven Medical Association ("city association"), an independent city medical association (a different organization than NHCMA, and not affiliated with the respondents herein). The city association agreed to cosponsor the project (Tr. 8594, 8608-09, 8613).

Dr. Neumann wrote a cover letter to accompany the questionnaire; in July 1976, both the letter and questionnaire were sent to physicians in New Haven who were listed in the telephone directory as practicing internal medicine, general practice or pediatrics. Dr. Neumann included in the cover letter a reference to the AMA's newly issued guidelines on physician directories. This reference was included independently by Dr. Neumann (Tr. 8609-12; RNHX 144). Dr. Neumann's staff sent out 100 to 150 questionnaires and received approximately 80 to 100 responses. None of the physicians receiving the questionnaire asked Dr. Neumann whether it was ethical to participate in the directory (Tr. 8609, 8614-17).

In late 1976, the directory was compiled, typed and photocopied. Approximately 50 copies of the "Primary Medical Care Directory" were printed and distributed without charge to the various social agencies in New Haven that would be likely to refer patients to primary care physicians. The 1976 directory includes an explanatory foreword written by Dr. Neumann and his staff. The directory is divided into four sections—family practice, internal medicine, pediatricians and health care centers. The listings include all the information requested in the questionnaire, including basic fee (Tr. 8617-20; RNHX 109).

In the fall of 1977, Dr. Neumann and the city of New Haven Mayor's Committee on the Elderly decided to publish a new edition of the directory. Thereafter, the city health department staff contacted the city medical association which again agreed to cosponsor the project. Health department staff used the same form questionnaire that had been used for the earlier directory. The staff drafted a cover letter, similar to the one used in 1976, which was sent along with the questionnaire to physicians whose names had not appeared in the first directory. The staff sent a letter noting that a revision was occurring to physicians whose names had been included in the first directory. Followup letters were sent if physicians did not respond to the first letter (Tr. 8622-27; RNHX 146, 147, 148).

Dr. Neumann's staff sent out approximately 100 to 120 questionnaires and received about a 90 percent response rate. None of the physicians objected that participation in the [186] directory would be unethical. At the time of Dr. Neumann's testimony at trial, the directory had been compiled and typed, and was ready for photocopying and distribution to social agencies. The revised directory had the same format and information as the 1976 edition (Tr. 8627-29; RNHX 149A-Z15). There were no objections to the publication or distribution of the directories from any medical societies (Tr. 8622, 8629).

### b. Medical Society Opposition to Business and Consumer Directories

131. AMA and its members societies have limited the publication of information on physicians in business and consumer directories. Opinion 18 of Section 5 of the 1971 *Opinions and Reports* declares that, "[m]ost, if not all, listings of physicians by specialty in directories published by commercial concerns, are but subtle ways of avoiding the pronouncement of the Principles of Medical Ethics concerning solicitation of patients" (CX 462Z9). Opinion 18 of Section 5 of the 1971 *Opinions and Reports* also states that if a physician permits the use of his name in a commercial directory that does not include on like terms the names of all licensed physicians in the directory area, he "has the burden of proving that his action is in keeping with the Principles" (CX 462Z9).

The 1971 *Opinions and Reports* recommends that local medical societies enforce an ethical policy that "the listing of physicians in directories of participating members [in bank credit card programs] is contrary to the ethics of the medical profession" (CX 462Z22 [Sec.

7, Op. 13]). In an August 1976 compilation of ethics interpretations, the state medical society in Maryland endorsed this AMA Judicial Council ethical standard and recommended its implementation and application by county medical societies (RX 308, p. 61).

In 1966, the King County (Washington) Medical Society sought the advice of the AMA Department of Medical Ethics on the ethical propriety of listing physicians in a directory of services and businesses participating in a bank credit card plan (CX 99). AMA's reply, which cited provisions of its *Opinions and Reports* (CX 100), assisted the county society in resolving the issue (CX 101A) and the society ruled that "any physician who allowed the use of his name in such a directory would be in violation of the Code of Ethics" (CX 101A). [187]

### Payne Avenue Business Directory

132. D. Patrick McCullough, an attorney in St. Paul, Minnesota, who testified in this proceeding, is a member of the Board of Directors of the Payne Avenue Business Association, a group of business and professional people located on Payne Avenue in St. Paul (Tr. 359-60). In 1972, the Association's Board of Directors discussed the possibility of promoting its annual "Harvest Festival" by placing various paid advertisements in a community newsletter. The newsletter was to include a listing of Payne Avenue area businesses and services, including physicians (CX 34B). The list was to contain only the name, address, telephone number and business or profession of each of the association's members (CX 34B), and was to serve as an alternative to the phone book for consumers interested in obtaining services specifically in the Payne Avenue neighborhood (Tr. 367). The business association hoped that distribution of the list would help maintain the viability of the aging Payne Avenue area as an in-town shopping district (Tr. 367-68, 360-61).

Attorney McCullough, working on the project, contacted the Minnesota State Medical Society concerning "possible ethical considerations" about the proposed list (CX 34B). The state society then sought the opinion of the AMA Department of Medical Ethics (CX 34A). The Director of the AMA Department of Medical Ethics replied that, under the applicable Judicial Council ruling, the list would be unethical if it included only those physicians who were members of the business association and was not open "to all physicians on like terms" (CX 33). Even if all the doctors in the neighborhood were to be included, the AMA letter questioned whether the list would be "in keeping with the ideals of the medical profession" (CX 33). The letter stated that "the wishes of all the physicians in Ramsey County should be taken into consideration" (CX 33). Inclusion, in the directory, of all the physicians in the county would have defeated the purpose of the plan, which was to serve the Payne Avenue neighborhood in particular (Tr. 381-82). As a result of the AMA letter, the proposed directory of businesses and services was dropped (Tr. 378, 380-82).

### Prince George's County, Maryland, Directory

133. In the summer of 1973, Public Citizen's Health Research Group of Washington, D.C. [a Ralph Nader-affiliated organization, Tr. 2126], undertook the compilation of a directory of physicians in Prince George's County, Maryland (Tr. 2126, 2136). Approximately 80 percent of the practicing [188] physicians in Prince George's County belong to the Prince George's County Medical Society. All members of the local society belong to the state society, the Medical and Chirurgical Faculty of the State of Maryland (Tr. 7405-06), and 95 percent of all physicians practicing in Maryland are members of the state society (CX 679C).

In Maryland, advertising by physicians is illegal, except as provided by the regulations of the Board of Medical Examiners (Tr. 7412-13; RX 400B). The Maryland state medical society elects all eight members of the Board of Medical Examiners which has the authority to adopt regulations governing advertising by physicians in Maryland. All members of the Board must be physicians practicing in Maryland (CX 2047A, B, D). The regulations provide that a physician may advertise only by use of a personal professional card, a removal notice, an announcement concerning his practice or identification signs, all of a specified size and restricted to certain information (RX 308, p. 3, 309, p. 3, 689, p. 3).

The Health Research Group did not notify the county medical society or the state medical society of its plan to compile a directory prior to initiating its survey of physicians (Tr. 2203-04, 7467, 7479). In mid-July, the consumer group undertook its own questionnaire survey of Prince George's County physicians after its preliminary search for information on physicians practicing in the county had produced only the names, addresses, telephone numbers, specialty certifications, local medical society memberships and some information on physicians' educations (Tr. 2128-29, 2132-38, 2141; CX 679D-H, 2032). The questionnaire, developed without consulting with the medical societies (Tr. 2203, 7407; CX 2032), included questions on specialty, type of practice, teaching or staff appointments, medical education, Board certification, hospitals used, office hours, after-hours coverage, support personnel, average waiting time for appointments, acceptance of new and walk-in patients, treatment of Medicaid and Medicare patients, time for examination, languages spoken, house calls, fee and billing information, tests available, prescription of birth control and various specific drugs, immunizations and handling of complaints (CX 2032). Physicians were then contacted in a telephone survey (Tr. 2138). Where no response was given by the physician to a particular question, a space was provided labeled, "would not answer." If the physician declined to participate at all, the questioner was directed to inform him or her that the [189] survey was a consumer effort and that "refusal to cooperate" would be published in the directory (CX 2032; Tr. 2218–19). Many physicians phoned the local medical society for information about the survey and the organization sponsoring it, and were disturbed by the Group's threats to list physicians as uncooperative (Tr. 7406–11).

Since the Health Research Group had not contacted the local society in advance, the society had no knowledge about the project or the Group. Moreover, the local society was concerned that questions relating to fees and other specific medical practices were being asked that might be prohibited and constitute unethical advertising by physicians (Tr. 7411–12). Because of the local society's concerns about the proposed directory, it circulated a warning note to its member physicians (CX 680).

The Health Research Group contacted the local society after the first week of the telephone survey (Tr. 2148), informing them of the identity of the organization and the nature of the survey (Tr. 7423). In a letter to the Health Research Group, the society enclosed the relevant ethical and legal regulations and referred the Group to the Board of Medical Examiners or the Commission on Medical Discipline for consultation (CX 681). A copy of the questionnaire was subsequently sent to the society (CX 682). Upon reviewing the questionnaire, the society had further concerns with the questions asked (Tr. 7430–31). The questionnaire was sent to each physician with a cover letter which demanded that the questionnaire be completed, verified and returned within a week, or else the original response would be deemed correct and published in that form. Physicians were again told that if any questions remained incomplete, the directory would note that the physician "would not answer" (CX 683).

The local society thereupon circulated another message to its members (CX 684), which stated that the legal and ethical considerations raised by the questionnaire had not been resolved. Member physicians were advised that if they declined to participate in the directory, they should do so by stating "the information returned for review is incomplete and inaccurate and that the physician does not consent to publication" (Tr. 7442–43; CX 684).

At the suggestion of the local society, the consumer group contacted the state medical society (Tr. 2148, 2150). The state medical society advised the consumer group by [190] letter that: "Other than to indicate his [a physician's] identity in such directory and specialty, if any, which he has and perhaps indicate his office hours, any other publications pertaining to the physician would constitute advertising" (CX 2035A). The state society, an AMA constituent organization (CX 2050J, Z22) that has adopted AMA's Principles of Medical Ethics as its ethical standards (RX 308, p. iii), also stated that a physician who answered any of the other questions in the questionnaire would be acting unethically (CX 2032, 2035). The letter specifically disapproved of a physician publicizing either his fees, that he is available to walk-in or non-English speaking patients or that he makes house calls (CX 2035A).

Many physicians declined to participate in the Health Research Group's directory project (Tr. 2036–43; CX 679N, O, 2031B). The questionnaires which were returned were compiled and the directory was published in January 1974 (Tr. 2166–67). About half of the doctors who had cooperated in the consumer group's initial telephone survey declined to complete the written questionnaire they were sent (Tr. 2158), and only 25 percent of the physicians in the county agreed to inclusion of their names in the directory (CX 2031B, 679 O; Tr. 2166). Only 500 copies of the directory were published by the Health Research Group (Tr. 2233–35).

The directory as published (RX 294) contains not only the responses to the questionnaires but a lengthy introduction. The introduction contains assertions about the alleged prevalence of unnecessary prescriptions and surgical procedures and the widespread physical or mental incompetence of physicians (Tr. 2240–43; RX 294H, S). The introduction also states that the state and local medical societies engaged in a systematic "intimidation of doctors" (RX 294W), and attempted to block publication apparently because the directory would reveal differences between doctors (RX 294J). It also states that "medical society resistance is to be expected in any consumer sponsored survey" (RX 294X). Emphasis was placed on the lack of cooperation of nonresponding physicians, and the names of those physicians were placed in a special list (Tr. 2250–51). The introduction also suggests that better medicine is practiced in group practices than by sole practitioners (RX 294A, A–1, A–2).

On the day of the directory's publication, the Health Research Group filed suit in federal court against the local and state medical societies, the Commission on Medical [191] Discipline and their officers. The lawsuit challenged the constitutionality of the Maryland advertising statute (Tr. 2167). The federal district court stayed proceedings to allow the parties to engage in settlement negotiations (Tr. 2262; CX 679K) and, subsequently, invoked the abstention doctrine until such time as the Maryland Commission on Medical Discipline had ruled as to whether publication of the directory was prohibited under Maryland law (Tr. 2176, 7487). At the time of the hearing in this case, the decision to abstain was on appeal to the Fourth Circuit Court of Appeals (Tr. 2176).

Health Research Group also filed a request for a declaratory ruling with the Maryland Commission on Medical Discipline pursuant to Article 41, Section 250 of Maryland law (RX 401). The Commission ruled that the directory constituted "advertising" within the meaning of the Maryland statute and was, therefore, illegal (CX 2031). It noted that consumer directories, as such, are not necessarily advertising, although "particular directories, because of the method of compilation, the interpretive gloss, or other factors, may violate Maryland law" (CX 2031P). The Commission held that a physician who participated in the Health Research Group directory would violate Maryland law, but declined to prosecute any participating physicians on the grounds that they were probably unaware of the introduction and commentary and would likely not have participated had they been aware of the endorsement and ratings suggested by those sections (CX 2031E-F).

134. In June 1974, the AMA Judicial Council issued an opinion on consumer directories of physicians stating it would not be unprofessional for a physician to be listed in a directory which is intended to list all physicians in the community on a uniform and nondiscriminatory basis and did not include any "self-aggrandizing" statement or qualitative judgment about physicians (CX 509A-B, N). In December 1974, the AMA House of Delegates adopted the Judicial Council report, with only minor word changes as follows:

> It is not unethical for a physician to authorize the listing of his name and practice in a directory for professional or lay use which is intended to list all physicians in the community on a uniform and non-discriminatory basis. The listing shall not include any self-aggrandizing statement or [192] qualitative judgment regarding the physician's skills or competence. The *American Medical Directory* provides an example of the kind of information that may be properly listed in national as well as community directories for health service personnel. Likewise, specialties or specialty practices used in the *American Medical Directory* should set the pattern for specialty designations (RX 5).

This statement was in effect as of November 1977 (Tr. 3998).

The *American Medical Directory* lists only each physician's name, address, year of birth and licensure, specialty, board certifications, type of practice, educational background and AMA membership status (RX 11, 12, 13, 14).

In 1975, the Illinois State Medical Society was considering issuance of guidelines permitting descriptions in consumer directories of a physician's education, hospital, and medical school affiliations, type of practice, office hours, house call policy, acceptance of Medicare assignments policy, second language spoken, billing practices and in-office allied health personnel (CX 718A, F–I). AMA advised the state medical society that "any such detailed directory . . . could not help but be self-aggrandizing for certain physicians, contrary to AMA principles," and informed the state medical society that the ethics "difficulty" of a directory is "compounded" by widespread distribution (CX 717A–B). AMA noted that the Judicial Council's opinion on consumer directories (RX 5) "is more negative than positive," and that "AMA is *not* on record as positively favoring directories" (CX 717A–B) (emphasis in original).

## Catawba County, North Carolina, Directory

135. In the fall of 1974, a sociology class at Lenoir Rhyne College decided to prepare a directory of physicians in Catawba County, North Carolina (Tr. 2366). The course instructor, Professor Daniel C. Bruch, who testified in this proceeding, assigned one student to contact the president of the Catawba County Medical Society ("CCMS") to determine whether the society would endorse the project. Another student was asked to write to the AMA to determine its position on the question of physician directories (Tr. 2371; CX 1835). Sometime in late September 1974, several students met with J. Thomas Foster, M.D., president of CCMS. Dr. Foster also testified in this proceeding. The students sought Dr. Foster's reaction to the preparation of a consumer directory of [193] physicians in Catawba County, North Carolina. Dr. Foster stated that, in his opinion, the general idea of a physician's directory was a good one (Tr. 2372–73, 7363). Shortly thereafter, the class sent a questionnaire to each of the physicians practicing in Catawba County (CX 698A–G; Tr. 2374, 7364). The questionnaire requested such information as the physician's name, address, specialty, fee-for-service or prepaid group practice status, number and type of support personnel in office, medical education and post-graduate training, board certification, hospital and teaching appointments, standard fees for phone consultations and office visits, billing procedures, willingness to make house calls, average waiting room time, acceptance of the Medicare

reimbursements schedule as payment in full and willingness to show patients their medical records on request (CX [illegible]48).

At the October 11, 1974, meeting of the CCMS, the subject of the directory was again discussed (Tr. 7364; RX 884A-B). The members expressed concern with several aspects of the questionnaire, such as whether the directory would be periodically updated (Tr. 7365) and whether the question regarding fees might prove to be misleading to consumers (Tr. 7366). Finally, some members felt that the question concerning a physician's prescribing of generic drugs might be misleading to consumers (Tr. 7367-68). The society discussed the AMA's position on the question of physician directories and decided that it would be all right for member physicians to respond "the way the Judicial Committee [sic] of the AMA states that it could be done, or otherwise, it would be unethical and considered to be advertising" (RX 884B).

Sometime during the next week, the Executive Committee of CCMS met with Professor Bruch's class to discuss the question of the physician's directory. When the society representatives raised their concerns about the updating of the directory and the possibility of misleading information, the students were unfriendly (Tr. 2407, 7373). The college class was told that the "self-aggrandizing" clause in the AMA Judicial Council opinion applied "when you list fees" (Tr. 2383, 2410). The CCMS official also stated:

> [S]omebody who reads the directory may choose a physician on the basis of fees, and get the cheapest doctor for example, and therefore it might become a point of competition between physicians to stress the fees and to work out a fee schedule that would be more advantageous than somebody else's (Tr. 2383-84). [194]

On November 11, 1974, the class received a letter from the AMA (CX 1834A-B) in response to their request for the AMA's position on the subject of physician directories (CX 1835). The letter noted that the AMA Judicial Council had adopted a report stating in part:

> It is not unprofessional for a physician to authorize the listing of his name and practice in a directory for professional or lay use. Which [sic] is intended to list all physicians in the community on a uniform and nondiscriminatory basis; providing that the listing shall not include any self-aggrandizing statement or qualitative judgment regarding the physician's skill or competence (CX 1834A. *See also* RX 5).

There is no evidence of any other communication with AMA. By letter of November 14, Dr. Foster informed Professor Bruch of the society's decision. The letter stated, in part: "the Catawba County Medical Society declines to ask its members to answer the questionnaire on the basis that the answers could be considered to be construed as unprofessional self-aggrandizement. The answers that might be considered ethical would be of no value in a Consumers' Directory" (CX 890). Following the society's action, the college class received only one additional completed questionnaire from a physician, the family pediatrician of the professor directing the project (Tr. 2396). Overall, the class received completed questionnaires from only approximately one-fourth of the physicians surveyed (Tr. 2397).

### 7. *Direct Contact with Institutions and Physicians*

#### Dr. Harry G. Browne

136. In mid-1973, Jerry K. Crowell, the administrator of the Lewis County Hospital in Hohenwald, Tennessee, asked Dr. Harry Browne to conduct a pre-survey of the hospital's laboratory and pathology services to determine what upgrading would be needed to bring the services into compliance with the standards of the Joint Commission on Accreditation of Hospitals ("JCAH") (Tr. 281-82, 292-93). Dr. Browne testified in this proceeding (Tr. 1905, *et seq.*) as did Mr. Crowell (Tr. 281, *et seq.*) Dr. Browne is a board certified pathologist in Nashville, and holds a clinical assistant professorship of pathology at Vanderbilt University (Tr. 1905-07). He practices in association with a large pathology group and laboratory company which provides services to hospitals, physicians and others throughout Tennessee and western Kentucky (Tr. 1908-10, 1944). [195]

Dr. Browne is in active competition with Dr. Jack Freeman and other pathologists for the pathology and laboratory business of hospitals in western Tennessee (CX 5A-B, 1B; Tr. 1928, 1930). Dr. Freeman has serviced Lewis County Hospital since 1971 (Tr. 291-92, 296). Dr. Browne visited Lewis County Hospital in the early fall of 1973 to conduct a pre-survey (Tr. 292-93). The hospital had asked Dr. Browne to make a proposal of the services which his pathology group and laboratory company could provide the hospital to give it better coverage than it was getting from Dr. Freeman and to bring it into compliance with the JCAH requirements (Tr. 293-94, 304-05). In October, Dr. Browne submitted a written proposal to the hospital (CX 4). Several months later, Dr. Browne sent Mr. Crowell a more detailed proposal which compared his proposed services and fees with those of Dr. Freeman (CX 1866). Prior to submitting his written proposal, Dr. Browne and his staff had been in direct contact with the hospital personnel, partly in the hope of obtaining their pathology and laboratory business (Tr. 1911-13; CX 4A).

Before acting on Dr. Browne's proposal, the hospital administrator gave Dr. Freeman a copy of it (Tr. 305-06). Dr. Freeman submitted a counter-proposal to the hospital which was almost identical to Dr.

Browne's offer (Tr. 306). The hospital thereafter decided to renew Dr. Freeman's contract, and Dr. Freeman immediately began providing the hospital with significantly improved services (Tr. 306-07, 312-14; CX 1864-65). Prior to Dr. Browne's proposal, Dr. Freeman had never discussed with the hospital administrator possible improvements in his services to the hospital (Tr. 313); furthermore, until Dr. Browne made his pre-survey, Mr. Crowell was unaware that improvements could be made in the hospital's laboratory and pathology services (Tr. 314).

In early 1974, Dr. Freeman sent a copy of Dr. Browne's proposal (CX 4) to the Chairman of the Ethics Committee of the Nashville Academy of Medicine (CX 3, 12), the local AMA component society (CX 1825B, E). Dr. Freeman objected that Dr. Browne's proposal was unethical (CX 3), and indicated that he would also start soliciting business if Dr. Browne's conduct were considered proper (CX 3). The Nashville Academy wrote to the Director of the AMA Department of Medical Ethics for advice (CX 12). The AMA official responded that solicitation of patients or [illegible]onage was forbidden, and that Opinions 6, 9, 11 and 20 of Section [illegible] of the 1971 *Opinions and Reports* (CX 462Z5-Z6, Z9) governed the matter (CX 11). The Nashville Academy then informed Dr. Browne that it had received a [196] complaint about his proposal to Lewis County Hospital (CX 7). The Academy stated that it had obtained an ethics opinion from AMA and recommended that Dr. Browne read the *Opinions and Reports* provisions cited by AMA (CX 7, 11). The Academy also stated that it had referred the matter to the Tennessee Medical Association's ("TMA") Judicial Council for its further review (CX 7).

Sometime in late June or early July 1974, the chairman of the TMA Judicial Council requested that Dr. Browne furnish the details surrounding his association with the Lewis County Hospital (Tr. 1922). Dr. Browne complied by sending a detailed description of the situation (CX 1A-C). The TMA Judicial Council then wrote to AMA for additional advice (CX 10). The state society specifically asked whether it was ethical for a physician to solicit, not patients, but referrals from another doctor or from the medical staff of a hospital (CX 10A). It stated that some physicians in the area viewed Dr. Browne's activities as "overly aggressive competition" (CX 10B). It also noted that the complaining pathologist merely wished "the same privileges of solicitation . . . as the other man" (CX 10B). In response, AMA noted that the Principles of Medical Ethics proscribe solicitation of patients or patronage, and stated:

> If a pathologist asks a hospital for the opportunity of providing pathological services and laboratory services, I would think this is solicitation. It is solicitation of

> patronage—of business. . . . I do not believe it is acceptable, usual or customary for any physician to solicit referrals or to solicit or offer *consultative* services to fellow physicians . . . . (CX 9)(emphasis in original).

The TMA then wrote to Dr. Browne, informing him that its Judicial Council considered his method of offering services to hospitals to be in conflict with the Principles of Medical Ethics, as interpreted by the AMA Judicial Council (CX 8C). The state society official's letter urged Dr. Browne to exercise greater care in bringing his conduct into line with AMA's and the state society's ethics interpretations (CX 8C). Dr. Browne agreed to abide by the advice and recommendations in every way (CX 2), and has since abided by them (Tr. 1929). [197]

Upon receiving the medical association advice, Dr. Browne resolved to modify his behavior so that it would not be considered distasteful (Tr. 1925). He became less personally involved in presenting proposals for the provision of the services of his pathology group and laboratory, particularly in offering services to Dr. Freeman's clients (Tr. 1925, 1928). Specifically, Dr. Browne instructed his laboratory company's marketing representative, in his discussions with potential clients, not to volunteer the names or fees of Dr. Browne and his pathology associates or to offer their services (Tr. 1927-28). He required hospitals to request proposals in writing as well as to request Dr. Browne's help, instead of Dr. Browne seeking proposals (Tr. 1925-27). He became less aggressive in marketing out of concern for his reputation, stating: "If I was to be criticized by my fellow physicians for being aggressive, it would denigrate my reputation and I did not want that to happen to make my position less effective as a physician and more humiliating as a human being" (Tr. 1927).

## Other Incidents Involving Direct Contacts with Potential Users of Medical Services

137. A pathologist in San Antonio, Texas, wrote to the Board of Censors of the Bexar County Medical Society in early 1972 to request an ethics investigation of the solicitation activities of a clinical laboratory and its two associated pathologists (CX 2062D). The inquiring pathologist stated that the laboratory and its two pathologists had already obtained as clients a hospital and several physicians whom he had been serving (CX 2062D). The executive director of the Medical Society referred the pathologist's complaint to the Society's attorney for an opinion as to the legality and ethics of the alleged solicitation (CX 2062A). The attorney replied that, because the Medical Practice Act did not prohibit solicitation by physicians

unless it was misleading to the public, the laboratory's solicitations really raised questions of ethics (CX 2063).

The Medical Society's Board of Censors then called the two accused pathologists to its April 1972 meeting (CX 2064A). The Board decided to inform the pathologists that they were in violation of the AMA ethics provision on solicitation of patients by groups and that they should immediately stop soliciting physicians' business through the laboratory's use of their names (CX 2064A). Shortly thereafter, the chairman of the Board of Censors sent a letter to the two pathologists quoting Opinion 8 of [198] Section 5 of AMA's 1971 *Opinions and Reports*, entitled "Solicitation of Patients by Groups" (CX 2065A, 462Z5). A few days after their meeting with the Board of Censors, and again following their receipt of the Board Chairman's letter, the pathologists wrote to the director of the laboratory with which they were associated and requested that their names not be used in contacts with hospitals or other prospective customers (CX 2066A-B).

The Santa Clara County (California) Medical Society has severely restricted the direct solicitation efforts of an industrial medical clinic headed by Dr. Joseph LaDou. The Medical Society has based its actions, which it took in response to complaints from competing medical clinics, on provisions of AMA's 1971 *Opinions and Reports* (F. 98, pp. 124-29).

In August 1976, the state medical society in Maryland published an ethics interpretation prohibiting physicians from the active advertising or direct solicitation of new contracts for delivery of industrial health care services (RX 308, p. 33).

In 1972, a San Francisco physician sent a letter to a local insurance company describing his office facilities and offering to perform physical examinations on its behalf. AMA, which reviewed the letter at the request of an insurance company employee, enclosed a copy of the Principles of Medical Ethics and declared that the conduct of the physician constituted solicitation in violation of Section 5 of the AMA Principles of Medical Ethics. The AMA also recommended that a copy of the physician's letter be sent to the local medical society (F. 96, pp. 122-23).

AMA has condemned as unethical solicitation of patients a number of physicians' form letters and other communications to fellow physicians seeking referrals (*See, e.g.*, F. 110, p. 145; 112, pp. 146-27).

### 8. *Open Houses*

138. Opinion 13 of Section 5 in AMA's 1971 *Opinions and Reports*

states that if a physician holds an "open house" with the intent of directly or indirectly soliciting patients, he is acting contrary to the Principles of Medical Ethics. The opinion makes it incumbent on physicians to discuss their plans for open houses with their component medical societies before implementing them (CX 462Z7). [199]

In 1973, the Columbia County (Pennsylvania) Medical Society requested advice from the Pennsylvania Medical Society about several physicians who had advertised and held an "open house." The Pennsylvania Medical Society sent AMA a copy of the newspaper advertisement for the open house (CX 95B-G) and asked for AMA's ethics advice (CX 95A). In response, AMA referred the Pennsylvania Medical Society to Section 5 of the AMA Principles and advised that, since the open house had already been held, the medical society was to obtain an apology from the physicians involved (CX 94).

In August 1976, the state medical society in Maryland published an interpretation, citing the AMA Judicial Council as authority, which declared unethical the holding of an open house for the purpose of solicitation of professional patronage (RX 308, p. 31).

In 1974, the Maricopa County Medical Society in Phoenix adopted guidelines for HMO marketing activities which state that an open house for prospects at the management level and for physicians is allowable, but that it is not allowable on a patient level except for invited specific groups of people that are in the decision-making process (CX 898I).

In 1975 and 1976, other AMA member medical societies have adopted ethical standards authorizing physician attendance at open houses held by HMOs only where the guests are personally invited (CX 2121B, 2122B, 751D).

### 9. *Other Methods of Soliciting Patients*

139. Opinion 27 of Section 5 of AMA's 1971 *Opinions and Reports* prohibits physicians from mailing out reprints of articles they have written where their intent is to solicit patients directly or indirectly (CX 462Z11). In its advice to medical societies, AMA has applied this restriction to the mailing of reprints to other physicians as well (CX 117-19, 140-43).

Opinion 14 of Section 7 in AMA's 1971 *Opinions and Reports* states that it is unethical for physicians to use their participation in bank credit card programs to solicit patients and, in particular, to list themselves in any bank credit card directory of participating members. Physicians are also prohibited from displaying outside their offices plaques or signs indicating their participation in such credit card plans (CX 462Z22-23). In August 1976, the state medical society in Maryland published a similar ethical rule, citing the AMA Judicial Council as authority (RX 308, p. 61). [200]

## E. Advertising by Fringe Medical Practitioners

### 1. *Health Quackery*

140. James Harvey Young, Professor of History and Chairman of the History Department at Emory University, teaches courses in American social and intellectual history and conducts two colloquial, one on the history of American medicine, the other on the history of American advertising (Tr. 6605-07). Professor Young's major research has been an analysis of health quackery in America. Quackery can be defined as the use of misleading communications to persuade consumers to use products, drugs or devices to improve their health (Tr. 6608-09). Professor Young has lectured on this subject at numerous medical schools and historical association meetings, participated in an international conference on health quackery, received grants or fellowships to study health quackery from various organizations and served on various national bodies related to this field, including the National Food and Drug Advisory Council and the Consumer Task Force of the White House Conference on Food, Nutrition and Health. Professor Young was chairman of the History of Life Science Study Section of the National Institutes of Health, a body which judges applications of scholars who wish to conduct research in the history of medicine or life sciences. Professor Young has written three books and about 50 articles on medical advertising (Tr. 6610-11).

Professor Young, an expert on the history of medical and health advertising in the United States, testified about false and misleading medical advertising in America as far back as the colonial period. He described many fraudulent methods of promoting medicines, devices and medical services which have been utilized over a 200 year period in the United States (Tr. 6627-35). According to Professor Young, passage of various regulatory legislation has not eliminated the continued threat of medical quackery; quacks merely have become more sophisticated (Tr. 6637-39). Quackery has historically included false and misleading medical advertising by physicians (Tr. 6642-49).

Professor Young testified that the misleading advertising of medical products and services remains a serious problem for several reasons. The ignorance of consumers is a major cause of the problem, since most laymen do not have sufficient medical expertise to recognize the deceptive nature of some medical advertising. Fear also plays a significant role in quackery, particularly with regard to an individual with a disease which medical science cannot cure or control. Individuals who are [201] stricken with a painful, life-threatening disease often do not act rationally regarding health matters. Finally, quacks rely on the fact that many ailments cure themselves. The individual then adopts the quack remedy, and often is "cured," not by accepting the remedy, but through natural causes. Yet, the patient will believe the remedy worked, will rely on it in the future and will refuse accepted medical treatment (Tr. 6652-54). Misleading advertising may thereby operate to disparage orthodox medical treatments and cause an unfavorable separation between reputable health care professionals and the public (Tr. 6650-51). A major social cost of medical quackery is the suffering and death of people who have rejected orthodox treatment methods in favor of quack remedies (Tr. 6649-50).

Professor Young believes that an increase in the amount of medical advertising is likely to result in an increase in the level of quackery and deception (Tr. 6655). Moreover, he testified that a removal of ethical guidelines which have been adopted by medical societies is likely to result in increased consumer deception. While neither ethical guidelines nor governmental regulations are likely to inhibit the unethical practitioner, some physicians who do not now engage in questionable advertising would probably do so were it not for the existence of standards set by medical societies. Professor Young stated that, without such guidelines, misleading advertising by physicians is likely to enhance quackery (Tr. 6656-58).

### 2. *Cosmetic Surgery Advertising in California*

141. Advertising by physicians has been most prevalent among plastic surgeons in California. AMA introduced extensive evidence of the experiences of physicians' organizations, individual physicians and consumers with advertising by cosmetic surgeons in California (Tr. 6888-7354). AMA contends that California provides a kind of laboratory in which the nature and effects of widespread physician advertising can be studied (RAF, p. 330).

Advertising by cosmetic surgeons in California began two to three years ago in the form of small, infrequent notices in the classified ads (Tr. 7050). In the past two years, the advertisements have become larger and more frequent (Tr. 7050-51). The record contains numerous examples of recent advertisements by plastic surgeons in California (Tr. 6964; RX 268, 269, 680, 682-85, 781, 783-87, 797, 800, 801). Some advertisements contain false promises about the physical results of surgery (Tr. 6933), inaccurate statements about the surgical procedure (Tr. 6975; RX 269), [202] false claims about the innovative character of an operation (Tr. 6988, 6990; RX 682, 785, 786) or false claims about the physician or his or her staff (Tr. 6986–88, 7108; RX 682, 785, 786, 804, exhibit 2). Some advertisements include "before and after" photographs, with the "after" picture posed in a more favorable angle and lighting (RX 268, 680, 682–83, 786, 800, 916–17; Tr. 6972, 6988–89). Showing the results of one patient's experience, or giving one person's testimonial, may imply to some people that anyone can and should have the same operation with similar results, an assertion that can be misleading (RX 682, 800; Tr. 6933–34, 6970–72, 6986, 7104–05).

Some advertisements utilize truthful information in a manner that may mislead potential patients as to the qualifications of the advertising physician. An example is one physician who included his membership in the AMA as part of his qualifications; membership in the AMA is not a function of professional skill (Tr. 6972–73, 6980; RX 268, 787, 783, 679, 680). More subtle is a claim by a physician asserting his qualification as a "Board certified cosmetic surgeon" (RX 268, 679, 680). In fact, there is no American Board of Cosmetic Surgery and, if cosmetic physicians are certified, they are certified in other specialties which may have nothing at all to do with cosmetic surgery (Tr. 6933, 6973, 6990). Other advertised credentials, perhaps impressive to lay persons but medically meaningless, include authorship of articles published in obscure medical journals (Tr. 6974, 6979; RX 268, 680B), invention or modification of surgical instruments (Tr. 6979–89; RX 787, 783) and false statements about "special residency training and expertise" (Tr. 6980; RX 787). The names of the advertising surgical groups themselves, such as the Academy of Cosmetic Surgery Medical Group (Tr. 6994; RX 684, 801) or Bay Area Woman's Medical Educational Services (RX 797; Tr. 6992–93), could imply that there is a learned organization or nonprofit social institution involved when such is not a fact.

Some advertisements emphasize the modernity of the facilities, and invite visits by patients who wish to make comparisons (RX 269, 787, 785, 683). Potential patients may not have the expertise to judge its adequacy or medical necessity, and may be misled by superficial appearances (Tr. 6981–82). The invitations also may be designed to lure people into the office where "hard-sell" techniques are adopted (Tr. 6981–82), and to divert attention from the qualifications of the surgeon (Tr. 6982). Some advertisements emphasize the reasonableness of the fees and the easy financing which is made available (RX 269, 787, 786, 684, 784, 685). Pictures of attractive models used in some [203] advertisements, have little relevance to the cosmetic surgery (Tr. 6984, 6990; RX 680, 682, 684, 690, 800-01). The bikini-clad figures may deceptively suggest that plastic surgery can reshape and rejuvenate the whole body (Tr. 6993-94, 6994-95; RX 684, 690, 784, 797, 801). These psychologically-appealing advertisements may minimize the seriousness of surgical operations (Tr. 6976-77; RX 269). Rarely, if ever, is fee information included in the advertising (RX 804, p. 7). Further, the easy financing which is featured may turn out to be quite expensive (Tr. 6977). Notably absent from such advertising is information about the risks involved in the operation, the expense of the surgery, the potential of permanent disfigurement and, sometimes, even the name of the operating surgeon (Tr. 6976-78, 6984-85, 6995, 7109; RX 680, 684, 685, 784, 781, 801, 804, exhibit 2).

Advertisements for cosmetic surgery appear in reputable publications, such as the *Los Angeles Times* (RX 279, 268, 800, 680, 684), and are widespread, appearing daily in newspapers in San Diego, Santa Ana and Los Angeles (Tr. 6997). Yellow Pages listings in the August 1977, edition of the City of Los Angeles telephone directory contain numerous advertisements for cosmetic surgeons. For example, there are a number of advertisements for E. B. Frankel, M.D., who is associated with the following organizations, all using the same location and telephone number: Acne Derm Medical Group, Affiliated Dermatologists' Medical Group and Cosmetic Surgery Center Medical Group; Dr. Frankel also sponsored a listing under his own name (RX 907A-G). Two advertisements appear for the Bosley Medical Group, including one which prominently states, "End Baldness Permanently With Your Own Living Hair" (RX 907B, C). The Yellow Pages also contains an advertisement for the Acupuncture Institute of Stanley Durbin (RX 907C).

### 3. *Consumer Witnesses in California Who Experienced Cosmetic Surgery*

142. Respondent AMA called consumer witnesses who testified about their experiences with cosmetic surgery in California, either for breast augmentation (Tr. 6995, 6767, 6795, 6824, 6889) or a "tummy tuck" (Tr. 6855). All of the witnesses responded to advertising by cosmetic surgeons which they had observed in the newspapers or on radio and television (Tr. 6696, 6769, 6795, 6825, 6889). Each of the witnesses was also subjected to high pressure sales techniques after responding to the advertisement (Tr. 6699, 6702, 6770-73, 6800-05, 6828-29, 6858-59, 6892-94). Five of the witnesses suffered severe injury to their health and serious emotional difficulties as a consequence of the surgery. The daughter of the remaining witness

died as the apparent result of the surgery performed by the advertising physician. [204]

The advertisement seen by the first witness appeared in the *Los Angeles Times* in August 1976 (Tr. 6697), and was sponsored by the so-called Women's Advisory Council (RX 877). The second witness saw an advertisement in the *San Diego Evening Tribune* in late 1976 (Tr. 6767-68); the sponsoring organization was identified as the Academy of Cosmetic Surgery; and a telephone number also appeared (Tr. 6767-68). The third witness saw advertisements in newspapers and on television and radio sponsored by "Women Who Help Women" (Tr. 6795). The fourth witness also saw and heard newspaper, radio and television ads sponsored by "Women Who Help Women" in July 1974 (Tr. 6825-26). The daughter of the fifth witness saw an advertisement in the *San Jose Mercury* in November 1976 (Tr. 6855-56). The witness's daughter contacted the advertising surgeon to arrange for a "tummy tuck," although she had previously been advised by several non-advertising physicians that the surgery was contraindicated in view of her obesity, diabetes and general physical condition (Tr. 6857). The sixth witness responded to an ad from the *Los Angeles Times* sponsored by "Women Who Help Women" (Tr. 6890).

All of the witnesses testified as to the medical treatment they received and the results of their cosmetic surgery (Tr. 6689-6919). Without going into the elaborate detail present in the witnesses' testimony, it is concluded from that testimony and from pictures of the results of the surgery that the care was unprofessional in every respect. One patient died and the others were permanently disfigured, even after reconstructive surgery performed by other surgeons. The five witnesses who survived the surgery were under medical care for weeks and months, and the total costs of the surgery were substantial.

### 4. *Advertising by Bariatric Physicians*

143. Bariatric medicine deals with people who have weight problems (Tr. 7137). The purpose of bariatric treatment is not merely to promote a change in weight, but also to help the patient live a longer, healthier and more useful life (Tr. 7145). A decrease in weight may also cure or control such serious physical problems as high blood pressure, hypertension, diabetes and heart disease (Tr. 7145-46). There are about 560 members of the American Society of Bariatric Physicians (Tr. 7140). This organization, which is not related to the American Medical Association, strives to encourage a high level of bariatric medical care through continuing medical

education programs, seminars and scientific publications (Tr. 7140-41). Approximately 60 members of the Society are certified by the American Board of Bariatrics (Tr. 7139). [205]

When a prospective patient presents himself to a reputable bariatric physician, the first stage of treatment normally involves both an in-depth interview and an extensive physical examination (Tr. 7142). A patient's desire to lose weight may be symptomatic of deeper psychological problems which cannot be treated by the bariatric physician. A reputable bariatric physician will not ignore a patient's psychological problems in order to treat only their physical consequences, but will endeavor to promote the patient's mental health as well (Tr. 7147-48). Sound bariatric treatment often involves not only diet and exercise, but consultation with a psychologist who can aid in behavior modification (Tr. 7143-44). Possible problems which a bariatric physician encounters include patients who suffer from diabetes, high blood pressure, glaucoma, cirrhosis, intestinal problems or kidney or liver dysfunctions, all of which require specialized forms of bariatric treatment (Tr. 7152-53). Recidivism in obesity is common, and weight control requires a well-rounded diet program, good exercise program and a change in eating habits and mental attitude (Tr. 7155). The key to bariatric treatment is loss of fat and a reduction in caloric intake (Tr. 7159-60).

Advertising of weight control programs is widespread both in California and across the United States. A large part of this advertising is sponsored by physicians (Tr. 7166; RX 806-09, 811-16). The copy of a bariatric advertisement may be meaningless but eye-catching, such as "Serious About Losing Weight?" (Tr. 7182; RX 812), or "Come in Fat. . .Walk out Thin" (Tr. 7188; RX 809). Other advertisements are more misleading, suggesting that the consumer can lose a certain amount of weight in a specified limited time period without strenuous exercise, side effects or hunger, and claiming that the system is safe for the "entire family" (Tr. 7177-80; RX 806, 807, 809). Bariatric advertisements frequently feature pictures or drawings of attractive men and women. In fact, even patients who manage to lose large amounts of weight will not look like they did before the weight gain because skin has stretched and wrinkled. Few, if any patients, will resemble the attractive bodies pictured in the advertisements (Tr. 7178-79, 7182-83; RX 813). Some advertisements claim they have a special or unique method of weight control (Tr. 7180, 7187; RX 811, 812, 814). In fact, no one clinic or physician has a unique "key" to weight loss; dieting and exercise is the only effective method of bariatric treatment (Tr. 7180-81). Bariatric advertisers often make unsubstantiated claims about the number of individuals they have successfully **[206]** treated (Tr. 7183–84; RX 813, 814, 816), and support their claims with patient testimonials (Tr. 7188–89; RX 808). These advertisements contain no information on the number of individuals who failed to lose weight (Tr. 7184).

The weight clinics to which consumers are drawn by these bariatric advertisements often provide inadequate care at a high cost. The patient may be required to pay a certain amount of money immediately or sign a contract and repeated collection attempts may be employed if he or she defaults (Tr. 7168–69). High pressure sales tactics are also used (Tr. 7170). Some physicians advertise a large number of offices in various locations, although they could not possibly service all of them and although patients are likely to be unable to contact their physician when they need to (Tr. 7185–86; RX 808, 816).

### 5. *Evaluation of Advertising by Fringe Medical Practitioners*

144. Most of the physicians engaged in the advertising of cosmetic surgery and weight loss programs are fringe practitioners (Tr. 9337, 6655). Moreover, since most of these advertising physicians are not members of state and local medical societies, they are not subject to their disciplinary jurisdiction (CX 2593, 2420, 2576–77, 2579–81; Tr. 6785, 9337; RX 679, 682, 683, 693, 797, 801); thus, AMA and its local medical societies cannot control the advertising of these doctors through their ethical restrictions (Tr. 9512–13, 9339–41). In any event, most of the fringe practitioners involved in the advertising incidents about which AMA has produced evidence are being actively proceeded against by state licensing officials and, in some cases, by local district attorneys in criminal prosecutions (CX 2206–07, 2210–17, 2222–25, 2582–84).

Quacks and borderline practitioners in the medical field have practiced for many years in California (Tr. 7025, 6757–58; RX 804, p. 6); witnesses were unaware of such advertising by doctors in states other than California (Tr. 6920–7026, 7031–7123, 9529). Most physicians are competent (Tr. 9526, 9335, 9367), and the number of physicians who would make false claims is small (Tr. 9333). Medical educational standards, both for qualifications and character, are stringent, and the physicians being turned out today are of exceptionally and uniformly high quality (Tr. 9335).

The essence of the problems raised by AMA's testimony with respect to cosmetic surgeons is not with the advertising but, rather, with the negligent, inept, insensitive and almost ruthless medical care given the patients (*See* RAF, pp. 339–60). **[207]**

## XI. ETHICAL RESTRICTIONS ON PHYSICIANS' CONTRACTUAL ARRANGEMENTS

### A. Contract Practice of Medicine

145. Section 6 of the Principles of Medical Ethics states: "A physician should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgement and skill or tend to cause a deterioration of the quality of medical care" (CX 462Z12; RX 1, p. 5). AMA has defined "contract practice" as follows:

> Contract practice as applied to medicine means the practice of medicine under an agreement between a physician or a group of physicians, as principals or agents, and a corporation, organization, political subdivision or individual, whereby partial or full medical services are provided for a group or class of individuals on the basis of a fee schedule, or for a salary or for a fixed rate per capita (CX 462Z12).

### B. The Restrictions and their Background

146. The 1971 AMA Judicial Council's *Opinions and Reports* provide that an organization's contract with a physician to deliver medical services is "unfair or unethical" under any of the following conditions:

(a) When the compensation received is inadequate based on the usual fees paid for the same kind of service and class of people in the same community.

(b) When the compensation is so low as to make it impossible for competent service to be rendered.

(c) When there is underbidding by physicians in order to secure the contract.

(d) When a reasonable degree of free choice of physicians is denied those cared for in a community where other competent physicians are readily available. [208]

(e) When there is solicitation of patients directly or indirectly[5] (CX 462Z12-13).

AMA has also published this five-part ethical guideline in its 1974 *Report on Physician-Hospital Relations* which was in effect as of the issuance of the complaint herein.

AMA's 1971 ethical standards also proscribe the following contractual relationships:

(a) Opinion 5 of Section 6 of the 1971 Judicial Council's *Opinions and Reports* states: "A physician should not dispose of his professional attainments or services to any hospital, corporation or lay body by whatever name called or however organized under terms or conditions which permit the sale of the services of that physician by such agency for a fee" (CX 462Z13).

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[5] "[B]y 'solicitation' is meant to seek professional patronage by oral, written or printed communications either directly or by an agent" (CX 462Z13).

(b) Opinion 8 of Section 6 declares that "[t]he action of a physician in accepting a salaried position offered by the hospital" to provide professional medical care in the emergency room "is not consonant with the policy of the AMA" (CX 462Z14, 959Z62).

(c) Opinion 4 of Section 6 states:

> In increasing numbers, physicians are disposing of their professional attachments to lay organizations under terms which permit a direct profit from the fees or salary paid for their services to accrue to the lay bodies employing them. . . . Certain hospitals are forbidding their staffs of physicians to charge fees for their professional services to 'house cases' but are themselves collecting such fees and absorbing them in hospital income. Some universities, by employing full time hospital staffs and opening their doors to the general public, charging such fees for the professional care of the patients, as to net the university no small profit, are in direct and unethical competition with the profession at large . . . . (CX 462Z13). **[209]**

(d) AMA's 1974 *Report on Physician-Hospital Relations* states:

> [A] physician should not bargain or enter into a contract whereby any hospital, corporation or lay body by whatever name called or however organized may offer for sale or sell for a fee the physician's professional services . . . . The physician and the medical staff, as principals, should not approve any contract whose terms or conditions are inconsistent with the 'Principles of Medical Ethics' and established policy of the American Medical Association.
>
> Throughout many years, it has clearly been AMA's position that no lay organization should profit from fees received for physicians' services (CX 959Z2).

This ethical restriction closely resembles Opinions 4, 5 and 8 of AMA's 1971 *Opinions and Reports* (CX 462Z13–15).

147. The actions of AMA's House of Delegates and Judicial Council over the years reveal the anticompetitive motivations behind AMA's ethical restrictions on contract practice. The AMA's House of Delegates adopted a resolution, in 1869, recommending "that all contract physicians, as well as those guilty of bidding for practice at less rates than those established by a majority of regular graduates of the same locality, be classed as irregular practitioners" (CX 1435Q). The AMA House of Delegates rescinded the 1869 resolution eight years later. In 1872, the House referred to the state societies a similar recommendation from its Committee on Ethics:

> [T]hat members of the profession hired by the month or year for definite, stipulated wages, by individuals, families, railroad or manufacturing corporation, or any other money-making institution whatever, for ordinary medical and surgical practice

(always excepting benevolent and eleemosynary institutions and medical officers of the Army and Navy), are to be classed as irregular practitioners (CX 1435Q). [210]

In the 1890's, the AMA House of Delegates adopted a report declaring that contract practice had "gone too far" and that "[t]oo much of the spirit of trade has found its way into the profession, and its further encroachment should be resisted—not encouraged" (CX 1435Q, R).

In 1926, the House of Delegates adopted a resolution recommending that "the whole matter of contract practice be investigated under the direction of the Judicial Council" (CX 1435R). In response, the AMA Judicial Council reported to the House of Delegates, in 1927, that "[t]here is no doubt that the [contract] practice is growing in frequency and becoming widespread. In fact, it is entering into so many phases of the practice of medicine as to be a distinct menace to the stability of our organization" (CX 953B). The Judicial Council proposed, and the House of Delegates then approved, language identical to the provisions of Opinion 3 of Section 6 of the Judicial Council's 1971 *Opinions and Reports* as a "formula . . . to pronounce as ethical or unethical, a given contract for medical services" (CX 1435R-S, 953B-C, E, F).

In 1927, the Committee on the Costs of Medical Care, a commission of leaders in medicine, public health and the social sciences funded by the Carnegie Corporation, the Rockefeller Foundation and other private philanthropies, began an extensive five-year study of the country's health care system (CX 2085). In its report, published in 1932, the Committee recommended the expansion of prepaid health care, involving an increase in the amount of contract practice (CX 2085M, V-Y, Z57). Nine physician members of the Committee on the Costs of Medical Care, including the Secretary of AMA, the then Chairman of the AMA Judicial Council and the 1927 Chairman of the Judicial Council (CX 2085R, Z27; 952B, 953B), published a minority report opposing the Committee's recommendations on group prepaid medical practice (CX 2085Q-Z25). Citing provisions of the Opinion 3 language adopted by the AMA House of Delegates in 1927, the minority disapproved the Committee's proposals for expanded group contract practice, stating that "[a]ny method of furnishing medical care which degrades the medical profession through unfair competition or inadequate compensation . . . must be condemned" (CX 2085W-Y). The minority also criticized the group practice contracts recommended by the Committee on the ground that "[w]herever they are established there is solicitation of patients, [211] destructive competition among professional groups . . . and demoralization of the profession" (CX 2085Z6), and that "able physicians outside of the groups are being pushed to the wall" (CX 2085Z7).

In 1933, the AMA House of Delegates voted to endorse the minority report of the Committee on the Costs of Medical Care as "expressive, in principle, of the collective opinion of the medical profession" (CX 1435Z42). That same year, the AMA House of Delegates amended the Principles of Medical Ethics to incorporate the Opinion 3 language on contract practice (CX 952B, E, 1435S).

In 1934, the AMA House of Delegates further amended the Principles of Medical Ethics to provide further that:

> It is unprofessional for a physician to dispose of his professional attainments or services to any lay body, organization, group or individual, by whatever name called, or however organized, under terms or conditions which permit a direct profit from the fees, salary or compensation received to accrue to the lay body or individual employing him. Such a procedure is beneath the dignity of professional practice, is unfair competition with the profession at large, is harmful alike to the profession of medicine and the welfare of the people, and is against sound public policy (CX 1435S–T).

Absent the second sentence, this provision parallels Opinions 5 and 8 of Section 6 in AMA's 1971 *Opinions and Reports* (CX 462Z13–14) and the restriction on contract practice published in AMA's 1974 *Report on Physician-Hospital Relations* (CX 959Z2).

### C. Application of the Restrictions

148. AMA and its member societies have utilized the above described ethical restrictions on contract practice (F. 146, pp. 207–09) to proscribe contracts under which hospitals, group prepaid health plans and other lay organizations employ physicians to care for patients, especially where the physicians are employed for a fixed salary. In a number of instances, AMA and its member societies have counseled physicians to refrain from actions contrary to the contract practice ethical restrictions. [212]

In 1936, the Medical Society of Milwaukee County (Wisconsin) expelled several physicians for associating with a prepaid group health plan proposed for the employees of the International Harvester Company (CX 580A–B). On appeal, the State Medical Society of Wisconsin and the AMA Judicial Council affirmed the physicians' expulsion (CX 580C–D). The AMA Judicial Council held that the physicians' relationship with the group plan constituted unethical contract practice and involved unethical solicitation of patients and advertising (CX 580C, E).

Shortly thereafter, the Medical Society of the District of Columbia expelled one physician affiliated with the Group Health Association, a prepaid group health plan, and succeeded in pressuring another to resign from the plan. The Medical Society charged the physicians with violating the same AMA ethical provisions on contract practice that were subsequently incorporated in Opinion 3 of Section 6 of the 1971 *Opinions and Reports* (*AMA* v. *United States*, 130 F.2d 233, 238-40 n. 23 (D.C. Cir. 1942), *aff'd* 317 U.S. 519 (1943)). In furtherance of the AMA policy of opposing group prepaid medical practice, the Medical Society also threatened disciplinary action against any physician who consulted with, or any hospital which granted staff privileges to, a Group Health physician (*United States* v. *AMA*, 110 F.2d 703, (D.C. Cir. 1940), *cert. denied*, 310 U.S. 644 (1940)). Both respondent AMA and the Medical Society of the District of Columbia were convicted of conspiracy to restrain and obstruct the development of the group health plan, in violation of the Sherman Act. In affirming the convictions, the D.C. Circuit Court stated: "The concern of [AMA and the local medical society] with the effect of Group Health on the economic status of the medical profession, and upon competition in financing and making available medical and hospital services, is abundantly illustrated by articles and statements of officers and members thereof" (*AMA* v. *United States*, 130 F.2d 233, 239 (D.C. Cir. 1942)). The Supreme Court affirmed the convictions in 1943 (*AMA* v. *United States*, 317 U.S. 519 (1943)). The Administrative Law Judge takes official notice of these decisions.

In 1965, AMA responded to an inquiry from the California Medical Association asking whether a physician could ethically compete with other physicians, through competitive bidding, to obtain an employment contract to perform physical examinations (CX 1158A, 539A). In its [213] response, AMA relied on the first three paragraphs of Opinion 3 of Section 6 of the *Opinions and Reports* governing contract practice (F. 146, pp. 2-7-08), including the provision barring "underbidding by physicians" (CX 1158A-C). The AMA letter stated:

> The guidelines as to what would be proper bidding could be indirectly resolved from points 1 and 2 [the first and second subparagraphs of the third paragraph of Opinion 3 of Section 6 of the 1964 *Opinions and Reports* (CX 465V) and later in the 1971 *Opinions and Reports* (CX 462Z12-13)]. That is, when the bid is below what is the usual fee paid for the same kind of medical service in the locality and when the remuneration is so low as to make it impossible to render competent service [it is unethical]. . . .
>
> . . . [As to] whether or not an affirmative response to such a general invitation to bid for use of the physician's professional services would [it] be within keeping of the dignity of the medical profession? Secondly, a doctor, would know by the type of request tendered to him that he probably is going to be competing against many of his associates for a specific contract or employment. Wouldn't this be a competitive force of so great a magnitude that it would cause a deterioration of the quality of medical service rendered? . . .

> Thirdly, wouldn't such a request, if answered, make an inroad into the concept of professionalism in that it reduces the profession to a business? (CX 1158C-D).

In the mid 1960's, corporate plantations in Hawaii were contracting with physicians, on salaried and other fixed compensation bases, to provide medical care for their workers and retirees (CX 852A, 850C). When the plantations' retirees began obtaining coverage under the [214] newly instituted Medicare program, the plantations decided to seek Medicare reimbursement for the services rendered by their contract physicians, while continuing to pay the physicians on a salaried basis (CX 852A-B). The plantations also planned to pay the Medicare deductible for those retirees who continued to obtain their care from the plantations' contract physicians (CX 852A-B). The Honolulu County Medical Society's executive secretary, and later the Hawaii Medical Association's attorneys, wrote to AMA in 1967 asking whether the proposed contractual arrangements were ethical (CX 852, 850). The Hawaii Medical Association's attorney stated: "If the Judicial Council deems it unethical, the doctors will pull out of the contract" (CX 848, 850A). The Secretary of the AMA Judicial Council responded to the Honolulu County Medical Society, enclosing contract practice provisions of the Judicial Council's *Opinions and Reports*, and stating:

> [T]his matter is a classic example of contract practice . . . . To the extent that the company seeks to derive benefit for itself from the labors of the physician . . . [i]t would be in derogation of basic ethical principles of medicine. . . . [T]he proposal of the plantation does not appear to be in keeping with traditional AMA policy. Were the plantation to accept an assignment of the physician's benefit, the plantation would be selling the services of the physician and would be exploiting him. There would be no assurance that the income of the physician from the plantation would relate in any way to the amount of services he furnished the individual patient . . . . Perhaps the time has come when an educational program is needed to eliminate as far as possible this older form of contract practice, substituting a fee-for-service system . . . . (CX 851).

The Honolulu County Medical Society adopted, as "clear and unequivocal," AMA's position on the plantations' contractual proposal and declared unethical any arrangement violating the policies set forth in the AMA letter (CX 846). The [215] Secretary of the AMA Judicial Council then wrote to the county society, praising it for "using the *Opinions and Reports* of the Judicial Council [to take] a stand" (CX 845). The AMA letter, which quoted a portion of an earlier AMA Judicial Council report, stated:

> The Judicial Council believes that the remedy for the evils associated with contract practice resides in the county societies, and that these societies should use their

influence and power . . . to prevent underbidding for these contracts below what would give a fair reward for medical services rendered . . . .

> It seems to me that the Honolulu County Medical Society is observing the spirit of ethical principles . . . . (CX 845A-B).

In January 1966, the AMA Department of Medical Ethics wrote to a Utah radiologist that "an agreement under which the hospital employs the radiologist and sells his services . . . is always considered unethical since professional services are being purveyed to the direct benefit of a lay group; namely, the hospital" (CX 807C, 537A).

In February 1966, the AMA Department of Medical Ethics advised a West Virginia physician that it is unethical to contract to provide coverage for a hospital's "walk-in" patients on a fixed salary basis, even when the physician's services are billed separately (CX 813A-B). AMA sent the physician the 1966 *Opinions and Reports* and directed his attention to, among other provisions, Opinion 8 of Section 6 (CX 813A), which proscribed salaried emergency room practice (CX 463V, W).

In May 1966, the Kentucky Medical Association, an AMA constituent society whose members must subscribe to the AMA Principles of Medical Ethics (CX 1827H, I, J), threatened three physicians with disciplinary action (CX 1823) for permitting a "lay organization to purvey their services to the public and not restricting their method of compensation as nearly as possible to the time-honored 'fee-for-service' concept" (CX 1823A). The state society's Board of Trustees stated that occupancy of offices in hospitals by "a privileged few" physicians "is a form of solicitation which is inimical to high professional standards" (CX 1823A). [216]

In June 1966, the AMA House of Delegates "approved for circulation" a model physician-hospital contract for the staffing of hospital emergency rooms (CX 954A-E). It provides:

> 11. *Professional fees:* The charges for professional services rendered by the Partnership [of physicians] shall be established, billed and collected by the Partnership in the same manner as are the fees of other physicians engaged in the independent practice of medicine. It is intended that the Partnership's schedule of fees shall conform generally with those customarily charged in the locality and nearby localities for comparable services (CX 954C).

The model contract also provides that the physicians "shall organize and operate the Emergency Department or Section and engage in medical practice therein in accordance with the ethical and professional standards of the American Medical Association . . ." (CX 954D). As recently as June 1974, the Secretary of the AMA Judicial

Council sent a copy of the model contract to a hospital which had requested guidance in staffing an emergency room (CX 868, 869A–D).

In 1967, the House of Delegates of the state medical society in Maryland voted to disapprove the closed-panel practice of medicine as an abridgement of "freedom of choice" (RX 308, p. 29). It relied on a similar policy adopted by the AMA House of Delegates in 1959 (RX 308, p. 29). Previously, the AMA Judicial Council had declared that "free choice of physician . . . expressly requires that any qualified licensed physician residing in the area in which the plan operates be allowed to participate" (CX 1435Z57). The Maryland medical society published its "freedom of choice" resolution in its August 1976 compendium of interpretations of the AMA Principles (RX 308, pp. iii, 29).

In April 1968, a New York physician wrote to AMA to ask whether his part-time employment as a salaried physician at a hospital would violate the AMA Principles of Medical Ethics. AMA replied that the opinions of its Judicial Council do not approve of hospitals employing physicians (CX 1753A). [217]

In July 1968, the Secretary of the AMA Judicial Council wrote to a Virginia physician that it is not ethical "for a physician to have a contractual relationship with a hospital in which professional fees for his services are collected by the hospital and he receives a salary not related to those fees" (CX 831).

Also in 1968, the Chairman of the Judicial Council of the Florida Medical Association wrote to the AMA Judicial Council inquiring about the ethical principles that apply to physicians employed on a salary basis by a hospital or medical school (CX 528A, B), AMA learned that the state association, whose own ethical principles are the AMA's Principles of Medical Ethics (CX 2543K), had adopted a statement providing:

> A salary may be paid to a physician for time spent in administration and supervisory capacity but not for patient care.
>
> It is not unethical for a physician to accept a salary for supervisory, or educational and administrative activities or his presence; but it shall be unrelated to how many patients he sees or how much money he collects from the patients for services rendered them; and fees for treatment of patients shall continue to be billed in the physician's name and disposed of by the physician rendering the service (CX 528A).

The AMA Judicial Council carefully considered this statement and unanimously decided that the Florida Medical Association's own ethical policy statement on salaried hospital practice would serve as an acceptable response to the state association's inquiry to AMA (CX 528B).

In December 1969, the Secretary of the AMA Judicial Council responded to a physician's inquiry by sending a letter to an AMA field representative (CX 812, 459D). The letter stated: "If the salaried physician is being paid by the hospital for medical care given patients the hospital is practicing medicine through a licensed employee . . . . [This activity] is contrary to AMA policy. See opinion 4 and 5 on page 32, Opinions and Reports of the Judicial Council [CX 463V]" (CX 812A). [218]

In October 1972, the State Medical Society of Wisconsin, a constituent society of AMA whose members are governed by the AMA's Principles of Medical Ethics (CX 1906A, G), wrote to the Secretary of AMA's Judicial Council regarding the ethics of a prepaid group health plan's distribution to the public of a list of its staff physicians (CX 1198). In response, the Judicial Council Secretary cited Opinion 3 of Section 6 of the 1971 *Opinions and Reports* as the most applicable opinion of the Judicial Council (CX 1199). Opinion 3 includes a ban on contract practice "[w]hen there is solicitation of patients directly or indirectly" (CX 462Z13).

In 1973, the Washington State Medical Association, an AMA constituent society that requires its members to subscribe to AMA's Principles of Medical Ethics (CX 475H, I, K, O), asked the AMA Judicial Council for ethics advice on a contract plan proposed by Manpower, the large temporary help service. Manpower wanted to hire physicians to cover hospital emergency rooms and adult health clinics and to conduct physical examinations, and pay them based on an established schedule. It had requested the state association's assistance in locating physicians who might be interested (CX 822A-C). The Secretary of the AMA Judicial Council wrote back noting that, under the proposal, Manpower "would hire a physician and tell him where and when to work, determine his salary, and determine its charge for its service in providing him to its subscribers" (CX 823). The AMA letter said the plan "would exploit the physician" and violate "ethical principles" (CX 823B). The AMA official called the state association's attention in particular to Section 6 of the Principles of Medical Ethics and to the opinions found in the 1971 *Opinions and Reports* following that section (CX 823B). The state association then wrote to Manpower, informing it of AMA's judgment that the contract practice plan would violate ethical principles and declining to provide assistance to Manpower (CX 824).

A hospital in Indianapolis paid an internist a fixed stipend to direct an arthritis treatment clinic which collected fees from patients for the services it rendered (CX 799). In 1974, a member of the medical staff of the hospital wrote to the AMA Judicial Council to ask whether the arthritis clinic was "in violation of ethics and policies of the AMA" (CX 799). In its response, the AMA Judicial Council questioned the propriety of the clinic selling its contract physician's services for a fee, stating that "[t]he policy of the American Medical Association is that the physician should set his own fees and bill his own patients" (CX 798). [219]

In 1974, a physician's attorney asked AMA whether the physician's contemplated employment with a medical clinic licensed by the Chicago Board of Health would be legal and ethical (CX 815). The physician planned to assign the fees he collected from his patients to the clinic, in return for compensation on an hourly basis (CX 815). The Secretary of the AMA Judicial Council responded that the practice was of questionable legality based on cited court cases. He advised that "[f]rom an ethical point of view I would say that it is contrary to the long established policy of the AMA," and enclosed an opinion reflecting that policy (CX 814).

Sometime after issuance of the complaint in this proceeding, the Texas Medical Association sent a letter to the Texas Hospital Association, with copies to the chiefs of staff of Texas hospitals and to the presidents of every county medical society in Texas, stating that "the only acceptable method for [hospital-based] physicians to fulfill their ethical and legal obligations" is for the individual physicians to bill their patients directly or through hospital accounting departments on a fee-for-service basis (CX 859A, B). The letter referred to the Principles of Medical Ethics (CX 859A), which govern the state society's members (CX 1899U, Z5). The letter also paraphrased the first paragraph of Opinion 5 of Section 6 of the *Opinions and Reports*, which states that physicians should not permit the sale of their services by a hospital or lay organization for a fee (CX 462Z13). The letter asked the Texas Hospital Association to cooperate "in circulating this policy to administrators of hospital facilities in Texas in order that physicians seeking to comply with these ethical guidelines may be able to negotiate, and if necessary renegotiate, acceptable contracts for provision of these medical services" (CX 859A). The letter also stated that Texas law prohibited the corporate practice of medicine. An attachment to the letter, containing Texas Medical Association ethical policies issued in November 1975 and May 1976, stated that physicians who practice under circumstances other than separate, direct billing of patients for particular services rendered "may be subject to charges of unethical conduct and previous policy allows no latitude in deciding the ethics of the matter" (CX 859C, D, A). [220]

## Florida Health Care Plan

149. In 1968, the Florida Medical Association ("FMA"), adopted a statement, later approved by the AMA Judicial Council, declaring it unethical for a physician to be paid a salary for patient care (CX 528A).

Throughout the 1970's the FMA and the Volusia County Medical Society ("VCMS"), both AMA member societies (CX 2543A, 1961B), have impeded the development of an HMO by restricting its marketing activities and declaring its physician employment contracts to be unethical. In their actions, the societies have relied on AMA ethical standards and other AMA statements.

In 1971, Dr. E. D. Davis, who testified in this proceeding, and others began organizing the Florida Health Care Plan ("FHCP"), an HMO in Daytona Beach, Florida, which has since gained federal certification and begun operations (Tr. 9146–47, 9155–56, 9158). Its staff includes contract physicians who are paid a fixed salary to care for patients (Tr. 9196–97). In late 1971, the VCMS voted unanimously to oppose and disapprove the plan (CX 2575D, E).

In 1972, the FMA published an ethics opinion stating:

> [A]ny physician contemplating providing medical service in an HMO setting should always be aware of Section 6 of the Principles of Medical Ethics and particularly those ethics covering conditions of medical practice, contract practice, purveyal of medical service to direct profit of lay group, practice of medicine by lay corporations, and lay corporations [Opinions 1, 2, 3, 4, 11 and 12, respectively, of Section 6 of the 1971 AMA *Opinions and Reports* (CX 462Z12–13, Z15)] (CX 2572E).

Also in 1972, the state society issued *Criteria for Ethical Contracts Between Physicians and Hospitals* ("Criteria") (CX 825). The Criteria begin with an almost verbatim rendition of the final paragraph of Opinion 5 of Section 6 of AMA's 1971 *Opinions and Reports* (CX 462Z14). The Criteria also declare that ethical contracts must not include a maximum or ceiling on the contract physician's income (CX 825).

In 1973, at the request of FMA, AMA's Department of Field Service supplied VCMS with "anti-HMO's" information "[which] will give you and your physicians all of the necessary information and 'ammunition' to rebut HMO activities in your area" (CX 2101). [221]

In May 1977, two of FHCP's physicians applied for malpractice insurance coverage (CX 2558, 2566) from an insurance carrier established and controlled by FMA (CX 2540C, D, 2539C). The only other source of malpractice insurance in Florida was a program run by the State of Florida. The rates for this plan were substantially higher than the FMA carrier's rates (Tr. 9198–99, 9202, 9210).

The state society's insurance carrier obtained copies of the FHCP physicians' employment contracts and forwarded them to the FMA's Judicial Council for review (CX 2562, 2565, 2544). The Judicial Council declared the employment contracts unethical (CX 2563–65, 2544). In June 1977, the insurance carrier rejected the physicians' applications for coverage (Tr. 9201–02), stating in letters to the physicians:

> The Judicial Council has disapproved this contract due to the ceiling on the physicians income or the flat salary which you receive from Florida Health Care Plan, Inc. It is the feeling of the Council that this cap or ceiling is not consistent with the ethical principles of the Florida Medical Association. The Council feels that the income of a physician should be based on his production and the ceiling can result in the exploitation of the contract physician (CX 2565, 2544).

FMA's ethical principles consist of AMA's Principles of Medical Ethics, as interpreted by the opinions of the AMA Judicial Council (CX 2543K).

The physicians employed by the FHCP have had to obtain their malpractice insurance from the high cost plan administered by the State of Florida (Tr. 9198, 9210–11). Consequently, FHCP must pay insurance premiums four times higher than the premiums charged by the medical society carrier (Tr. 9210–11).

### D. The Connecticut Respondents

150. The AMA House of Delegates has adopted a resolution declaring that no state or local society which has not adopted AMA's Code of Ethics shall be entitled to [222] representation in AMA (CX 1435Z15–16). CSMS has adopted the AMA's Principles of Medical Ethics to govern the conduct of its members (CX 991D, L–M; CX 1404I–J). NHCMA has also adopted the AMA's Principles of Medical Ethics (CX 1404I). NHCMA's bylaws declare that members can be expelled for violating AMA's Principles of Medical Ethics, "as reflected in the [AMA] Judicial Council" (CX 1404I).

CSMS adopted a resolution in 1962 condemning as "corporate practice of medicine" hospitals' receipt of fees from government health programs and other third-party payers for services which the hospitals' staff physicians were providing to certain beneficiaries (CX 1344A, Z9–Z11). The resolution declared that such beneficiaries "shall have the status of private patients of privately practicing physicians" and that "no fees paid by any third party agency for services rendered by such physicians shall be paid directly or indirectly to any hospital . . ." (CX 1344Z9, Z11). This resolution is similar to Opinion 5 of Section 6 of AMA's *Opinions and Reports* (CX 462Z13). Copies of the resolution were distributed to general community hospitals throughout Connecticut (CX 1344Z10).

The original draft resolution stated that "the practice of payment to hospitals of fees for services to patients is detrimental to the private practice of medicine and should cease" (CX 1344C–D). In the debate on the resolution, one CSMS delegate stated: "The big thing that we are most concerned about is the fact that certain pressures may be brought upon private physicians in the institutions to which these patients are admitted so that the fee will be paid to the hospital for professional services rendered by physicians" (CX 1344G). Another delegate received applause when he stated that "it is the principle behind this thing . . . that third party payments should not get into the hands of people other than the doctors" (CX 1344Z2). Another CSMS delegate also was applauded when he stated: "[W]e want to stop the hospitals from putting their hands out for that particular type of payment . . . . Now, if we get strong on this motion, perhaps in the future we can go to the help of these poor anesthesiologists and radiologists" (CX 1344Z1). Three years later, in 1965, the CSMS House of Delegates adopted resolutions from its Sections on Radiology and Pathology, supporting "the principle that all hospital patients be billed separately for the professional services of doctors of medicine" (CX 1343E, H, A, B–C). The House declared that "[t]his principle is in accordance with the positions adopted by the American Medical Association . . ." (CX 1343E). In some of its advisory letters to physicians regarding contractual arrangements, AMA has linked the [223] separate billing requirement to the ethical proscription regarding salaried medical practice (CX 820, 830, 831, 806C, G, 813A–B, 798, 799).

From 1972 to 1974, NHCMA complained about HMO written solicitations of patronage in letters to CSMS (CX 964), the Connecticut Commissioner of Insurance (CX 962, 963) and the Commissioner of the Connecticut Department of Consumer Protection (CX 965). In its letter to the insurance commissioner, NHCMA questioned the propriety of a "closed panel health service plan without free choice of physician" which was "supplying medical service . . . in direct competition with the rank and file of taxpaying practitioners" (CX 962).

In 1974, NHCMA wrote to the Secretary of HEW to criticize an HMO's application for a federal grant (CX 966). In a December 1976, newspaper interview, the president of NHCMA associated HMOs with socialized medicine and otherwise disparaged them (CX 2440, 2441).

Earlier, in a September 1971, letter written by one NHCMA official to another, NHCMA questioned whether, in light of its advertising and publicity, a New Haven HMO was "in violation of AMA principles of medical ethics and principle [sic] of *economics*" (CX 960) (emphasis in original). However, NHCMA took no action because a Connecticut statute permitted the HMO's promotional activities (CX 961).

### E. Physicians' Arrangements with Nonphysicians

151. The AMA Principles of Medical Ethics and 1971 *Opinions and Reports* prohibit partnerships between physicians and nonphysician health professionals (CX 1189A, 462Z15, Z16, 1154, 1153). AMA's 1971 *Opinions and Reports* permit physicians to join in the formation of professional associations or corporations for the delivery of health care only if ownership of the organization remains solely in the hands of licensed physicians (CX 462Z15, Z16).

In 1970, AMA advised a county medical society that it would not be ethical for a psychiatrist-member of the county society to form a partnership with a psychologist (CX 1189, 52A).

In 1975, AMA sent an advisory letter to Dr. Paul D. Saville, a West Virginia rheumatologist, who testified in this proceeding (Tr. 2705), informing him that it would be neither ethically nor legally acceptable to form a business partnership or income-sharing arrangement with a [224] physician's assistant for the purpose of delivering health care (CX 1196). After receiving the AMA advice, Dr. Saville and the physician's assistant, Helen Kramer, formed an income-sharing arrangement; however, fearing physician hostility, they have kept the arrangement secret from everyone except their spouses (Tr. 2727-30). Physician's assistant Kramer, who also testified in this proceeding, brought administrative and patient-relations skills to the private practice of Dr. Saville, who lacked such skills (Tr. 2758-59, 2717). The result was a maximal effective practice which enabled the physician always to see new patients who came to his office and to treat a large group of people at minimal cost to them (Tr. 2717-19). Explaining the benefits of the income-sharing arrangement, Dr. Saville testified:

> [W]e both contribute something, and it is to our mutual advantage that we both do well.
>
> And the better we do, the harder Helen works, the harder I work, the more income

> there is, and the more load on Helen's back. It is a better incentive to share in the profits rather than be fixed salary, in my opinion (Tr. 2720-21. *See also* Tr. 2762).

In 1975, the Texas Medical Association advised an orthopedic surgeon that, under AMA's *Opinions and Reports*, it would be unethical for the physician to enter into an income-sharing arrangement with a physical therapist working in his office because the physical therapist would be getting a direct financial interest in the productivity and fees earned by the physician (CX 1150, 1151A-B).

In 1974, Dr. Kenneth Pitts, a psychiatrist residing in Hillsboro Hills, Michigan, first considered the possibility of establishing a psychiatric out-patient center in surburban Detroit. He discussed the matter over a period of months with Dr. Marvin Hyman, a clinical psychologist with whom Dr. Pitts had worked in the past. Dr. Hyman shared Dr. Pitts' enthusiasm for the project and the two men set out to establish a new out-patient center (Tr. 3166-68). Dr. Pitts and Dr. Hyman each invested an initial sum of $10,000 and, in late 1974, the Orchard Hills Psychiatric Center was organized under Michigan law as a professional corporation (Tr. 3167-70; CX 2102). Each of the men received 50 percent of the corporate shares (Tr. 3171). Dr. Pitts is medical director of the Center and Dr. Hyman serves as its [225] administrative director (Tr. 3164, 3170). All medical decisions at the Center are made by staff psychiatrists. Psychologists and social workers do not have authority to prescribe drugs, hospitalize patients or sign patient termination forms (Tr. 3173).

When the Center was created, Dr. Pitts considered establishing the practice on his own and hiring Dr. Hyman as an employee. Dr. Hyman, because of "professional or personal pride," wanted to be an equal "partner" in the practice (Tr. 3174). The doctors decided that the formation of a professional corporation would be the best alternative—it would offer the potential for a profit-sharing and pension plan, and would allow Drs. Pitts and Hyman to have an equal position in terms of profit and control (Tr. 3174).

In April 1975, Dr. Pitts, who testified in this proceeding, wrote to the Michigan State Medical Society concerning the ethical propriety of forming a mixed professional corporation with a psychologist and a social worker (CX 1183B). The Medical Society deferred its decision until it had obtained the opinion of the AMA Judicial Council (CX 1184). The AMA Judicial Council told the Medical Society that Opinions 14 and 15 in Section 6 of AMA's *Opinions and Reports* prohibit a psychiatrist from owning jointly with a psychologist a professional corporation for the delivery of mental health services notwithstanding the legality of the arrangement under state law (CX 1185, 1183, 2102N). In October 1975, the Medical Society conveyed the AMA ethics interpretation, which had confirmed its own opinion, to Dr. Pitts, and stated that the prohibition would apply to partnerships of otolaryngologists-audiologists, pathologists-medical technologists, ophthalmologists-opticians, radiologists-physicists, family physicians and paramedical personnel or physician assistants (CX 1186). In May 1976, the Medical Society's Judicial Council reaffirmed that physician-nonphysician partnerships are unethical (CX 1729).

The Medical Society's October 1975, letter led Dr. Pitts to incorporate the AMA ethics opinions in the standards for out-patient psychiatric clinics which he subsequently drafted for the Michigan Psychiatric Society (Tr. 3189–90; CX 2054C). These standards for out-patient psychiatric clinics, published in April 1977, quote Opinions 13 and 15 of Section 6 of AMA's 1971 *Opinions and Reports* (CX 462Z15, Z16), and state that any out-patient psychiatric clinic organized as a professional corporation must be solely owned by physicians (CX 2054A, C). The Michigan Psychiatric Society [226] promulgated these standards to its members, advising them that it would enforce the standards through peer review and ethics committee activities (Tr. 3191; CX 2054C).

Dr. Pitts had already formed his mixed corporation when he was told it was unethical (Tr. 3182–83). It made possible his association with other professionals and created opportunities for teaching and professional development (Tr. 3174–75). The psychologist, Dr. Hyman, brought a special skill in psychological testing and many other special talents to the joint endeavor (Tr. 3175). Dr. Pitts did not dissolve the corporation because he did not believe the corporate arrangement compromised medical practice; he also thought that it would have been "a very complicated thing to dissolve the corporation at that time" and that Dr. Hyman might have grounds for a lawsuit (Tr. 3185). Dr. Pitts was embarrassed by the situation, but apparently suffered no monetary losses, possibly because information about his situation was not generally known (Tr. 3185–88).

Association with nonphysician health personnel such as psychologists, physician's assistants and physicial therapists, can help physicians spend their time where it is most needed and can increase their productivity (CX 959Z24, 197Z27, U.).

## XII. ABANDONMENT OR DISCONTINUANCE

152. The Principles of Medical Ethics of the American Medical Association (RX 1) consist of a preamble and 10 short paragraphs setting out basic principles or standards by which a physician may determine the propriety of his or her conduct in relationships with

patients, colleagues, allied health personnel and the public (Tr. 3940–44, 4289; RX 1). The 10 basic sections of the Principles were approved by the AMA's House of Delegates in 1957 (Tr. 3940, 4289; RX 1).

The *Opinions and Reports* of the Judicial Council are a collection of opinions and statements of the Council on a variety of subjects which have come before it (CX 462; RX 1). Some of these opinions and statements involve interpretations of the Principles of Medical Ethics; the opinions, statements and interpretations are modified from time to time to meet changing conditions of medical practice (RX 1, p. 1; Tr. 4290). The Judicial Council's interpretations of the Principles of Medical Ethics are contained in a booklet, entitled *Judicial Council Opinions and Reports* (Tr. 3982; CX 462; RX 1). The *Opinions and Reports* are distributed to anyone requesting a copy (Tr. 3982). The Judicial Council opinions and statements circulated by AMA [227] prior to the issuance of the complaint in this proceeding were the 1971 *Opinions and Reports*, which were published in booklet form and distributed commencing in 1972 (CX 462). Subsequent to issuance of the complaint, the Judicial Council, in 1976, issued revised opinions and statements which were published in booklet form in 1977 (RX 1). The Principles of Medical Ethics remained unchanged (RX 1, pp. 4–5). Some of the activities of AMA officials and the Judicial Council which preceded publication of the 1977 *Opinions and Reports* are described in the following paragraphs.

In September 1975, the Secretary of the Judicial Council wrote to a state medical society: "It was not felt that a major revision of the profession's position on advertising was necessary or advisable, but that an updating of the Judicial Council's previous opinions and reports on advertising might be helpful in the near future" (CX 627A–B). He further stated that any updating would uphold, in general, "reasonable restrictions" on advertising (CX 627B). The proposal for a new "updated" edition of the 1971 *Opinions and Reports* was formally sanctioned at a meeting of the Judicial Council in November 1975 (Tr. 4336; RX 621). Thereafter, on April 9, 1976, four months after the complaint in this proceeding was issued, the Judicial Council issued a revised statement on physician advertising and solicitation (CX 502A, H–K). The content and format of a new edition of *Opinions and Reports* was approved by the Judicial Council on June 26, 1976 (CX 501F). This revised statement was included in a revised edition of the *Opinions and Reports* which was published by the Judicial Council in March 1977, well over a year after the complaint herein was issued (RX 1, pp. 30–31; Tr. 4335). The

AMA Judicial Council issued the revised statement on advertising and solicitation and the 1977 edition of *Opinions and Reports* largely because "changing legal considerations," represented by the Supreme Court decision in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975) (Tr. 4337), and administrative agencies' consideration of physician advertising and solicitation (CX 502A, E-H) had, in the view of the Judicial Council, rendered some provisions in the earlier [1971] edition of *Opinions and Reports* "legally inappropriate" (Tr. 4338, 4335; CX 503I).

For a number of months following issuance of the complaint in this proceeding, AMA continued to distribute excerpts from the 1971 *Opinions and Reports*, as well as its "Guidelines on Telephone Directory Listings" and the 1974 *Report on Physician-Hospital Relations* (CX 1790A, 1788, 501D-E). Through at least the beginning of the trial [228] in this proceeding, AMA component and constituent medical societies have continued to restrict physician advertising, solicitation and contract practice based on the 1971 *Opinions and Reports* (Tr. 2076-78, 2085-86; RX 1, p. 31, p. 61, F. 95, p. 121; 98, pp. 124-29; 109, p. 144; 114, pp. 150-52; 118, p. 158; 123, pp. 174, 176; 138, p. 199; 139, p. 199; 148, p. 219; 149, pp. 220-21; 151, pp. 224-26). There is no evidence that any of these societies rescinded any existing ethical rulings, or revised existing ethics guidelines or codes on advertising, solicitation and contract practice since 1975, because of changing legal considerations or because of the revised statement of the Judicial Council. For instance, the former president of the Maricopa County Medical Society, a physician who had served as chairman of both the Society's Professional Committee and its Board of Censors (Tr. 7208-09), stated his belief that, as of the date of his testimony in January 1978, physician members would not be allowed to advertise factual nonmisleading information, such as the opening or closing of an office in newspapers under the Code of Ethics of the Maricopa County Medical Society (Tr. 7254). This statement supports the belief that the 1971 *Opinions and Reports* continue to affect the application of ethical principles to physicians' advertising, solicitation and contract practice, as evidenced by their pervading influence on the ethical guidelines promulgated and enforced by local medical societies. A further example of continuing reliance being placed on the 1971 *Opinions and Reports* involves the Michigan Psychiatric Society, which adopted parts of the 1971 *Opinions and Reports*. Although the psychiatric society is not affiliated with AMA, the chairman of the committee who drafted the society's 1977 guidelines relied on the AMA ethical interpretations of 1971 (Tr. 3189-90; CX 2054C; F. 151, pp. 225-26).

153. The 1976 revised statement of the Judicial Council expressly "reaffirms the long-standing policy of the Judicial Council on advertising and solicitation by physicians" (RX 1, p. 30). The revised statement does not rescind or amend the long-time absolute ban on solicitation in the AMA Principles of Medical Ethics; "[The Principles] proscribe the solicitation of patients" (RX 1, p. 30). Dr. Robert S. Stone, who is Dean of the University of Oregon Medical School, a former Director of the National Institute of Health and a member of AMA's House of Delegates as well, was called by AMA to testify in this proceeding "exclusively about the AMA's position on advertising and solicitation by physicians" (Tr. 9683, 9686, 9688, 9711). He testified that it would still be appropriate for a local medical society to reprimand a physician or clinic for truthfully advertising its services because "that is soliciting business" — "The issue is not the truth of the contents [of the advertisement]" (Tr. 9716-18). [229]

While the revised Judicial Council statement permits the physician to provide certain information which the public is entitled to know, such as names of physicians, their types of practice, office location, office hours and "other useful information that will enable people to make a more informed choice of physician," the statement continues the use of catch-words such as "accepted" local media, "dignified" announcements, "reputable" directories, "solicitation" and "self-laudatory" statements (RX 1, p. 30), words which AMA and its local societies have long used to proscribe physician advertising (CX 462Z5 [Sec. 5, Op. 6], Z6 [Sec. 5, Op. 11], Z7 [Sec. 5, Op. 13], Z39 [Sec. 10, Op. 3], Z44 [Sec. 10, Op. 13], 545D, 514B, 512C, 94, 768B, 117). Examples of acceptable media for making information available to the public are stated to be office signs, professional cards, dignified announcements, telephone directory listings and reputable directories. No mention is made of newspapers, periodicals, radio or television (RX 1, p. 30).

Physician publicity and announcements which constituted "infractions of good taste" were disapproved under the 1971 *Opinions and Reports* (CX 462Z5 [Sec. 5, Op. 6], Z7 [Sec. 5, Op. 14]; Tr. 741; F. 99, pp. 130-31). Dr. Robert B. Hunter, the Chairman of AMA's Board of Trustees, called as a witness by AMA, testified that AMA officials have made public utterances that it is AMA's position that physician advertising must not be only factual, but also "tasteful," and that most state and local medical societies also have that policy (Tr. 9660-61. *See also* Tr. 4870-72). Dr. Stephen C. Biering, Dean of the School of Medicine, University of Indiana, called as a witness by AMA regarding its position on physician advertising and solicitation (Respondent American Medical Association's List of Witnesses For

Its Surrebuttal Case, dated April 21, 1978, p. 3), testified that it is appropriate for a medical society to reprimand or expel a member who has advertised in the newspaper in a truthful fashion but in "bad taste" (Tr. 9533–34).

The 1977 *Opinions and Reports* declares that "local, state, specialty medical associations. . .may have ethical restrictions on advertising, solicitation of patients, or other professional conduct of physicians that exceed the Principles of Medical Ethics" (RX 1, p. 30). AMA has made all such supplementary ethical principles binding upon the respective medical societies' members, provided that the principles are not inconsistent or in conflict with AMA's constitution and bylaws (CX 1435Z20). AMA **[230]** also has declared that when a physician disregards "local custom," as determined by the local society, he has acted unethically and may be subject to disciplinary action (CX 462Z9–10, Z7, I–J, 1349; RX 1, p. 9).

The 1977 *Opinions and Reports* continues to prohibit health plans from placing in their advertisements the names and qualifications of particular physicians, unless the plan's entire physician roster is included (RX 1, p. 31. *See also* CX 951).

The 1977 *Opinions and Reports* continues to prohibit physician publicity in the media if it "bespeaks self-exploitation," and encourages physicians to pre-clear publicity with their local medical society (RX 1, p. 35. *See also* CX 462Z44). AMA's 1974 ethics restriction on physician directories, which prohibits inclusion of "self-aggrandizing" statements (CX 509A–B, N; RX 5), is still in effect (Tr. 3998).

The 1977 *Opinions and Reports* does not enumerate physician prices or fees among the items of information that it says can be advertised; it mentions prices only in discussing the information that may be included in a "reputable" directory (RX 1, p. 30).

The 1977 *Opinions and Reports* continues to provide that physician conduct may be deemed unethical and subject to medical society disciplinary action when it does not conform to the "customs and usages of the medical profession" and may reflect upon the "dignity of and respect for the medical profession" (RX 1, p. 9; CX 462I–J [Preamble, Op. 4]).

AMA has not specifically rescinded the 1971 *Opinions and Reports* or the 1974 *Report on Physician-Hospital Relations* (CX 959, 461Z156). AMA has not specifically rescinded the "Guidelines on Telephone Directory Listings" (CX 673B–I), which were adopted and approved by the AMA House of Delegates (CX 663, 673A). In June 1977, the AMA House of Delegates adopted a resolution commending the Judicial Council for "updating" the *Opinions and Reports* (RX 4, p. 52); however, the resolution did not rescind the House's earlier adoption of provisions in the 1971 *Opinions and Reports* and of other AMA restrictions on advertising and solicitation (CX 463), and remained silent on the relationship of the 1977 *Opinions and Reports* to those earlier provisions and restrictions (RX 4, p. 52). While the 1977 *Opinions and Reports* does state that the [231] Judicial Council has "suspended the distribution of the previous edition of Opinions and Reports" (RX 1, p. 1), it does not state that the 1971 or other preexisting AMA ethical restrictions on advertising and solicitation have been rescinded or superseded (RX 1, p. 1). There is no evidence that AMA has advised or requested component and constituent societies to revise or update their own codes or guidelines.

Furthermore, AMA's conduct in respect to the formal and informal promulgation, distribution and enforcement of the Principles of Medical Ethics, established by the record as existing prior to 1975, continued after 1975 as well. Since this conclusory finding is somewhat ambiguous as to which ethical standards were enforced subsequent to 1975, some further elaboration is necessary. Accordingly, it is further found that the correspondence in the files of AMA in the possession of Susan Roberts, prepared, dispatched or received from January 1, 1975 to October 11, 1976 (the date the subpoena duces tecum was served on AMA), relating or referring to any alleged breach of any ethical standard of medical practice by any physician, would have revealed instances of AMA's and of component and constituent medical societies', reliance upon the 1971 *Opinions and Reports* of the Judicial Council in the enforcement of the Principles of Medical Ethics, or reliance upon ethical interpretations consistent with positions stated in the 1971 *Opinions and Reports* (Order Ruling on Complaint Counsel's Motion for Adverse Rulings and Other Relief Due to Noncompliance with Subpoena Duces Tecum by Respondent the American Medical Association, dated February 24, 1977, p. 10). The Administrative Law Judge makes this finding based upon Rule 3.38 of the Commission's Rules of Practice providing for sanctions for disobeying the Administrative Law Judge's order (Order Ruling on Motion of Respondent American Medical Association to Quash Subpoena Duces Tecum, dated November 12, 1976; Order Ruling on Complaint Counsel's Motion for Adverse Rulings by Respondent the American Medical Association, dated February 24, 1977). This finding is consistent with other documentary evidence received in the record (*e.g.*, CX 627, 501, 502, 1790, 1788). Accordingly, this is an appropriate adverse finding. [232]

## CONCLUSIONS

### I. FACTUAL SUMMARY

The complaint issued in this proceeding challenges the ethics restrictions of respondents AMA, CSMS and NHCMA as violative of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. These ethics restrictions do not deal with the medical or therapeutic aspects of a physician's practice; at issue are predominantly restrictions on economic activities. The record evidence presents a substantial body of formal and informal actions, initiated, instigated and directly or indirectly influenced by each of the respondents, that have the effect of enhancing the economic positions of the members of each of the respective medical societies. Moreover, this result has not come about through mere chance or coincidence but, rather, through the concerted efforts of each of the respondents and the numerous other constituent (state) and component (local) medical societies located throughout the United States. The end result of their energies has been the placement of a formidable impediment to competition in the delivery of health care services by physicians in this country. That barrier has served to deprive consumers of the free flow of information about the availability of health care services, to deter the offering of innovative forms of health care and to stifle the rise of almost every type of health care delivery that could potentially pose a threat to the income of fee-for-service physicians in private practice. The costs to the public in terms of less expensive or even, perhaps, more improved forms of medical services are great.

The main body of evidence against respondent AMA consists of the Principles of Medical Ethics, official interpretations of the Principles, which AMA has adopted and disseminated, and letter after letter from AMA officials to medical societies and individual physicians explaining the Principles, applying the Principles to specific conduct and urging compliance with the Principles by the constituent and component societies. This body of evidence, consisting principally of documents from the files of AMA and constituent and component societies located throughout the United States, shows the sweeping nature of the challenged restraints, including a total ban on solicitation of patronage, severe restriction of most forms of advertising and unfair interference with physicians' contracts with third parties.

AMA has invited concerted action by its constituent and component medical societies to enforce the challenged restrictions. All of AMA's member societies have accepted [233] this role within the

AMA ethics framework. They have adopted AMA's Principles of Medical Ethics as their own, their members have abided by them and they have formally and informally enforced the Principles. The Connecticut respondents have adopted AMA's ethical principles and, like AMA's other member societies, have engaged in enforcement of the challenged restrictions.

This proceeding has placed several issues in precise focus. At the outset, there is the jurisdictional question, arising out of Section 4 of the Act, as to whether each of the respondents is a "company . . . or association . . . organized to carry on business for its own profit or that of its members", 15 U.S.C. 44. Another aspect of the multifaceted question of whether respondents are subject to the Commission's jurisdiction arises out of the "in or affecting commerce" requirement of Section 5(a)(1) of the Act, 15 U.S.C. 45. To come within Commission jurisdiction, respondents' acts and practices must be shown to have the requisite interstate commerce nexus.

The record evidence presents a far-ranging and impressive accumulation of the activities of AMA, CSMS and NHCMA from which to focus on the jurisdictional issues. A substantial amount of each respondents' activities are devoted to the betterment of the health care delivery system in the United States through contributions to science, education and the public health. However, a substantial amount of each respondents' activities also inures to the pecuniary advantage of individual physicians. In fact, some of respondents' activities which are clearly beneficial to the general public also operate to directly or indirectly confer economic benefit upon the physician members of the respondent medical societies. Thus, the record evidence establishes that each of the respondents carries on business for the profit of its members. The record also establishes that respondents' acts and practices are in or affecting commerce. Consequently, each of the respondent medical societies is subject to Commission jurisdiction. This jurisdictional issue is discussed hereafter (*See* pp. 236–54, *infra*).

Having resolved the jurisdictional questions against respondents, the substantive issues of respondents' acts and practices must be considered. Complaint counsel contend that respondents and other medical societies have acted to place restraints on physicians' solicitation and advertising activities. Complaint counsel argues that these restraints [234] constitute unfair methods of competition in violation of Section 5. Complaint counsel also contend that respondents and others have acted anticompetitively with respect to physicians' contractual arrangements, also in violation of Section 5.

Essentially, the record evidence demonstrates that the restraints placed upon physician competition by AMA and state and local medical societies have operated to restrict the dissemination of information about the price, type and availability of medical services, including information concerning industrial medical clinics, preventive medical services and prepaid group practice plans (*i.e.*, HMOs). The methods that can be used to seek patronage, were it not for the adamant opposition of medical societies, have been denied to physicians as have the benefits to the public that would come with increased competition in the health care sector. AMA and its constituent and component medical societies have restricted physicians' use of announcements, form letters and brochures, newspaper advertising, radio and television advertising, publicity in the news media, Yellow Pages listings, business and consumer directories, direct contact with institutions and physicians, open houses and other methods of soliciting patients. Moreover, ethics limitations have hampered the ability of physicians to engage in contractual arrangements for the provision of medical services.

The effects of respondents' ethical restrictions on physicians, and respondents' purported justification for the restrictions, are discussed later in this decision (*See* pp. 254–79, *infra*).

Having laid out a substantial body of evidence detailing the anticompetitive restraints placed upon physicians by the respondent medical societies and other medical societies not named as parties to this proceeding, Commission counsel assert that the existence of a conspiracy to restrain competition among physicians is thereby established. Taken together, the organization of each of the respondents, their interrelationships and the mutuality manifest throughout their application and enforcement of ethics proscriptions attest to the logical conclusion that the respondents and others have acted in concert to restrain competition among physicians.

Each of the respondents is a nonprofit corporation, comprised primarily of physicians engaged in the private practice, fee-for-service delivery of medical care (F. 1, p. 5; 9, p. 8; 12, p. 9). Respondent AMA is a national organization, with its basic make-up that of a federacy of [235] its state medical societies, which are termed constituent societies. The constituent societies, in turn charter local medical societies, which are termed component societies. In most instances, a physician must be a member of a component society to be a member of a constituent society, and a member of a constituent society to be a member of AMA. A substantial majority of all physicians retain membership in the AMA and in their constituent and component medical societies.[6]

Not only is there a virtually singular identity of membership in the AMA and state and local medical societies, but there are also other indicia of interconnections. Often, dues are centrally collected by the constituent society for the AMA and the component society. There is a true hierarchy in the manner in which physicians are elected to serve as officials of each of the respective medical societies. For instance, members of component societies elect the officials who govern the constituent societies; they, in turn, elect the governing officials of the AMA (*See* F. 6-8, pp. 7-8; 10-11, pp. 8-9; 13, p. 10).

Of even greater significance is the deference paid by the state and local societies to the AMA. This unbending support of the national organization is attested to by the degree to which the constitutions and bylaws of AMA's constituent and component societies provide that AMA's Principles of Medical Ethics shall govern the conduct of their members.[7] The extent to which local and state societies look to AMA for advice and guidance on ethical matters and the quite numerous occasions on which they follow and implement that advice do more than suggest the interrelationships between the national and the state and local societies. Indeed, the abundance of record evidence establishes an interlocking relationship both organizationally and practically with regard to the formal and informal enforcement of ethics policies. This evidence establishes the existence of a conspiracy between AMA and its constituent and component societies (*See* pp. 279-90, *infra*).

There is also little merit to AMA's contention that it abandoned or discontinued any anticompetitive acts or practices by the issuance and publication of its 1977 *Opinions and Reports* (RX 1). There is no policy statement by AMA to the effect that the 1971 or any other preexisting AMA ethical restrictions have been rescinded [236] or superseded; nor is there any evidence that AMA's constituent and component medical societies have revised or otherwise departed from the ethics strictures of their own codes and guidelines. There is only an unbroken continuum of ethical pronouncements, and enforcement of those pronouncements, that will perpetuate the anticompetitive effects amply established in the record absent a remedial order (see discussion on Abandonment or Discontinuance, pp. 290-92, *infra*, and on Remedy, pp. 293-98, *infra*).

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[6] F. 3-4, p. 6; 9, p. 8; 12, p. 9. However, a physician need not be a member of a particular medical society in order to be licensed to practice medicine. F. 2, p. 5; 9, p. 8.

[7] See Appendix A, pp. 306-09.

## II. JURISDICTION

### A. Nonprofit Exemption

In Section 5(a)(2) of the Federal Trade Commission Act, Congress limits the jurisdiction of the Commission to "persons, partnerships, or corporations", 15 U.S.C. 45(a)(2). Section 4 of the Act defines the word "corporation," for purposes of Section 5(a)(2), to include:

> any company, trust . . . or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust . . . or association, incorporated or unincorporated without shares of capital or capital stock or certificates of interest . . . which is organized to carry on business for its own profit or that of its members.[8]

Respondents take the position that they are professional societies committed to the advancement of science, education and the public health, and are not organized for their own pecuniary benefit or that of their members (AMA Conclusions of Law, p. 6).[9]

Respondents are organized as nonprofit corporations; no part of their funds has ever been distributed to their members, the largest single source of funds are dues from [237] their members and each respondent is exempt from the federal income tax. Respondents argue that, under the rationale of the decision in *Community Blood Bank of the Kansas City Area* v. *FTC*, 405 F.2d 1011 (8th Cir. 1969), they are exempt from Federal Trade Commission jurisdiction. It is clear, however, that in reviewing a jurisdictional challenge under Section 4 of the Federal Trade Commission Act, the form of incorporation is not controlling. *Id.* at 1018–19. The crucial consideration is whether each of these respondents is carrying on business "for its own profit or that of its members", 15 U.S.C. 44. This determination must be made on an *ad hoc* basis depending on the facts of each case. *Id.* at 1018.

While this is a case of first impression involving professional associations claiming the nonprofit exemption under Section 4, there are, nevertheless, some guidelines that are helpful in resolving the controlling issue. In *Community Blood Bank*, the court recognized that Congress did not intend to provide a blanket exclusion for all nonprofit corporations, for it was aware that corporations ostensibly organized not-for-profit, such as trade associations, were merely vehicles through which a pencuniary profit could be realized. *Id.* at 1017. The court also accepted, as settled law, the principle that the Commission does have jurisdiction over nonprofit organizations engaged in activities that produce a pecuniary profit. *Id.* at 1019.[10]

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[8] 15 U.S.C. 44.

[9] Respondent AMA, on March 24, 1976, filed a Motion for Summary Decision Dismissing the Complaint for Lack of Jurisdiction on the basis that AMA is a nonprofit corporation not subject to the jurisdiction of the Commission. Respondents CSMS and NHCMA filed similar motions on April 26, 1976. These motions were subsequently denied as were requests for interlocutory appeals.

In *Community Blood Bank*, the court examined the activities of the respondents and found that those activities did not inure to the financial benefit of anyone and at all times were directed towards promoting a community-sponsored program in the public interest. *Id.* at 1020–22. These facts convinced the court that the organization was in law and in fact charitable, and that the Commission lacked jurisdiction over the nonprofit corporation because it was actively engaged in business only for charitable purposes. *Id.* at 1019, 1021. [238]

In *Ohio Christian College*, the Commission pierced the corporate veil of a nonprofit corporation to assert jurisdiction over the corporation where it provided the individual respondents with much of their subsistence and shelter. *Ohio Christian College*, 80 F.T.C. 815, 847 (1972). In a recent decision, the Commission asserted jurisdiction over a nonprofit corporation "existing in substantial part for the pecuniary benefit of the egg industry." *National Commission on Egg Nutrition*, 89 F.T.C. 89, 177 (1976), *aff'd*, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 47 U.S.L.W. 3218 (October 2, 1978). In determining that the National Commission on Egg Nutrition was subject to Commission jurisdiction, the Commission looked at the record as a whole. This required analysis of a large number of possible indicia of commercial purpose, such as origin, character of membership, source of funding, relationships with profit oriented groups, nature of publications and stated purpose. *Id.* at 177, 178.

The facts determinative of jurisdiction in the present proceeding do not fit into the exact pattern of any previously decided matter. It is therefore incumbent that the entire record be examined to determine if respondents' activities are entirely charitable or if their activities are infected with a commercial purpose. In *National Commission on Egg Nutrition*, a decision rendered several years subsequent to the *Community Blood Bank* decision, the Commission stated that the respondent existed in "substantial part" for the pecuniary benefit of the egg industry. At another point in its decision, the Commission stated that the respondent "exists in principal part" for the benefit of the egg industry. The Commission also stated that an organization which engages primarily in noncommercial activity and incidentally performs a function valuable to commercial interests might not be subject to its jurisdiction. Further, the Commission indicated that the presence of only one possible indicia of commercial purpose might be an insufficient basis for asserting jurisdiction. *National Commission on Egg Nutrition*, 89 F.T.C. at 177–79. The conclusion to be drawn from this imprecise language would seem to be that the Commission will assert jurisdiction over nonprofit organizations whose activities engender a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some noncommercial activity.

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[10] The court cited a number of court cases where the Commission has successfully exercised jurisdiction over trade associations, specifically, *FTC* v. *Cement Institute*, 333 U.S. 683 (1948); *Fashion Originators Guild* v. *FTC*, 312 U.S. 457 (1941); *Millinery Creators Guild, Inc.* v. *FTC*, 312 U.S. 469 (1941); *Pacific States Paper Trade Ass'n.* v. *FTC*, 273 U.S. 52 (1927); *California Lumbermen's Council* v. *FTC*, 115 F.2d 178 (9th Cir. 1940), *cert. denied*, 312 U.S. 709 (1941); *Chamber of Commerce* v. *FTC*, 13 F.2d 673 (8th Cir. 1926).

Respondent AMA contends that the test of whether a corporation is organized for profit within the meaning of Section 4 is whether it *pays* dividends or other pecuniary [239] benefits to its members (AMA Conclusions of Law, pp. 16, 19). The Commission has previously held otherwise: "Profit, for the purpose of Section 4 of the Federal Trade Commission Act, is not limited to dividends, gains or direct reward." *Ohio Christian College*, 80 F.T.C. at 848.[11] The benefits to the egg industry generated by the respondent in the *National Commission on Egg Nutrition* were advertisements creating a favorable business atmosphere promoting the consumption of eggs. *National Commission on Egg Nutrition*, 89 F.T.C. at 178. No direct benefits were paid to the egg industry. The Commission asserted jurisdiction over the respondent and the courts have upheld that determination. Thus, AMA's contention that dividends or other benefits must be paid is rejected. If respondents directly or indirectly promote the pecuniary and economic interests of their members, the statutory test is satisfied.[12]

The respondents contend that for an organization to be subject to the jurisdiction of the Commission, profit-seeking must be the reason that it was organized and must play a dominant role in its activities (AMA Conclusions of Law, p. 20). While admitting that some parts of their budgets are devoted to activities that confer economic advantages upon their members, respondents argue that such activities are incidental or subordinate to the scientific, educational and public health activities in which they are primarily engaged (AMA Conclusions of Law, p. 25; CSMS Conclusions of Law, pp. 11-12, 14; NHCMA Conclusions of Law, pp. 4–6). [240]

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[11] The Commission quoted, with approval, the definition of profit as stated by the Ohio Supreme Court: "Profit does not necessarily mean a direct return by way of dividends, interest, capital account or salaries. A savings of expense which would otherwise be incurred is also a profit to the person benefitted." *Russell* v. *Sweeny*, 153 Ohio St. 66, 68, 91 N.E. 2d 13, 16 (1950).

[12] The Seventh Circuit Court of Appeals, in a separate proceeding involving a request by the Commission for a preliminary injunction, ruled that even though the respondent in National Commission on Egg Nutrition did not earn or distribute profits to its members, it was within the Commission's jurisdiction because it pursued "profit indirectly" by seeking to improve the business environment for them. *FTC* v. *National Commission on Egg Nutrition*, 517 F.2d 485, 488 (7th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976).

There is no such dominant purpose standard elucidated in any previous case. If respondents are engaged solely in scientific, educational and public health matters which might incidentally have some economic benefit for their members, they might well be exempt from Commission jurisdiction under Section 4. That is not the situation in this case, however. An analysis of the whole record in this proceeding reveals that respondents are engaged to a substantial degree in activities which directly and indirectly protect and enhance the economic well being of their members.

It is not disputed that AMA devotes a substantial part of its time and resources to the advancement of medical science, education and the public health. AMA plays an active role and devotes significant amounts of time and resources to the organizations which set standards for and accredit medical schools, internship and residency programs and continuing medical education courses for physicians and allied health services (F. 16(a)–(d), pp. 12–15). Such programs and courses are open to members and non-members of AMA.

The AMA also devotes a sizeable portion of time and resources to scientific activities. It publishes one of the most influential medical journals in the world, *Journal of the American Medical Association ("JAMA")*. It also publishes nine highly regarded specialty journals, such as the *Archives of Dermatology.*[13] (F. 17(h), pp. 23–25). The AMA publishes a variety of important scientific works including AMA Drug Evaluations, for example (F. 17, pp. 16–25). It sponsors a number of conferences and publications in various medical areas, *e.g.*, nutrition (F. 17(f), pp. 19–20). Its publications and conferences are not restricted to AMA members.[14]

In the field of public health, the AMA engages in a wide variety of activities, such as testifying on many legislative bills and administrative regulations, conducting programs to upgrade the quality of health care in jails, assisting United States medical efforts in South Vietnam and later the Vietnamese physicians who fled South Vietnam to this country [241] and instituting a program to reduce the amount of violence on television (F. 16(f), pp. 15–16; 17(c), pp. 17-18; 17(e)–(g), pp. 18–23; 18, pp. 25–29). AMA distributes hundreds of pamphlets and posters on health care matters to the general public (F. 17(c)–(d), pp. 17–18; 17(f), p. 20; 17(g), pp. 21–23). It also responds to calls and letters from the public asking general medical questions (F. 17(c), p. 17; 19, p. 32). It gathers and publishes data on physicians and health care; such data is utilized not only by AMA, but also by scholars and governmental units (F. 16(e), p. 15; 17(d), p. 18; 17(g); 19, pp. 29-32).

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[13] The journals are basically self-supporting, since revenues from advertising and subscriptions roughly equal costs of publication and dissemination of the journals (F. 17(h), p. 25; 53, p. 70).

[14] AMA members receive *JAMA* and one specialty journal free as a membership benefit. The non-member subscription price for *JAMA* is $30 per year, and $18 per year for each specialty journal (F. 17(h), pp. 24, 25).

The Connecticut respondents engaged in activities that are somewhat similar to the activities of AMA, although on a much smaller scale since their memberships are smaller than AMA's membership. CSMS conducts an annual Scientific Assembly on subjects relating to science and medicine. It has a committee on continuing medical education concerned with investigating and evaluating alternatives in continuing medical education programs and in sponsoring continuing medical education programs. Those programs are available to members and nonmembers alike (F. 55, pp. 73-77).

CSMS publishes a monthly journal, *Connecticut Medicine*, which contains articles of educational value, as well as articles of general intellectual interest and information on the society's activities. The journal is furnished free to CSMS members (F. 56, p. 77).

CSMS offers pamphlets on health related matters to the public free of charge, answers requests from members of the public seeking information about locating a physician, sends delegates to organizations concerned with health care and communicates with legislative bodies concerned with issues of health care (F. 57, pp. 78-80). CSMS has published a Relative Value Scale for use by Connecticut physicians in ascertaining fees (F. 60, p. 83). CSMS annually gives an $8,000 grant to Connecticut medical schools to be used as a loan fund for needy students (F. 61, p. 84).

NHCMA has standing committees, some of which are concerned with matters of public health (F. 74, pp. 92-93). NHCMA publishes *Issues and Insight* on a quarterly basis for distribution to its membership. It sends representatives and advisors to various community-oriented health organizations, such as the Cancer Society and the American Heart Association (F. 76-77, p. 95).

While it can be argued that the above described activities of respondents have, at most, indirect or incidental economic benefits to members, a closer examination of many of [242] respondents' activities reveals a clear, direct economic purpose and effect. These activities which have a pecuniary benefit to members have been set forth in detail in the findings of fact herein (*See* F. 23-50, pp. 38-61; 62-73, pp. 84-92; 79-84, pp. 96-101). These activities combined with other characteristics of respondents, leave no doubt that while respondents do engage in educational, scientific and public health activities, a significant part of their time and resources are devoted to obtaining, protecting and furthering the economic interests of their members.

AMA's membership is limited to physicians, interns and medical students. In 1977, 63.8 percent of AMA's total revenues came from membership dues, with the bulk of the remainder coming from advertising and subscriptions revenue. Most of AMA members are engaged in the profit motivated private practice of medicine, with over 75 percent of office based practitioners and over 80 percent of board certified physicians in this country being members of AMA. AMA has told its membership that it operates to protect and foster their interests and that one of its primary purposes is to serve its membership (F. 3, p. 6; 23, pp. 38–40).

In communications with its members, AMA has detailed some of its most important activities which have a direct economic benefit for physicians. For example, AMA told its membership that it had made substantial progress towards solving the medical liability insurance crisis, won an important legislative battle to prevent Federal control of residencies, fought for and won exemption for current medical students from paying back Federal grants to medical schools and supported a pay increase for V.A. physicians (CX 1522).

AMA told its membership that because of activities undertaken by AMA certain things did not happen to physicians: precertification of hospital admissions; a national health insurance plan which physicians cannot live with; price controls on physicians' fees; sweeping HMO grants; national relicensure of physicians; unrealistic restrictions on physician discretion in prescribing drugs; mandatory government service for all medical school graduates; and, premature HEW establishment of consumer-run program review teams for Medicare and Medicaid. AMA has stated to its [243] membership that other things did happen for physicians because of AMA: modification of the Keogh law; development of a universal health insurance claim form; American Hospital Association acceptance of the concept that the medical staff should be represented on hospital boards; and, model state legislation to safeguard medical information (CX 245D).

AMA has told its members that certain key benefits of membership are insurance programs at a lower cost than is available anywhere else, a membership retirement fund, physician placement service, leading scientific publications, authoritative legal information and guidelines on every aspect of medical practice, professional management information and guides "to increase the productivity and profitability of medical practice," the resources of the nation's greatest medical library and comprehensive scientific programming at conventions (CX 245D).

Although these membership representations may be somewhat exaggerated as sales materials, there is no reason to doubt that AMA contributed substantially to all the listed accomplishments. In fact, other record evidence supports AMA's representations.

AMA contends that its program of governmental "interface" serves to encourage government to initiate and maintain programs which will best serve the public health, that there is no substantial economic motivation underlying the program and that it is not designed to enhance the economic welfare of physicians (RAF, p. 53).[15] This contention is rejected. While there are public interest aspects to some of AMA's positions on legislation and administrative regulations, it is concluded that AMA's governmental lobbying activities are directed primarily at the interests of its membership - the physicians.[16] [244]

AMA has stated that the most important AMA membership benefit is having AMA as an effective and influential national spokesman to represent the medical profession's views, interests and rights (CX 259Z13).[17] Professor Paul Feldstein, an acknowledged expert in the field of medical economics, believes that political representation of physicians is AMA's most important activity for its membership (CX 2586F). AMA itself has categorized some of its legislative activities as being in behalf of consumers; it acknowledges that other activities are for physicians (CX 246).

AMA lobbying activities which have had substantial economic impact on physicians include the removal of price controls on physicians' fees (F. 25, p. 43); assurance that physicians receive their usual, customary, and reasonable fees under the Medicare program F. 26, pp. 43-44); opposition to national health insurance programs that do not meet AMA's physician reimbursement standards[18] (F. 27, p. 44); opposition to federal funding of HMOs and opposition to liberalization of existing HMO legislation (F. 28, p. 45; 102, p. 134);

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[15] AMA contends that its opposition to federal price controls on physicians' fees arose out of a concern that controls would lead to "a decline in the quality of medical care" (AMA's Reply to Proposed Findings of Fact of Counsel Supporting the Complaint, p. 19). Can one logically conclude that this is the sole motivation of AMA's effort?

[16] Indirect service to the public may result from some of AMA's legislative activities. In most instances, however, it is the physician who directly benefits. AMA has stated: "Activities in the area of quality assurance and promoting the effective delivery of care ultimately benefit the public, but the benefits generally accrue to the public through the physician" (CX 1042Z7).

[17] As part of its effort to achieve this goal, AMA has 10 lobbyists registered with the federal government (Tr. [illegible]).

[18] In 1950, the AMA spent over $2.5 million in a campaign it mounted against President Truman's national health insurance proposal (F. 27, p. 44; 45, p. 56).

support for passage of the Keogh Act (F. 29, p. 45); work to solve the malpractice insurance crisis facing physicians (F. 24, p. 41; 30, p. 46; 43, p. 54); support for pay increases for physicians in the Armed Forces and the Veterans Administration (F. 38, p. 49); and opposition to legislation requiring relicensure, retraining recertification or continuing medical education of physicians (F. 31, p. 46). In support of its efforts to influence legislation, AMA organized, and now supports and controls, a political organization, American Medical Political Action Committee, which engages in political education activities and provides financial support for political candidates (F. 22, pp. 35-37; 39, p. 50).

There are other AMA activities which provide a direct economic benefit to AMA members. AMA is very active in dealings with third-party payers, having been instrumental [245] in the creation and development of the Blue Shield insurance plans. AMA acts to assure that physicians are reimbursed on an adequate basis by insurance plans, including Medicare. AMA intervenes directly with insurance carriers when disputes are deemed to have national significance. AMA provides support for foundations for medical care which are physician-controlled health care organizations created to counteract the economic impact of HMOs. AMA has attempted to intervene with the Department of Defense in its military dependents medical program to assure that physicians fees are adequate. To assist physicians in billing and collecting from third-party payers, AMA has developed and distributed a uniform claim form and has developed two publications to aid physicians in billing for medical services, *Current Medical Information and Terminology* and *Current Procedural Terminology* (F. 40, pp. 50-52).

AMA has represented physicians' interests when dealing with hospital administrations such as by calling for separate billing by hospital and physician (F. 41, pp. 52-53); has instituted court actions to challenge governmental controls on physicians' fees (F. 42, pp. 53-54); created and funded, at an investment of $2 million, American Medical Assurance Company to help solve the malpractice insurance crisis (F. 43, p. 54); spent approximately $3 million on public relations activities to help boost the public image of physicians (F. 45, pp. 55-56); and provides members with negotiations training, (F. 46, p. 56), practice management assistance (F. 47, p. 57), legal advice (F. 48, p. 58) and scientific journals and a medical newspaper (F. 49, pp. 58-59). AMA also sponsors insurance programs for its members and has established an investment retirement fund (F. 20, p. 34; 49, pp. 58-59).

Lastly, AMA's ethical restrictions on advertising, solicitation and contract practice insulate physicians from competition and have a substantial economic benefit to AMA members. The economic effects of these restrictions are discussed in a separate section of this decision at pages 254-79, *infra*.

The evidence unquestionably establishes that AMA has engaged in the listed activities and that they do have a substantial pecuniary benefit for AMA members. AMA has, [246] in fact, represented to its members that these are important benefits to the membership; there is no evidentiary basis in this record on which to doubt these statements. Being a membership organization supported by membership dues, it is neither illogical nor derogatory of the organization to conclude that AMA provides substantial economic benefits for its members.[19]

The federal income tax exemption accorded AMA supports the conclusion reached herein. AMA is exempt from payment of federal income tax pursuant to Section 501(c) (6) of the 1954 Internal Revenue Code. Internal Revenue Regulations describe a Section 501(c)(6) organization as a business league, which is an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. In contrast, the American Medical Association Education and Research Foundation, a subsidiary of AMA, is exempt from federal income tax pursuant to Section 501 (c)(3), which section exempts from federal income tax those organizations organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes (F. 21, p. 35; 50, pp. 60-61).

AMA devotes a substantial portion of its income to the activities which have an economic benefit for its members. While precise percentages of AMA's income devoted to these activities cannot be ascertained, Professor Paul Feldstein estimated that between 35 percent and 43 percent of membership dues income was spent for these purposes (F. 53, p. 70). [247]

In a report to members made in December 1976 (CX 1055), the AMA explained where its dues dollar goes:[20]

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[19] In 1946, the Supreme Court of Illinois, in *American Medical Association* v. *Board of Review of Department of Labor*, 392 Ill. 614, 65 N.E. 2d 350 (1946), had to determine whether or not AMA was entitled to exemption from an Illinois state tax. This issue involved a determination of whether AMA's activities were solely scientific, educational or charitable. The court stated: "It is conceded that appellant [AMA] devotes a substantial portion of its efforts and of its income towards protecting and furthering economic benefits to the individual members of the association." 65 N.E. at 354.

[20] In this publication distributed to all members, informing them of the many benefits that come with AMA membership, benefits that assure economic advantages to physicians, AMA stated in bold-faced type, in reference to the group rates available to members in the various insurance and retirement programs offered by AMA: "In many cases, a physician member can save more than the equivalent of his annual AMA dues" (CX 1055R).

| | |
|---|---|
| 1. Assisting the Physician and His Practice | 17.7% |
| 2. Strengthening Organized Medicine | 13.8 |
| 3. Representing the Profession | 10.0 |
| 4. Serving the Public | 8.0 |
| 5. Upgrading Care Through Educational Standards | 12.3 |
| 6. Disseminating Scientific Information | 38.2 |

The total of the first three categories equals 41.5 percent of dues revenue. The 41.5 percentage would appear to directly benefit the physician; it does not include anything from "disseminating scientific information," which would include the distribution of *JAMA* and specialty journals free to members.

Respondent AMA asked several of the physician witnesses who testified in this proceeding whether they felt they received an economic benefit from AMA membership; several said that they did not think so, and that they had dropped their membership in AMA because the dues were getting larger and it was no longer worth the price (Tr. 1153, 2665, 4203). This fact, however, reveals little about the nature of the organization of AMA and the purposes of its various programs. Whether an institution has failed in its profit-making endeavors or is perceived as having failed is irrelevant. The witnesses' abandonment of membership reveals, if anything, that members expected something personal in return for the monies given respondent AMA, and when the expected return was not forthcoming, they stopped giving — hardly the typical attitude of the charitable contributor. [248]

The Connecticut respondents engage in substantial activities which have a pecuniary benefit for their members. In the first instance, one must be a member of a local and state society before being eligible to become an AMA member (F. 4, p. 6). The pecuniary benefits which AMA provides its members are key benefits which are available to CSMS and NHCMA members upon joining AMA through their local and state societies. In 1975, 81.6 percent of the physicians registered in Connecticut were members of CSMS; over 50 percent of CSMS members were also members of AMA (F. 9, p. 8).

Approximately 71 percent of all physicians registered in New Haven County are members of NHCMA; over 90 percent of NHCMA members are also members of CSMS, and approximately 40 percent are also members of AMA (Tr. 8439). Membership in NHCMA provides an opportunity for a physician to become a member of CSMS and receive the pecuniary benefits offered by that society.

CSMS as an organization represents the professional interests of physicians in Connecticut in a manner that would be impossible for individual physicians to act on their own behalf. A guiding principle of CSMS is that physicians should always have the right to charge their usual, customary and reasonable fees (F. 62, pp. 84–85). CSMS has published a *Relative Value Guide* and strongly recommended that physicians use it to determine usual, customary and reasonable fees. Third-party payers in Connecticut also use the *Guide* to determine physician fees (F. 63, pp. 85–86). CSMS has opposed policies of insurance carriers and governmental agencies to prevent physician fees from being reduced or becoming substandard. CSMS opposed a contract adopted by the Connecticut Blue Shield Plan because payments to physicians were lower than the usual and customary fees being received by CSMS members. CSMS strenuously opposed a payment policy adopted by Aetna Life and Casualty Company that paid fees only up to a level determined by Aetna (F. 64, pp. 86–87).

CSMS has urged its component societies to form foundations for medical care to protect the interests of practicing physicians. CSMS issued an interest-free loan, repayable when feasible (RCX 68, p. 17), in an amount of $4,999, to the New Haven County Foundation for Medical Care (F. 65, pp. 87–88).

CSMS has lobbied for legislation having significant economic benefits for physicians. CSMS opposed price controls on physicians' fees. CSMS pressed for repeal of the Connecticut law requiring physicians to pay a $150 [249] annual registration fee. CSMS has lobbied for adoption of malpractice insurance legislation that would forestall premium increases as well as make it more difficult for plaintiffs to prevail in malpractice litigation and reduce the size of possible malpractice liability awards against physicians. CSMS has supported increases in and faster payment of physicians' claims under Medicaid, and has opposed the charging of fees by the State Health Laboratory and legislation expanding the practice of podiatrists and chiropractors (F. 66, pp. 88–89).

In support of its legislative activity, CSMS has organized and financially supported Connecticut Medical Political Action Committee to serve as the political "arm" and "tool" of the medical profession in Connecticut (F. 58, pp. 80–82; 67, p. 89).

CSMS operates a physician placement service, gives estate planning and settlement advice, operates a public relations program and sponsors a variety of group insurance programs at a savings to CSMS members, the most significant of which is the malpractice insurance policy available to CSMS members at a substantial savings (F. 68–70, pp. 90–91). CSMS also publishes a monthly journal, *Connecticut Medicine*, made available to members free of charge (F. 56, p. 77; 71, p. 91).

CSMS's principal source of funds is membership dues (F. 72, p. 91). It is exempt from federal income tax under Section 501(c) (6) of the 1954 Internal Revenue Code (F. 73, p. 92. *See also* F. 50, pp. 60–61).

NHCMA also defends and supports the maintenance of usual, customary and reasonable physicians fees, and is an advocate for better working conditions for its local physicians (F. 79, p. 96). NHCMA has engaged in lobbying activities on behalf of physicians, protesting federal controls on physicians' fees, opposing the special treatment given HMOs and the annual $150 registration fee for physicians practicing in Connecticut. NHCMA maintained an active legislative program to resolve the malpractice insurance crisis. NHCMA urged CSMS to press the Connecticut Welfare Department to bring the Medicaid program fees up to the usual, customary and reasonable level. NHCMA protested to the Connecticut Commissioner of Insurance about the marketing efforts of an HMO operating "in direct competition" with private practitioners, and it urged the Department of HEW to deny extension of grant money to an HMO (F. 82, pp. 99–100). [250]

The New Haven County Foundation for Medical Care was organized by NHCMA to promote the economic interests of its members and has loaned the Foundation $4,999 on an interest-free basis. The Foundation is an organization of fee-for-service practitioners which is controlled by NHCMA with fees based on the usual, customary and reasonable concept (F. 80, pp. 96–98).

NHCMA operates an active Board of Censors and Third Party Payments Committee, which together comprise the Peer Review Committee. The Peer Review Committee assists NHCMA members in their disputes with third-party payers and patients about fee-related matters. The Committee has relied upon the CSMS *Relative Value Guide* and a conversion factor geared to the usual, customary and reasonable fee concept in their resolution of fee disputes (F. 81, pp. 98–99).

NHCMA also operates a public relations program, sponsors insurance programs for members and intervenes with local hospitals on behalf of physicians to assist them in obtaining hospital privileges (F. 83, p. 101).

NHCMA's principal source of funds is membership dues, and it is exempt from federal income tax under Section 501 (c)(6) of the 1954 Internal Revenue Code (F. 79, p. 96; 84, p. 101. *See also* F. 50, pp. 60–61).

CSMS and NHCMA have adopted, disseminated and enforced ethical restrictions on physician advertising, solicitation and contract practice which have restrained and eliminated competition between and among physicians (*see* pp. 254–79, *infra*). These activities have rebounded to the economic benefit of their members.

The record clearly establishes that respondents are engaged in a substantial number of activities that have a direct economic benefit for their members. It is equally clear from the record that respondents are engaged in a substantial number of activities of an educational, scientific or charitable nature which benefit their members, if at all, in an indirect manner. It is virtually impossible to precisely measure which activities predominate in respondents' overall operations. Such a determination is unnecessary, however. Neither the courts nor the Commission has ever held that Commission jurisdiction is limited to nonprofit organizations whose sole *raison d'etre* is to [251] serve as a conduit for the commercial interests of members. Nor is there any precedent for the proposition that business activity conducted by a nonprofit organization *for economic objectives* as distinguished from charitable objectives, is exempt. To the contrary, the legislative history of the Federal Trade Commission Act discloses that, in 1914, Joseph E. Davies, Commissioner of the Bureau of Corporations (predecessor to the Federal Trade Commission) informed Senator Newlands, the Senate manager of the Federal Trade Commission Act, that trade associations should be covered notwithstanding the fact that "[a]s to some of the things done by these associations, no question as to their propriety can be raised." *Community Blood Bank*, v. *FTC*, 405 F.2d 1011, 1017 (8th Cir. 1969).

Since respondents are engaged continuously and substantially, as contrasted to incidentally or sporadically, in activities which have a pecuniary benefit for their members, it is concluded that they are subject to the jurisdiction of the Federal Trade Commission. The eleemosynary results of many of respondents' programs cannot provide a shield for the restraint of trade resulting from its other programs. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787 (1975). The public service aspect of professional practice is not controlling in determining whether respondents are within the Commission's jurisdiction.

## B. Commerce

AMA has stipulated that its acts and practices are in or affect interstate commerce (F. 14, p. 10; Tr. 2120, 2124). CSMS and NHCMA, however, claim that complaint counsel did not meet the burden of proving that their conduct is in or affecting interstate commerce (CSMS Conclusions of Law, pp. 14–19; NHCMA Conclusions of Law, pp. 6–8). The Connecticut respondents admit that substantial dollar amounts of Medicare, Medicaid and insurance payments are made to their members for medical services and that such payments derive from sources outside Connecticut. It is argued, however, that these facts relate to the practice of medicine by CSMS and NHCMA members and not to the challenged acts and practices of respondents. Thus, respondents insist there is no nexus between the acts and practices being challenged and interstate commerce (CSMS Conclusions of Law, p. 15; NHCMA Conclusions of Law, p. 6).

The Connecticut respondents also argue that the fact that some members may occasionally treat patients who reside in other states and the fact that some medications are [252] manufactured outside Connecticut and dispensed from pharmacies pursuant to prescription by physicians, some of whom are CSMS and NHCMA members, does not establish the required nexus with interstate commerce (CSMS Conclusions of Law, p. 17; NHCMA Conclusions of Law, p. 7). These respondents further argue that their ethical restrictions were concerned with Connecticut physicians in Connecticut and that occasional travel outside Connecticut to attend AMA conventions and occasional use of the interstate mails or interstate telephones are insufficient to establish that the challenged conduct is in or affecting interstate commerce (CSMS Conclusions of Law, p. 19; NHCMA Conclusions of Law, p. 7).

The restrictions on physician advertising and solicitation adopted, disseminated and enforced by the Connecticut respondents are in or affect interstate commerce in several respects. The restrictions affect the volume and destination of millions of dollars coming into Connecticut from out-of-state government and private health insurance sources in payment for medical care and related services rendered in the state; they have been undertaken as part of a nationwide conspiracy which restrains competition and commerce in every state; they are furthered through use of the United States mail and other interstate communications media and transportation facilities; they restrain advertisements by Connecticut physicians in newspapers with interstate circulation and in out-of-state telephone directories; and, they affect the flow of patients into Connecticut from other states and countries.

The great majority of licensed physicians in Connecticut and New Haven County, respectively, belong to CSMS and NHCMA and have agreed to abide by the AMA ethical code. Because this code of ethics restrains, hinders and deters these Connecticut physicians from advertising, soliciting patients and engaging in the proscribed forms of contractual relationships, it necessarily affects the volume, destination and amounts of interstate payments into Connecticut for medical services. A physician who does not seek new patients by advertising must obviously forego the reimbursements he would receive if he attracted such new patients. Similarly, the ultimate destination of interstate insurance payments is necessarily affected when physicians [253] are restrained from competing with one another through advertising. For example, a physician in New Haven restrained by respondents' ethical restrictions from advertising physical examinations is likely to receive less patronage than if he had been able to advertise his prices and services. Accordingly, the physician will automatically receive a lesser volume of interstate Medicare, Medicaid and private insurance payments for his services. If the physical examinations are performed by other doctors, then the destination of the interstate payments has been affected. In *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976), the Supreme Court held that interference with revenue received by a hospital from out-of-state insurance companies affects interstate commerce. Whether the conduct affecting interstate commerce was directed at, or intended to affect, interstate commerce, is irrelevant. It is sufficient that interstate commerce has been affected. *Hospital Building Co., Id.* at 744–45.

Further, there need be no showing of the magnitude of the effect on interstate commerce. In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the Court stated:

> The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved . . . *Id.* at 785.

Use by the Connecticut respondents of the United States mails and other interstate transportation and communications facilities in transmitting and receiving interpretations of the challenged ethical restrictions and copies thereof and in attending AMA conventions where many of the challenged ethical restrictions have been discussed and approved, provide "an adequate basis for Commission jurisdiction." *Tysons Corner Regional Shopping Center*, 85 F.T.C. 970, 988, 1015 (1975).

The Connecticut respondents have joined together with other state and local medical societies to form AMA and have adopted, as have these other societies, the AMA Principles of Medical Ethics to govern the conduct of their members. By [254] participating in concerted activities which restrain commerce throughout the country, CSMS and NHCMA have subjected themselves to Commission jurisdiction. As the Supreme Court has observed: "The Commission would be rendered helpless to stop unfair methods of competition in the form of interstate combinations and conspiracies if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of a single state." *FTC* v. *Cement Institute*, 333 U.S. 683 696 (1948). *See also United States* v. *Wilshire Oil Co.*, 427 F.2d 969, 974–75 (10th Cir.), *cert denied*, 400 U.S. 829 (1970).

The substantial volume of commerce involved, including direct federal government funding of Medicare and Medicaid, the participation of out-of-state third-party insurers, interstate laboratory testing and diagnostic evaluations, commercial flow of drugs and medical equipment and the inseparability of particular physician services from the interstate aspects of health care generally, together with the use of interstate communications and transportation facilities, provides a satisfactory basis for concluding that the acts and practices of respondents CSMS and NHCMA are in or affect interstate commerce and that these respondents are subject to Federal Trade Commission jurisdiction. *See* discussion at *Doctors Inc.* v. *Blue Cross of Greater Philadelphia*, 490 F.2d 48, 50–54 (1973).

## III. RESTRICTIONS ON PHYSICIANS' ADVERTISING, SOLICITATION AND CONTRACTUAL RELATIONS

### A. The Restrictions and their Anticompetitive Effects

It is not disputed that the AMA has made a significant public contribution through its health related activities from the date of its first meeting in 1847 to the present. Furthermore, it is not possible to give the AMA its just credit by a mere listing of the tremendous inroads it has made in the areas of medical education, medical licensure standards and public health programs, to name but a few. However, the history of the AMA is largely irrelevant for the purposes of this proceeding, which deals not with whether the AMA is deserving of public admiration but, rather, with what effects AMA ethics policies have had on physician competition in recent years. Moreover, the AMA's history is not untainted, as evidenced by the criminal conviction over 30 years ago of the AMA and the [255] Medical Society of the District of Columbia for conspiring to restrain and obstruct the development of a group prepaid health plan. *American Medical Association* v. *United States*, 317 U.S. 519 (1943), *aff'd* 130 F.2d 233 (D.C. Cir. 1942).

Respondent medical societies exercise complete control over physicians' advertising, solicitation and contractual relations. Their control has effectively thwarted competition by physicians in the health care sector. To accomplish these ends, the AMA, CSMS, NHCMA, numerous other constituent and component societies and individual physician members have engaged in a persistent pattern of formal and informal enforcement of broadly based ethics rulings. The means utilized by medical societies in their efforts to perpetuate the fee-for-service physician in private practice and the "usual, customary and reasonable" method of fee reimbursement as the driving forces in medical care in the United States have been the AMA's Principles of Medical Ethics, the AMA's *Judicial Council Opinions and Reports* and sundry interpretations of each. Reliance by the AMA and by constituent and component medical societies upon these sources of ethics pronouncements has been extensive and cannot be disputed in view of the extensive evidence in this record.

Complaints about physician advertising and solicitation often have been submitted to local medical societies, including respondent NHCMA, by individual physicians in the same specialties as the accused doctors. Some of the complaining physicians have expressed concern about the competitive implications of the offending doctors' activities. In response to these complaints, the medical societies have taken restrictive ethics actions regarding the accused physicians.[21] On occasion, they have gone so far as to openly refer to and take into account the competitive concerns expressed by the complaining physicians.[22]

Complaints about health maintenance organizations' advertising and solicitation activities have been registered with local medical societies by physicians openly concerned about HMO competition with their fee-for-service practices. [256] Complaints about HMOs have also been made by competing health plans, including foundation health plans sponsored by local medical societies. (F. 104, pp. 137, 138). In response to these complaints, the medical societies have taken restrictive ethics actions regarding the accused HMOs and their physicians.[23]

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[21] F. 98, pp. 124-29; 100, pp. 131-32; 112, pp. 147, 148; 113, pp. 148-50; 120-22, pp. 160-71; 136-37, pp. 194-98; CX 136, 137; Tr. 1789, 1743, 1745-47.

[22] F. 98, pp. 124-29; 100, pp. 131-32; 120, p. 162; 136, p. 196; CX 759, 764B, 10B, 2062A.

Statements by officials of AMA and its constituent and component medical societies reveal their opposition to doctors competing with each other. In 1973, Edwin J. Holman, Director of the Department of Medical Ethics of AMA, stated to an AMA constituent society: "[I]f the day should ever come when physicians or groups of physicians would regularly utilize professional public relations staffs, then medicine would find its members competing *against* each other for selfish, personal reasons" (CX 272B) (emphasis in original). In 1974, the president of the Allegheny County Medical Society in Pittsburgh, Pennsylvania stated: "[A]s you may know, it is considered unethical for doctors to advertise or to compete for patients, as soap companies compete for buyers, in the marketplace" (CX 2182B). Dr. Stephen Biering, called by AMA to testify in this proceeding about the role medical societies should play in regulating physician advertising, believed it inappropriate for physicians to compete on the basis of price, quality and service in the delivery of medical care (Tr. 9544-45, 9547-48).

An official of the Catawba County [North Carolina] Medical Society stated to a class at Lenoir Rhyne College, in opposition to a medical directory the class was proposing:

> [S]omebody who reads the directory may choose a physician on the basis of fees, and get the cheapest doctor for example, and therefore it might become a point of competition between physicians to stress the fees and to work out a fee schedule that would be more advantageous than somebody else's (Tr. 2383-84. See also F. 135, pp. 192-94).

Other AMA and medical society documents and officials have indicated their opposition to competition among physicians in connection with advertising, solicitation and contract practice.[24] [257]

Respondents' ethical restrictions on advertising and solicitation seek to prevent any doctor from presenting his name or information about his practice to the public in any way that sets him apart from other physicians. AMA's 1971 *Opinions and Reports* allows the limited publication of information on physicians only in media which are open to all physicians on like condition (CX 462Z6 [Sec. 5, Op. 11]). AMA has declared that it is not unethical for a physician to authorize the listing of his or her name in a physician directory which is intended to list all physicians in the community on a uniform and nondiscriminatory basis. AMA's Guidelines for Telephone Directory Listings prohibit box advertisements by physicians in the Yellow Pages and require uniformity of size and face of type among the physician listings. AMA's position on listing physician's names in credit card plans is that the plan must be available to all physicians in an area (CX 98C, 100A). In 1973, AMA wrote to the Bergen County [New Jersey] Medical Society about the ethics of a preventive medicine clinic's magazine article describing its services. AMA stated:

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[23] F. 102-07, pp. 134-43.

[24] *See* F. 123, p. 174; 148, pp. 212-13; CX 759, 764B, 2119B.

> Aren't there many physicians in Bergen County engaged in preventive medicine in one way or another? . . . Isn't the description of medical facilities best left to the medical society, which speaks for all physicians . . .? If one physician extols his own services, facilities, competence, etc., what is to prevent another physician from doing likewise and then what is the need for a medical society at all? (CX 1747; F. 119, pp. 159-60).

AMA's ethical restrictions affect all facets of competition among physicians, from the sole practitioner desiring to announce the opening of a new office to the group practitioners wishing to disseminate information regarding preventive medical services. While the Findings of Fact detail numerous incidents of restrictive practices adversely affecting physicians' abilities to compete, several of the more aggravated and pronounced instances deserve individual mention as illustrative of the serious consequences that the restraints have had and continue to have upon the delivery of health care in the United States. [258]

Dr. Joseph LaDou formed the Peninsula Industrial Medical Clinic ("PIMC"), located in Sunnyvale, California, to offer a package of occupational health and safety services to local industry on a large scale. Santa Clara County, which encompasses Sunnyvale, is an industrial community that would benefit by receiving the type of services being offered by Dr. LaDou and PIMC. The only feasible way in which Dr. LaDou could make PIMC's services known would be by solicitation. However, the Santa Clara County Medical Society informed Dr. LaDou that he and other industrial physicians, as well as their sales agents, would be prohibited from making any direct contacts with companies through personnel officers and other executives, such as by a general promotional mailing. This ruling came about as a consequence of complaints about PIMC made to the medical society by a competing medical clinic. As a result of the medical society's ruling, Dr. LaDou and PIMC have had to curtail the services they were intending to offer to local industry, to the detriment of consumers of occupational medical services in Santa Clara County.[25]

In 1973, Dr. Richard Hansen, director of a private rural hospital near Chattanooga, Tennessee, instituted a program called "Operation Heartbeat." The program planned to offer a package of tests to assess a patient's risk of heart attack or other coronary disease. The cost to each patient would be $25, which was about half of what would otherwise be charged for similar services in the area. In response, the Chattanooga and Hamilton County (Tennessee) Medical Society advised Dr. Hansen, both at a meeting to which he was summoned and in a letter sent to him by the Medical Society, that any future announcements for the program should avoid the appearance of advertising which, it was stated, is unethical. Dr. Hansen promptly dropped the Operation Heartbeat program.[26] The direct impediment to a service that would not only promote competition but also serve a vital public health need in a rural area is manifest. [259]

The Volunteer Medical Clinic, staffed by Drs. Ralph Robinson and Catherine Gilreath, performs abortions in Knoxville, Tennessee. An abortion at the Clinic costs $175, as compared with the $450-600 cost at Knoxville hospitals. To promote its services, the Clinic was advertising in local newspapers in 1975. In response to abortion clinic advertising, the Knoxville Academy of Medicine, an AMA component society, forbade members from affiliating with organizations that advertised in the public media. Consequently, Dr. Gilreath, the only physician on the Clinic staff with admitting privileges at any Knoxville hospital, resigned from the Clinic. Dr. Robinson, a board certified obstetrician-gynecologist and the twice elected president of his own Bell County (Kentucky) Medical Society, found himself unable to obtain staff privileges at a local hospital due to the furor over his advertising; this hampered the Clinic's functioning. In 1977, the Clinic ceased all advertising.[27] Its ability to secure patronage was demonstrably affected.

In 1973, Medi-Call, Inc., a firm located in Johnson County, Kansas, near Kansas City, Missouri, began offering a commercial physician house-call service. For a $50 annual charge, subscribers would receive two night house-calls by a physician; subsequent visits would cost $25 each. At the time, physicians were reluctant to make house-calls in the area Medi-Call planned to serve. Medi-Call began advertising its services through radio, television newspapers and billboards; without such advertising, the firm could not hope to attract clients. Subsequently, the Area Medical Council, composed of the top officers of four AMA component medical societies in the area, informed Medi-Call that its advertising was unethical. The firm ceased promoting its services. The action of the medical societies led to the financial failure and termination of Medi-Call's physician house-call service.[28]

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[25] F. 98, pp. 124-29.

[26] F. 100, pp. 131-32. While Dr. Hansen later reinstituted the program, he did not resort to any advertising owing to the above-described encounter with the Medical Society. As a result, the program attracted minimal attention.

[27] F. 114, pp. 150-52.

Dr. Edward Diethrich, an eminent cardiovascular surgeon, established the Arizona Heart Institute in 1971, in Phoenix. The Institute offered the latest methods for the study and treatment of cardiovascular problems, and charged fees which were often lower than similarly situated cardiovascular surgeons. Dr. Diethrich began promoting the Institute through various public media in order to get it off the ground. Dr. Diethrich received adverse reactions from the Maricopa County Medical Society, the AMA, the [260] American College of Surgeons and the Society of Thoracic Surgeons (the latter two are specialty societies). He was denied membership in both the MCMS and the AMA, and was placed on three years' probation by the two specialty societies. Dr. Diethrich and the Institute have since become less visible and have experienced difficulty in raising funds.[29]

Dr. Leon Zucker, an ophthalmologist in Waterbury, Connecticut, participated in a newspaper interview in 1976, regarding an operation he had performed in order to better inform the public about medical advances. Both CSMS and NHCMA, in response to complaints from other ophthalmologists who viewed the newspaper article as publicity, declared that Dr. Zucker's action constituted self-aggrandizement and unethical behavior. Fearful of medical society reprisal, which could have deprived him of his source of malpractice insurance, Dr. Zucker immediately acceded to requests to refrain from such behavior in the future. Dr. Zucker testified that he felt stigmatized by the matter and has since been reticent with regard to communicating information to anyone.[30] The economic motivation behind the informal use of medical society power, and the resultant harm to competition and the flow of innocent information are apparent.

In 1973, Public Citizen's Health Research Group of Washington, D.C. (a Ralph Nader-affiliated organization) undertook the compilation of a physician directory in Prince George's County, Maryland. The project was begun in light of the dearth of accessible consumer information regarding physician providers of medical care in the area. The response from the local and state medical societies was one of noncooperation and opposition; the consumer group was advised that a physician who supplied more than his identity, specialty and office hours would be acting unethically. As a result, the Health Research Group obtained a minimal response rate from physicians, thereby depriving consumers of worthwhile and beneficial information that would aid them in choosing a physician.[31]

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[28] F. 117, pp. 154-56.

[29] F. 120, pp. 160-66.

[30] F. 121, pp. 167-68.

In 1973, Dr. Harry Browne, a Nashville, Tennessee, pathologist, submitted a written proposal to Lewis County (Tennessee) Hospital. The proposal detailed how [261] the hospital's laboratory and pathology services could be improved; Dr. Browne also compared his proposed services and fees to those of the hospital's current pathologist, Dr. Jack Freeman. Upon seeing Dr. Browne's proposal, Dr. Freeman submitted an almost identical counter-proposal to the hospital which was accepted. The hospital experienced lower costs and a significant improvement in its laboratory and pathology services. The Nashville Academy of Medicine, Tennessee Medical Association and AMA all viewed Dr. Browne's action as in conflict with the AMA's Principles of Medical Ethics and advised him so. Dr. Browne deferred to the ethical guidance of the medical societies, and has since restricted his marketing activities.[32] Ironically, it was Dr. Freeman who initiated the complaint against Dr. Browne; and it was Dr. Freeman who upgraded the medical services being provided, although only in response to the competition presented by Dr. Browne.

In 1971, Dr. E.D. Davis and others began organizing the Florida Health Care Plan, Inc. ("FHCP"), an HMO in Daytona Beach, Florida. Earlier, in 1968, the Florida Medical Association adopted a statement, later approved by the AMA Judicial Council, declaring it unethical for a physician to be paid a salary for services provided. The FHCP includes contract physicians on fixed salaries. FHCP met with opposition from the state society and the Volusia County Medical Society. In 1977, two of FHCP's physicians applied for malpractice insurance from an insurance carrier controlled by the state medical society; the only other insurance carrier had substantially higher rates. The applications for insurance were rejected for the explicit reason that the two physicians were on fixed salaries. The physicians were forced to pay the higher rates of the other carrier.[33] The financial burden to the FHCP is indicative of the obstacles placed in the path of health maintenance organizations, which pose a direct economic threat to the fee-for-service private practitioner.

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[31] F. 133, pp. 187-91.

[32] F. 136, pp. 194-97.

[33] F. 103, pp. 135-37; 149, pp. 220-21.

Dr. James Warren is head of the Department of Obstetrics and Gynecology at Washington University Medical School in St. Louis. He is also medical director of the Washington University Center for Outpatient Gynecological Surgery. [262] In 1975, Dr. Warren prepared and distributed to St. Louis area physicians a brochure describing the Center's abortion services, including information on fees and facilities. The Center was ideally located adjacent to the hospital center which would be available for emergency treatments. The brochures, sent only to area physicians, met with opposition from several sources, including the state and local medical societies. Dr. Warren, fearful of disapprobation by the medical community, sent a letter of apology to two-thirds of the physicians on the St. Louis Medical Society's mailing list before action could be taken by any medical society. Shortly thereafter, the Ethics Committee of the St. Louis Medical Society recommended that Dr. Warren be censured. The Medical Society resolved the situation by getting Dr. Warren to write a second letter of apology, which was distributed to all Medical Society members along with a Medical Society report of the incident. Since this incident, Dr. Warren's medical clinic has never issued another brochure describing its activities.[34]

The Harvard Community Health Plan, an HMO in the Boston area affiliated with Harvard University, began operating in 1969. In order to familiarize the public with its method of financing medical services and, thereby, attract subscribers, the Plan began advertising in the news media. Physicians complained to the Massachusetts Medical Society that the Plan's advertising was attracting patients away from private practitioners and was unethical; in other words, the fee-for-service private practitioners were fearful of the economic competition posed by the plan. In response to discussions with the medical society, the Plan agreed to refrain from advertising. The motivating factor behind the refusal of the Plan's physicians to authorize advertising was fear of medical society reprisal. In late 1976, the Plan's physicians authorized limited advertising in light of the instant FTC proceeding among other things.[35] Were it not for their overriding belief that more expansive forms of advertising would prompt ethical objections by the Medical Society, the Plan's physicians could be expected to authorize the dissemination of more extensive information in the media, with concomitant benefits to the public. [263]

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[34] F. 99, pp. 130-31.

[35] F. 106, pp. 140-41.

An organization in Bergen County, New Jersey sought approval from the local medical society of a proposal to send a form letter to the Mayors and Councils of 72 communities offering physical examinations for the communities' firemen, police and volunteer ambulance corpsmen at $50 each. The AMA advised the local society that the proposal "is out and out solicitation" proscribed by the Principles of Medical Ethics (F. 95, pp. 118–19). A physician in Minnesota wrote to AMA about a pap smear clinic he was proposing to run for one week during which he would reduce his fee for a pap smear and pelvic examination by one-fourth. He requested an opinion as to whether he could alert the public through newspaper and radio announcements. The AMA advised that public announcements of the kind that was proposed should not be made by individual physicians (F. 95, p. 119).

The above examples demonstrate the extent to which the AMA, CSMS, NHCMA, countless other constituent and component societies and their physician members have gone to deprive the public of any semblance of meaningful competition among physicians. Respondents AMA, CSMS, NHCMA and other medical societies did not engage in these efforts independently of each other. To the contrary, they actively consulted with each other and followed the state of affairs in jurisdictions other than their own. Needing guidance, advice or merely assurance as to ethical positions already or soon to be taken, constituent and component medical societies repeatedly solicited and acted upon the advice of the AMA. The Principles of Medical Ethics, the 1971 *Opinions and Reports* and autocratic interpretations of each provided the beacon that guided each medical society initiative to its goal. The respondents and numerous other medical societies acted in concert with each other in the formal and informal promulgation and enforcement of ethical pronouncements that suppressed physician competition.[36] [264]

## B. Justifications for the Restrictions

Several expert witnesses testified about the nature of health care delivery in the United States, the information available to assist consumers in making an informed choice of a physician, the information necessary to enable consumers to make such an informed choice, the probable effect of physician advertising and related activities upon the cost and availability of medical care, the probable effect of such advertising upon the physician-patient relationship and the practice of medicine, and the public interest in medical society regulation of physician advertising.

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[36] *See* pp. 279–90, *infra*, for a more detailed discussion of the evidence which demonstrates the conspiracy that existed between AMA and its constituent and component societies.

Witnesses called by AMA[37] testified that lack of knowledge does not usually inhibit patients from entering the health care system. Most consumers currently have access to sufficient information to allow them to make an intelligent choice of a physician. Information concerning physicians and their practices is available through the mass media, telephone directories, physician directories, medical societies and individual physicians' offices. People gain information about physicians from other doctors, relatives, friends, coworkers, employers, hospitals, departments of health and medical societies. People who do not have a regular physician often wait until they are sick and, then, present themselves at an emergency room. They will typically inquire about obtaining a physician at that time. AMA's witnesses concluded that widespread advertising by physicians is not likely to substantially enhance the quality or usefulness of this information, since advertising by its very nature conveys only the selected information the advertiser chooses to disclose (Tr. 9690-91, 7703-09, 9498-99, 9517, 6094-95). **[265]**

In the case of patients without financial resources, or in the event there is a large dollar difference between two comparable medical procedures, the cost of a physician's service is a factor in the choice of physician. Where, for example, there is a $25 difference in two medical procedures and third-party payment is involved, the difference in cost usually does not have a significant impact upon the consumer's decision. In emergency situations, price is rarely a factor. Dr. Halberstam stated that it is reasonable to assume that the cost of physician advertising will be passed along to patients in the form of higher fees. In addition, physician advertising can be expected to increase the demand for medical services, with the majority of this increased demand being for potentially unnecessary services (Tr. 7701-03).

AMA's experts testified that widespread advertising by physicians would have a deleterious effect upon the practice of medicine. For example, if physicians were allowed or encouraged to disseminate "objective" information concerning the number of cases of a particular disease which they have treated, inexperienced or unqualified physicians might well be encouraged to treat more cases of the disease. Similarly, allowing physicians to advertise the mortality or complication rates of their patients might discourage them from treating more difficult cases. Such advertising might also encourage overutilization of medical care, since physicians might tend to perform more and more relatively easy procedures or treatments on patients who did not necessarily require them. A physician might also choose to advertise the number of operations which he or she has performed. If the physician is being judged publicly on such a criterion, he might tend to "accummulate" a large string of operations. This motivation could also result in overutilization of medical services (Tr. 7695–97, 5332, 6089).

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[37] AMA called the following witnesses to testify about physician advertising and its effects upon medical care: Dr. Robert S. Stone, Dean of the School of Medicine at the University of Oregon; Dr. Stephen Biering, Dean of the School of Medicine at Indiana University; Dr. Franz J. Ingelfinger, former editor of the *New England Journal of Medicine*; Dr. Michael Halberstam, a practitioner in Washington, D.C.; and Dr. Theodore Cooper, Dean of the Cornell University Medical College and a former top government health official

Further, fee advertising could cause a physician to alter his best medical judgment in order to stay with the fee which he advertised. Widespread physician advertising may lead the patient to believe that his or her physician is "selling" the recommended treatment, thus undermining the traditional relationship of trust and confidence and interfering with the quality of medical care (Tr. 5328, 5347, 5353–56, 7700, 9702).

Dr. Cooper testified that advertising of physicians' services also has the potential for consumer deception. Consumers are more vulnerable to deceptive advertising when they are sick than when they are well. A misleading **[266]** advertisement on behalf of a physician may lure a patient away from a source of responsible, continuing care to someone who may be less responsible (Tr. 6083–84, 6089). A physician's advertising of his medical credentials may result in consumer deception.

AMA's witnesses testified that a physician's advertising of prices generally will not enable a consumer to predict the cost of his or her specific medical care, since there is great diversity in the extent of care required by any individual. Price advertising is also unlikely to assist a consumer in making an informed choice of a physician, since price information alone cannot convey the quality of care which will be provided (Tr. 9504–05, 9692–94).

Dr. Ingelfinger testified that fee advertising has the potential for bait and switch tactics because the initial fee will often not cover further tests necessitated by complications or the need to confirm inconclusive results. He stated that advertising of the fee for a physical examination is misleading unless disclosure is made of the amount of time the physician spends with the patient, the thoroughness of the examination, whether the fee includes the taking of a history and what other tests and procedures are included in the fee (Tr. 5340–42, 5346). Advertising of new techniques which have not been generally accepted in the medical community can be deceptive and hazardous. An example of such a situation is the Wagenstein method of treating ulcers by freezing the stomach, which was highly touted at first but which subsequently proved to be harmful (Tr. 5336-38).

Claims that one physician is better than another or is the best in a particular group are misleading because superiority cannot be objectively determined. Success depends on the kind of patient treated along with other factors, such as the degree of difficulty of each procedure, the general health of the patient and the kind of patient who is being treated. Thus, advertising of success rates in medicine is potentially misleading. Patient testimonials about physicians' services, even when based on truthful facts, are inherently misleading because of their statistical invalidity. No meaningful predictions about other cases can ever be made on the basis of one individual's medical experience. Anecdotal reports mean nothing unless one studies case histories or two groups of patients in a scientifically controlled setting (Tr. 5332-35, 6082, 9501-02, 9701). [267]

Promises of cures are deceptive because no medical procedure is always successful and all involve some degree of risk. Physician advertising may be deceptive unless it contains disclosure of the risks involved in the procedure being advertised (Tr. 5330-31, 6090).

Complaint counsel's witness, Dr. Robert H. Ebert,[38] testified that physicians should be allowed to advertise. Medicine has become increasingly complex in recent years and patients often are not aware of the choices available to them. It is difficult for patients to know about how to get into the health care "system," or to know about primary care physicians, specialists, hospitals, physician groups that provide a complete range of services, medical foundations, HMOs and prepaid medical plans. Dr. Ebert was of the opinion that most information available to patients today is communicated by word of mouth, rather than on a more orderly basis. He believes that advertising should supplement whatever information is already available. Dr. Ebert stated that the public is entitled to know what services are available in the health care system and that advertising can educate the public in this respect. Fee information is something the public is entitled to know and price advertising would provide access to it (Tr. 9318-21, 9354, 9409).

In testifying about HMOs, Dr. Ebert stated:

> . . .it is very difficult for the general public to appreciate what is available in various kinds of systems. For example, it is now mandatory, I guess, through recent legislation

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[38] Complaint counsel called as a witness Dr. Robert H. Ebert, President of the Milbank Memorial Fund and former Dean of Harvard University Medical School.

> that there should be [a] choice in any firm of over 25 if an HMO exists in a region, that there should be at least a freedom of choice between that and an ordinary Blue Cross-Blue Shield or whatever commercial carriers may be offering. One of the great difficulties with this is it is not easy to get the best information about that choice. One gets some general descriptions of it [268] but very often it is not considered proper to list the physicians, who they are and what their background is and so on. It does seem to me the kinds of things that can be put into advertising that lists the services, that lists the costs, that lists the people and their qualifications, is valuable in terms of educating the public (Tr. 9321-22).

Dr. Ebert was also of the opinion that there are ways in which the quality of medical services can be utilized in advertising, and that any media is appropriate for medical advertising (Tr. 9322-32). Doctors have always solicited patients through social gatherings, membership in clubs, talks, presentations of papers and participation in church or community activities. Thus, solicitation by specialists in certain areas, for example in industrial medicine, would be in the public interest. Dr. Ebert stated his belief that advertising would not detract from the professionalism which is deeply engrained in physicians, but would tend to open up the "guild" philosophy which exists in medicine today.

Dr. Ebert is opposed to medical society regulation of advertising; in his testimony, he stated: "I say that because, again, I worry about this kind of guild philosophy, that it is too easy in a sense to use that in a way, and sometimes even inadvertently, as a weapon against anything new, any novel approach to the practice of medicine" (Tr. 9332). He believes the majority of physicians would not under any circumstances advertise falsely, and the threat of malpractice would be an enormous deterrent to false advertising. Dr. Ebert testified that restrictions on physician advertising were developed for another time when physicians were less trained and there was more concern about control of fringe people and quacks; today, physicians are well trained and of exceptionally high quality. The problem today is not control of false advertising, but "what more information can patients get and what can they learn about what is available in their community in a much more complex time." (Tr. 9334-35, 9333).

Controlling fringe practitioners through medical society regulation of advertising is, in Dr. Ebert's opinion, "rather indirect" (Tr. 9337), as brought out in his testimony: [269]

> [W]ell, I would almost say since usually the people are outside of legitimate medicine and practice outside of the medical society and they don't belong and many of them are moving from one state to another ahead of the law, I would say that how they should be regulated is much more in the substance of what they do.

* * * * *

And it would seem to me that the medical society, in its concern, which is a legitimate concern for the welfare of the legitimate public, would be much more advised to go immediately where this practice is being carried out to see whether there is not a way of controlling it quite directly, because usually there is. I would have said quite honestly that the advertising by these fringe people might also be an advantage in the sense that it gives you evidence that it is going on. . . . I would be almost more worried if it was all underground and there was no way to know that this kind of thing was being kind of promulgated by word of mouth.

So I really think that one can clearly attempt to control, you are never going to control completely this sort of thing but one can follow up on it and do it rapidly enough so it simply makes it very uncomfortable for people to do that kind of practice or anything illegal. (Tr. 9337-38. *See also* Tr. 9395, 9400, 9403).

Dr. Ebert further believes that the public is capable of evaluating and utilizing physician advertising, physicians are not going to engage in making exaggerated claims in advertisements, advertising will not adversely affect the physician-patient relationship or affect a patient's confidence in a physician, advertising will not lead to overutilization of those medical facilities that are under the control of the physician, price advertising by physicians will not lead them to cut corners in the treatment or [270] diagnosis of patients, advertising may or may not cut medical costs, and advertising by legitimate physicians may actually dilute the effect of advertising by fringe practitioners (Tr. 9333, 9341-58, 9409-10. *See also* Tr. 7001-02, 5361-62). He stated that directories of physicians are helpful, but there is need to advertise that such directories are available to patients (Tr. 9354-55). Dr. Ebert believes that the majority of physician advertising will center around systems of health care rather than the sole practitioner (Tr. 9377, 9409).

Dr. Ebert supports the principle that medical societies should not exercise any control over physician advertising:

JUDGE BARNES: The issue here is whether to take all control away from the medical society as to advertising?

THE WITNESS: Yes.

JUDGE BARNES: That is the basic issue and I think that is what Mr. Costilo is seeking an answer to. The question is do you support that view?

THE WITNESS: Yes, I do. I support the view not (sic) to take away overall advertising because I think it now is ineffective in controlling a group of physicians who are operating outside of the framework of organized medicine anyway and it is limiting the information that can be given to the public by perfectly legitimate groups of physicians, therefore I do think the relief sought is proper and it should be taken away.

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A. I think that what is important here is not the advertising per se, but what the physician does. I would think that untruthful advertising would certainly be the signal to find out whether his behavior as a physician was unethical in terms of his practice. Certainly, if it were, he should be expelled.

Q. But with respect to his advertising, should the local medical society regulate his advertising as advertising? [271]

A. No. I don't think they should. I think, and the reason for that, Your Honor, is not that in the blatant cases (pointing) it might not be useful there, but what is difficult is the gray areas. There is unfortunately the tendency to regulate rather more severely those things you don't happen to like personally, so I think the principle is a dangerous one. As I say, not in these blatant kinds of ads (pointing), but the principle, when applied to the grayer kind of area, I think the consequences could be such as to prevent perfectly responsible things from developing.

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Q. . . .Should a medical society be able to expel a doctor if, in making an advertisement, the advertisement is concluded by the medical society to be likely to create inflated or unjustified expectations of favorable results?

A. I think my answer, Your Honor, is the same as I have given earlier, that I don't think that using the criteria of advertising is the appropriate criteria for expelling a member. I think an appropriate criteria would be what has actually happened to the patients of the doctor rather than the ad. As I indicated, I said that because of the potential that it could be misused.

Q. When you say "It can be misused," what do you mean?

A. The potential that it could be misused in those areas in which some question might be raised where the bias of an individual in the medical society might be such that they would tend to be more severe on a system they were less familiar with or didn't like or was more competitive with them, whereas, I think, on the basis of what the results are, where the medical society then does have that prerogative. (Tr. 9339-40, 9416–17, 9419–20). [272]

## C. The Justifications are Without Merit

The arguments presented by respondents need not be looked at in isolation from similar arguments raised in other settings. The Supreme Court has already addressed itself on several occasions to the legality of ethical restrictions enacted by a "learned profession." *National Society of Professional Engineers* v. *United States*, 98 S. Ct. 1355 (1978); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* 425 U.S. 748 (1976); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975). These cases, then, provide the contours within which the restraints upon physician competition imposed by the AMA, CSMS, NHCMA and other medical societies must be analyzed.

The importance of advertising as the prime means by which information about the nature, price and availability of products and services is conveyed to the public is a well recognized fact. "Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange." *Bates,* 433 U.S. at 376. As such, advertising "performs an indispensable role in the allocation of resources in a free enterprise system . . . [and] serves individual and societal interests in assuring informed and reliable decisionmaking." *Id.* at 364. Price advertising places pressure on sellers to reduce prices, instills cost consciousness in providers of services and informs the public about price alternatives. *Advertising of Ophthalmic Goods and Services,* 43 Fed. Reg. 23992, 23994-95 (FTC June 2, 1978). Advertising facilitates the entry of new and alternative providers of services into the marketplace; in the absence of advertising, such providers would be hard pressed to make their very existence known to the public. Through advertising, the public is presented with a wider array of choices and is better equipped to comparison shop among providers of the same services.

The record in this proceeding demonstrates the substantial anticompetitive effects of respondents' restrictions on physician advertising and the free flow of commercial information to the public. Physicians have been prevented from seeking customers by advertising or offering to provide services at a particular price, or by advertising their [273] services, availability or qualifications. As a result, it is more difficult for consumers to comparison shop for physicians' services, to locate physicians upon first arriving in a community, to change physicians, to find physicians who will accept the Medicare reimbursement schedule as payment in full, to become informed about group practices and HMOs and to benefit in many other ways from competition among the providers of health care services. The challenged restrictions have hindered the entry of new providers into the physicians' services market, including private practitioners, prepaid health care plans such as HMOs and other organizations and programs using innovative or alternative approaches in the delivery of health care. Physicians, prepaid health care plans and other medical organizations and programs that have been prevented and deterred from advertising and soliciting patronage have been injured economically, and the restrictions have made it more difficult for these physicians and organizations to continue to offer their services to the public and to compete effectively.

The Supreme Court has declared that there is no longer any automatic immunity from the antitrust laws based on the mere fact that a group constitutes a "learned profession." The Court stated: "[T]he cautionary footnote in *Goldfarb*, 421 U.S. at 788–89, n. 17 . . . cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions." *Professional Engineers*, 98 S. Ct. at 1367. *See also Goldfarb*, 421 U.S. at 787–88.

There is also no merit to the contention that the ethical restrictions on advertising are necessary to guard against adverse effects on professionalism. The record evidence has clearly demonstrated that respondents' ethical strictures were motivated by economic objectives rather than by a need to maintain professionalism among physicians. Physicians are, perhaps, the most highly regarded profession, as a whole, in this country today (RX 915). To say that advertising would destroy that degree of public respect and tear into the physicians' self-image would be to deny the great skills and talent and the life-or-death judgmental abilities possessed by many physicians. "[T]he postulated connection between advertising and the erosion of true professionalism [is] severely strained." *Bates*, 433 U.S. at 368. *See also Virginia State Board of Pharmacy*, 425 U.S. at 768–770. [274]

Allowing advertising by physicians will not open the floodgates to widespread abuses with resultant detriment to the public. The overwhelming majority of physicians are honest, competent and dedicated and will not engage in false, misleading or deceptive advertising or other truly unethical forms of behavior. Respondents' arguments that because of advertising physicians will cut corners in their professional services, perform unnecessary treatments, or select out the easy procedures in order to compile an impressive success record, unduly denigrates a highly trained professional group. The Supreme Court has observed of other professions that advertising will not have such adverse effects: "We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system." *Bates*, 433 U.S. at 379. Nothing less should be said about physicians.

Further, high professional standards, including standards against dereliction in performance, are assured by state medical licensing boards[39] and state statutes regulating physician conduct, including advertising and solicitation.[40] Moreover, false or deceptive advertising is already prohibited in every state and the District of Columbia in enacted laws preventing deceptive and unfair trade practices. *Ophthalmic Rule,* 43 Fed. Reg. at 23997, n. 89. The substantial penalties provided for under the Federal Trade Commission Act are a substantial deterrent to false or deceptive advertising. (15 U.S.C. 45(1).) Since not all physicians are members of medical societies, and therefore not subject to medical society ethical rules, those fringe practitioners who might be more likely to commit abuses remain unaffected by present ethical restrictions.[41] "Restraints on advertising . . . are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising." *Bates,* 433 U.S. at 378 "The advertising ban does not directly affect professional standards one way or the other." *Virginia State Board of Pharmacy,* 425 U.S. at 769. The same reasoning holds true for physicians. [275]

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[39] See F. 88, pp. 108–10.

[40] See Appendix B, pp. 310–12, *infra*.

With regard to advertising by attorneys, the Supreme Court stated in *Bates:*

> We are not persuaded that restrained professional advertising by lawyers inevitably will be misleading. Although many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of that type. The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like-the very services advertised by appellants. Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising misleading so long as the attorney does the necessary work at the advertised price. The argument that legal services are so unique that fixed rates cannot meaningfully be established is refuted by the record in this case: The appellee State Bar itself sponsors a Legal Services Program in which the participating attorneys agree to perform services like those advertised by the appellants at standarized rates. Indeed, until the decision of this Court in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), the Maricopa County Bar Association apparently had a schedule of suggested minimum fees for standard legal tasks. . . . We thus find of little force the assertion that advertising is misleading because of an inherent lack of standardization in legal services. Bates, 433 U.S. at 372–73.

The Court's response applies with equal force to the case of physician advertising. Services such as routine examinations, laboratory and diagnostic tests, immunizations and other short, simple procedures do lend themselves to meaningful advertising. The Relative Value Guides[42] promulgated by many medical societies indicate that there are base fees that can serve [276] as standards for even complex procedures.[43] More importantly, price advertising is only one of many types of information that could be disseminated once the ethical ban on advertising were lifted. Consumer directories, information about health maintenance organizations and medical clinics, more informative telephone listings, in person solicitation of corporate clients and other professionals and open houses are some of the means by which physicians could apprise the public of the range of available forms of health care delivery. The Supreme Court recognized that a well informed public represents, perhaps, the best means to the rational choice and utilization of services, for only a well informed public will perceive their own best interests. *Virginia State Board of Pharmacy,* 425 U.S. at 769-70. In *Bates,* the Court stated:

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[41] See discussion at F. 144, p. 206.

[42] *See* F. 33, p. 46; 60, p. 83; 63, pp. 85–86.

[43] During the period of federal price controls in the 1970's, federal regulation required all medical practitioners to post a sign in their facilities announcing the availability for public inspection of a schedule showing their

*(Continued)*

> [I]t seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative - the prohibition of advertising - serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. *Bates,* 433 U.S. at 374-75.

To say that physicians are above "trade," and to assert that they are entitled to preserve their basic ethical values despite deleterious effects on [277] competition, would be to completely remove physicians from a marketplace setting, rather than admit that the services they offer, the delivery of which are both highly necessary and equally highly respected, might better comport with the public's needs were they subject to appropriate competitive factors, *i.e.,* advertising, solicitation and contract practice.

Respondents also argue that they do not proscribe advertising *per se,* but only that advertising which is misleading or deceptive.[44] The actual occasions on which medical societies interceded and effectively curtailed various forms of physician advertising show the fallacy of this argument. Dr. LaDou desired to acquaint the public with the advantages of preventive medicine and industrial medical services; he intended for his advertising to accomplish this objective.[45] He had hoped to bring his services to the attention of business executives, a

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customary prices for those services which accounted for 90 percent of their aggregate annual revenues (CX 2602). From this evidence, it can be inferred that physicians' fees are readily capable of being publicized in a nondeceptive manner.

[44] There is a real danger here, as Dr. Ebert has pointed out. Having your competitor determine whether your advertisement is false or deceptive has inherent risks. This power can be used as an anticompetitive weapon. One is more likely to closely regulate that which he dislikes or is unfamiliar with. Restrictions aimed at fringe practitioners are ineffective and prohibit legitimate advertising.

[45] See discussion at p. 258, *supra,* and at F. 98, pp. 124-29.

knowledgeable consumer group. Dr. Browne's proposal, stating the nature of and price for the laboratory and pathology services that he could offer, was intended to show that improved services did not require any increase in price.[46] Dr. Browne was dealing with hospital executives, again a knowledgeable group. These physicians, Dr. LaDou and Dr. Browne, and others posed obvious economic threats to medical societies and their members, who viewed the fee-for-service, private practice physician, in a noncompetitive setting, as the only viable means for delivering medical services. Neither Dr. LaDou, Dr. Browne nor the greater majority of physicians who engaged in advertising or who proposed to engage in some form of advertising, as recounted in the record evidence, misled or deceived the public. The information they hoped to [278] disseminate would only contribute to the pool of information on medical services available to the public, and thereby add to the breadth of the system of health care delivery in this country.

In considering the justifications for the ethical restrictions presented by respondents and the benefits to society engendered in competition among physicians, there are two modes of antitrust analysis. One category consists of agreements that are so "plainly anticompetitive" that they are "illegal per se;" the other category consists of agreements that must be subjected to the Rule of Reason analysis, which determines "whether the challenged agreement is one that promotes competition or one that suppresses competition." *Professional Engineers,* 98 S. Ct. at 1365. "Under [the Rule of Reason], the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, 49 (1977). In *Professional Engineers,* the Court held that a canon of ethics prohibiting the submission of competitive bids and refusing to discuss price until after an engineer was selected operated as an absolute ban on competitive bidding and violated Section 1 of the Sherman Act on its face. *Professional Engineers,* 98 S. Ct. at 1365–66.

The record evidence in this proceeding is overwhelming in establishing the anticompetitive effects of respondents' ethical restrictions, their economic motivations and their consequent harm to the public interest. The unreasonableness of the restraints on competition imposed by respondents AMA, CSMS, NHCMA and other AMA constituent and component medical societies needs no further elucidation. The ethical restrictions which the medical societies have imposed heavily tip the balancing scales against the needs of the public and in favor of the maintenance of the financial security of physicians. In such instance, the Rule of Reason is clearly violated. Since a record has been made that clearly demonstrates the unreasonableness of respondents' ethical restrictions, it is unnecessary to consider whether such activities also fall within a *per se* ban.

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[46] See discussion at pp. 260–61, *supra,* and at F. 136, pp. 194–97.

Respondents' ethical restrictions on advertising, solicitation and contract practice are also unfair under Section 5 of the Federal Trade Commission Act. A practice is unfair and violates Section 5 if it results in substantial [279] harm to consumers and offends public policy. *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244-45 n. 5 (1972); *Spiegel, Inc.* v. *FTC*, 540 F.2d 287, 293 (7th Cir. 1976). That public policy supports advertising even where a professional group is involved was recognized by the Supreme Court in *Professional Engineers, Bates, Virginia State Board of Pharmacy, Goldfarb* and *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). The Commission, most recently, has ruled in favor of a policy of providing information about commercial transactions to the public. *Advertising of Ophthalmic Goods and Services.* That respondents ethical practices have caused and continue to cause substantial injury to consumers has been established by the reasoning presented herein. Recent Supreme Court and Commission decisions leave no doubt that public policy strongly favors providing the public with information, not keeping them in ignorance.

The purported justifications for restrictions on advertising, solicitation and contract practice are an insufficient basis to overcome the substantial adverse effects on competition imposed by the restrictions and the strong public policy favoring the free flow of commercial information. As the Supreme Court stated: ". . . [W]e may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition." *Professional Engineers*, 98 S. Ct. at 1367. Therefore, respondents' ethical restrictions are unfair and violate Section 5 of the Federal Trade Commission Act.

## IV. RESPONDENTS HAVE ENGAGED IN A CONSPIRACY TO RESTRAIN COMPETITION

The record evidence establishes the existence of a conspiracy between the AMA and its constituent and component medical societies, including respondents CSMS and NHCMA. The degree and pattern of reliance by state and local medical societies upon the AMA for statements of official ethics policy, as well as for advice on ethical matters as they arise or are likely to arise, and the dependence by the AMA upon the state and locals to implement and enforce those ethics policies become manifest in the internal structure and organization of the AMA and its constituent and component societies and in their working interrelationships. The prescriptions and proscriptions of AMA, as set forth in AMA's Principles of Medical Ethics, *Judicial Council Opinions and Reports* and other official pronouncements represent a pervading force in virtually all disciplinary actions undertaken by medical societies. To conclude, from respondents' admissions and from the parallelism between the nature of official policy on ethical issues as articulated by the AMA and as implemented and enforced by AMA member medical societies, that the striking uniformity of medical societies' positions [280] on ethics matters should have come about by mere chance or coincidence, as respondents have argued, rather than based on a common understanding and concerted activity is to adopt the impractical and ignore the reality.

To find otherwise than that the AMA and state and local medical societies were engaged in a conspiracy to restrain competition would be to ignore an abundance of evidence to the contrary. The record contains a more than sufficient quantum of independently admissible evidence to establish the existence of the conspiracy. There is also additional third-party documentary materials that were offered as evidence of the nature of the local medical societies, their actions and statements; these documents were provisionally admitted subject to connection to a conspiracy. Under the coconspirator rule[47] regarding statements that would otherwise be classified as hearsay, such documentary evidence from AMA's constituent and component societies is admissible against all respondents without the necessity of calling witnesses from these nonrespondent societies. The third-party documentary evidence provides further proof that supports and confirms the finding of a conspiracy. Moreover, this third-party evidence may be used as direct proof of the unlawfulness of the conspiracy.

### A. The Conspiracies Being Challenged

The complaint alleges that respondents and others have agreed to prevent and hinder competition among physicians (Comp. ¶¶ 6 and 7). Respondents have engaged in two types of unlawful agreements. First, AMA has agreed with all of its constituent and component medical societies, including the Connecticut respondents, to promulgate and enforce ethics restrictions on physicians' advertising, solicitation and contractual relations. Second, each respondent medical society has engaged in concerted activity with its members by adopting the ethics restrictions, disseminating them to its members and agreeing to abide by them. [281]

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[47] Rule 801(d)(2)(e) of the Federal Rules of Evidence, states:

"A statement is not hearsay if the statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

## B. The Legal Standard Governing Respondents' Activities

The core of conspiracy is a mutual understanding or agreement to accomplish an unlawful objective. The agreement is often described by the words, "meeting of the minds," "unity of purpose" or "common design and understanding." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946). So long as there is a mutual understanding to follow a common plan, a conspiracy may be found despite the lack of total uniformity among the conspirators. *FTC* v. *Cement Institute*, 333 U.S. 683, 715-16 (1948).

A formal or express agreement is not necessary to constitute an unlawful conspiracy, *American Tobacco*, 328 U.S. at 809, and will rarely be found in antitrust conspiracy cases. "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators." *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 227 (1939). *See United States* v. *Masonite Corp.*, 316 U.S. 265, 275 (1942). Instead, the inherent nature of a conspiracy is often marked by a continuous course of conduct. To isolate out and separately analyze the individual components of a conspiracy would be to contradict the very theory that lies behind it. "Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute [the Sherman Act] forbids, they come within its prohibition." *American Tobacco*, 328 U.S. at 809. The agreement may be inferred from a course of conduct which could include communications among the coconspirators as well as seemingly concerted activities. "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 379 U.S. 690, 699 (1962), quoting *United States* v. *Patten*, 226 U.S. 525, 544 (1913). This represents not only a rational legal and analytical approach to the instant factual situation, but a common sense view of it as well.

In *Interstate Circuit*, 306 U.S. at 226-27, the Supreme Court held that where concerted activity is contemplated and invited by a central, coordinating party and such [282] invitation is accepted by competitors knowing that their participation is essential to achieve the purposes of the agreement, a conspiracy has been established. The kind and gravity of the conduct entered into that, taken as a whole, comprises the conspiracy may not only vary, but may defy categorization under traditional conspiracy concepts. "If persons devise some subtle, unique form of conspiracy tailored to best serve their own purposes which purposely leaves few tracks or fingerprints, it may violate the law even though it cannot be easily accommodated in the familiar mold of a simple and limited conspiracy." *United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978).

It is not necessary to show that *every* constituent and component medical society participated in the agreement in order for a conspiracy to be established; "what is required . . . is substantial evidence from which such an agreement can be inferred." *Northern California Pharmaceutical Association* v. *United States*, 306 F.2d 379 (9th Cir. 1962), *cert. denied*, 371 U.S. 862 (1962). *See also Interstate Circuit*, 306 U.S. 208 (1939). Once a conspiracy has been established, only slight evidence is necessary to connect a particular participant to it; such evidence might be no more than a single act demonstrating, directly or inferentially, the intent to participate. *Consolidated Packaging*, 575 F.2d at 126–27; *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1087 (5th Cir. 1978), *cert. denied*, 46 U.S.L.W. 3776 (June 19 1978). *See also Blumenthal* v. *United States*, 332 U.S. 539, 556–57 (1947).

In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the Supreme Court decided that § 1 of the Sherman Act was violated by a minimum fee schedule for lawyers that was promulgated by a county bar association following the impetus provided by the state bar association in its fee schedule reports. The Court noted that enforcement of the fee schedule was aided by the prospect of professional discipline from the State Bar - a distinct possibility unmistakably present in the State Bar's ethical opinions - as well as the desire of attorneys to comply with announced professional norms. *Id.* at 781, 791 n. 21. However, there had been no formal disciplinary action to enforce the fee guidelines. *Id.* at 776–77. The Court concluded that "[t]he State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private [283] anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act." *Id.* at 791–92. The parallelism between *Goldfarb* and the instant set of facts is clear.

The second type of conspiracy challenged here, namely a conspiracy between each respondent medical society and its members, has also been addressed by the Supreme Court. In *National Society of Professional Engineers* v. *United States*, 98 S. Ct. 1355 (1978), the Court held that a learned profession's canon of ethics prohibiting the submission of competitive bids amounted to an unlawful agreement among members of the society to restrain trade. "Petitioner's ban on competitive bidding prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the society's views of the costs and benefits of competition on the entire market place." *Id.* at 1367. These words apply with equal force here. The Court further noted that "the cautionary footnote in *Goldfarb*, 421 U.S. at 788–89, n. 17 . . . cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions." *Id.*

### C. The Existence of a Conspiracy Is Established by Independently Admissible Evidence

The record evidence shows that respondent AMA served as the focal point of a plan to restrict physicians' advertising, solicitation and contractual relations. AMA provided the impetus for the Connecticut respondents and other state and local medical societies to act in concert with them in the restrictive practices detailed in the findings of fact, herein. The means by which such restraints were effected include the promulgation and distribution of the Principles of Medical Ethics, the *Opinions and Reports* and interpretations thereof, and communications with medical societies and individual physicians to promote compliance with these and other ethical pronouncements.

The structural hierarchy of the AMA and its member societies and the organizational network that allows them to function in an efficient and integrated manner reveal a close working relationship.[48] AMA is a federation of constituent (state) medical societies which, in turn, charter component (county and district) medical societies. [284] In most instances, a physician must join his or her state medical society to be eligible for AMA membership. Membership in a local society is usually a prerequisite to membership in a state society (F. 4–5, p. 6; 9, p. 8). The state societies usually collect AMA membership dues on behalf of AMA.

The local societies select the members of the state societies' governing bodies, and the state societies select the members of the AMA ruling body, the House of Delegates. The House of Delegates, representing the medical societies in the AMA federation, has adopted the Principles of Medical Ethics and has made adherence to them a condition of membership in AMA. The House has approved and specifically adopted many of the ethical restrictions on physicians' advertising, solicitation and contractual relations that are contained in the *Opinions and Reports.* The House has declared it a prime purpose of AMA to maintain "ethical" standards among all members of the medical profession (CX 990Z10). Promulgation and enforcement of its code of ethics has been a principal function of AMA since its founding (CX 959Z28). The House of Delegates elects the members of the AMA Judicial Council. The Judicial Council issues interpretations of the Principles *(Judicial Council Opinions and Reports),* is empowered to institute disciplinary proceedings at the request of state societies against physicians who violate the Principles and has appellate jurisdiction over cases originated by constituent and component societies in ethical matters (F. 6, p. 7; 8, pp. 7-8; 85, p. 102; 86, pp. 105-06).

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[48] See discussion at pp. 234–35, *supra*.

Often, the constitutions and bylaws[49] of constituent and component medical societies expressly state that a primary purpose of existence is to form and maintain, along with other medical societies, the AMA (F. 5, p. 6). The bylaws of these medical societies provide that AMA's Principles of Medical Ethics shall govern the conduct of their members (*See* Appendix A, *infra*). The AMA House of Delegates has adopted a resolution making state medical societies' own ethical principles binding upon the respective societies' members, provided that the principles are not inconsistent or in conflict with the Constitution and Bylaws of AMA (CX 1435Z20). AMA has also declared that when a physician disregards "local custom," as determined by the local medical society, he has acted unethically (F. 86, p. 104; CX 1349). Furthermore, AMA has declared it the duty and [285] obligation of its local medical societies to insure full compliance with the spirit and intent of the AMA Principles of Medical Ethics (CX 462Z9 [Sec. 5, Op. 20]), and has frequently urged its constituent and component medical societies to fulfill this obligation (CX 462Z1 [Sec. 4, Op. 9], Z2 [Sec. 4 Op. 14], Z5-6 [Sec. 5, Op. 9], Z6, [Sec. 5 Op. 11], Z6-7 [Sec. 5, Op. 12], Z7 [Sec. 5, Op. 13], Z9 [Sec. 5, Op. 20], Z10 [Sec. 5, Op. 23], Z40 [Sec. 10 Op. 4], Z45 [Sec. 10, Op. 13]; 26B, 54, 488B-C, 662B-C, 673A, E, 845, 1392C, 1810). AMA has also stated that the application of all of the opinions in the *Opinions and Reports* is the obligation of county medical societies (CX 489).

AMA has distributed thousands of copies of the Principles and the *Opinions and Reports,* which interpret the Principles to its state and local societies; these AMA member medical societies have, in turn, distributed copies throughout their organizational network (F.85, p.103), thus assuring that the Principles and the *Opinions and Reports* filter down to all physician members. By these actions, AMA has openly encouraged medical societies and consequently, member physicians to take part in the restrictive practices and thereby to participate in a conspiracy to restrain competition.

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[49] AMA has not challenged these documents on the grounds of authenticity or hearsay. Therefore, they are adjudged independently admissible evidence.

The hierarchy of the medical societies, their common members, the bylaws of the state and local societies, combined with AMA's Principles and its *Opinions and Reports,* constitute a prima facie showing of the conspiracy between AMA and its constituent and component societies, including the Connecticut respondents. Moreover, the actual restrictive practices, including the constant flow of communications between AMA, its member medical societies and individual physicians concerning ethics policy and ethics enforcement, further demonstrate the existence and extent of the conspiracy. AMA has prompted its constituent and component medical societies to apply its restrictions on physician advertising, solicitation and contractual arrangements to particular physicians and medical care organizations, has offered guidance to its member societies in interpreting and applying the restrictions and has expressed after-the-fact approval of specific restrictive actions taken by its member societies.[50] State medical societies including CSMS, [286] have prompted and participated with their local medical societies including NHCMA, in specific actions to interpret and enforce AMA's ethical restrictions on solicitation, advertising and contractual arrangements. Apparently feeling less qualified and less expert in the application of ethical pronouncements than the AMA, local societies have written to AMA to solicit its advice and opinions on numerous occasions. AMA's responses often take the form of advisory opinions, ethical policy statements and, where appropriate, have usually resulted in the informal enforcement by the local societies of the restrictions on physicians' advertising, solicitation and contractual relations contained in the Principles. Where the AMA receives communications from sources other than member medical societies, it often responds by referring ethical complaints and inquiries to the appropriate component medical society for action.

In sum, AMA acts as a clearinghouse for the dissemination of policy on ethic matters and, frequently, for the resolution of ethics complaints. AMA field officials, under the direction and guidance of the AMA Judicial Council and its staff, act as intermediaries on matters of medical ethics between AMA and its constituent and component medical societies and others. In so doing, AMA field officials engage in many of the same activities as the AMA Judicial Council and its staff and routinely, in formal and informal ways, interpret and enforce, and assist and advise AMA's constituent and component medical societies and others in the interpretation and enforcement of, AMA's Principles of Medical Ethics and AMA's Judicial Council interpretations thereof.[51] The incessant obedience of the locals and their members to AMA's ethical dictates belies the possibility of mere coincidence. Instead, such concerted actions bespeak of a common conspiratorial undertaking.

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[50] AMA's Department of Medical Ethics, in internal reports, has stated that it "works closely" with the officers and staff of state and county medical societies on ethical matters, including those relating to advertising (CX 1766A, 1767A).

Evidence independently admissible against the Connecticut respondents establishes their prima facie involvement in a conspiracy with AMA and other constituent and component societies.[52] NHCMA members are directly represented in the CSMS House of Delegates which, in turn, sends delegates to the AMA House of Delegates. Both CSMS and NHCMA have adopted, published and distributed to their members the AMA's Principles of Medical Ethics and interpretations of them; both have made adherence to the [287] Principles a condition of membership. NHCMA has explicitly provided that its members are bound by the AMA Principles as reflected in the opinions of the AMA Judicial Council (F. 86, p. 104). Both Connecticut respondents have communicated with AMA about matters relating to the Principles and, thereby, to the aforementioned restrictions on physicians, and both have engaged in informal enforcement of the AMA Principles (F. 95, pp. 119-20; 112, p. 147; 119, p. 160; 121, pp. 167-68; 123, pp. 172-73; CX 136A-F, 137). This is more than the "slight evidence" that is needed to connect a particular party to an ongoing conspiracy.

The record evidence[53] evinces, beyond any reasonable doubt, a "unity of purpose" and a mutual understanding on the part of the AMA, its constituent and component societies and the individual physicians that comprise the membership of those medical societies to promulgate, disseminate and enforce ethical restrictions on advertising, solicitation and contract practice. The orchestration of activities that effectively restrain physician competition throughout the United States is too harmonious to be suggestive of anything other than concerted action - a conspiracy - among physicians and their medical societies.

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[51] See Order Ruling on Complaint Counsel's Motion for Adverse Rulings and Other Relief Due To Noncompliance With Subpoena Duces Tecum By Respondent The American Medical Association, February 24, 1977, pp. 11-12.

[52] Since it is held that all medical societies and their individual physician members, not named as parties to this proceeding, are participants in the conspiracy, it follows that CSMS and NHCMA are also coconspirators aside from the quantum of evidence that is independently admissible against them.

[53] These specific instances of implementation of AMA ethical pronouncements to restrain competition among physicians are too numerous to repeat again here. Instead, reference is made to pp. 254-63, *supra*, and to Sections X and XI of the findings.

### D. Third-Party Medical Society Documents

The third-party evidence admitted provisionally subject to connection to a conspiracy is made up of a large number of documents from the files of AMA's constituent and component societies. The documents consist primarily of communications between constituent and component medical societies and individual physicians, minutes of meetings of the state and local societies and other correspondence generally relating to ethics inquiries and complaints addressed by the state and local medical societies.[54]

Respondents have not challenged the authenticity of these documents. The main objections to them are on the grounds of relevancy and hearsay. There are several alternative evidentiary bases upon which the documents are admissible. [288]

First, the documents are admissible under the well established principle that out-of-court declarations of conconspirators are admissible against all of the conspirators once a *prima facie* showing has been made by independently admissible evidence that the parties were engaged in a combination, partnership or "common plan." This principle is based upon the agency relationship that comes into existence when a conspiracy has been established. It is not necessary to show by independent evidence that the combination was unlawful, for that "element of illegality may be shown by the [hearsay] declarations themselves." *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229, 249 (1917). *See Schine Chain Theatres, Inc.* v. *United States*, 334 U.S. 110, 116–17 (1948); *United States* v. *United States Gypsum Co.* 333 U.S. 364, 388–93 (1948); *Bakers of Washington*, 64 F.T.C. 1079, 1137 (1964), *aff'd sub nom., Safeway Stores, Inc.* v. *FTC*, 366 F.2d 795 (9th Cir. 1966), *cert. denied*, 385 U.S. 932 (1967).

Since a conspiracy has already been established by independently admissible evidence, as described above, the third-party documents become admissible as declarations of the coconspirators in aid of the conspiracy. These documents provide further confirmatory evidence that buttresses the finding of a conspiracy to restrain competition. It is immaterial that the AMA or other parties to the conspiracy may not have known of the commission of the act or the making of the declaration contained in the third-party document. The coconspirator doctrine attributes those acts and declaration to each partner in the conspiracy.

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[54] Most of the documents specifically refer to AMA's Principles of Medical Ethics and *Opinions and Reports* as the authority for ethics actions; almost all of those that do not are from societies which have adopted the Principles to govern their members.

The third-party documents may, however, be used as evidence of the conspiracy itself. To reach this end, the basis for admissibility lies in the fact that the documents constitute nonhearsay and, therefore, are independently admissible.

The documents are not hearsay because they can be viewed as having been offered not for the truth of the matters stated, but rather for the fact that the statements contained in each document were made. *See United States* v. *Mesarosh,* 233 F.2d 449 (3d Cir. 1955); *rev'd on other grounds,* 352 U.S. 1 (1956); *Baush Mach. Tool Co.* v. *Aluminum Co. of America,* 79 F.2d 217 (2d Cir. 1935). Consequently, the third-party documents may be used to establish the conspiracy.

Since many of the third-party documents refer explicitly, as well as implicitly, to the AMA's Principles of Medical Ethics and to the *Opinions and Reports,* they constitute [289] additional direct evidence of a conspiracy. Indeed, the documents attest to the wide-ranging extent of the conspiracy to restrict physicians' advertising, solicitation and contractual relations. Those third-party medical society documents that do not either mention the Principles or directly refer to the AMA as the primary source of ethics pronouncements, form a pattern of advice and policy on ethics matters that is not only consistent with AMA views but unswervingly in line with almost all AMA ethics dictates. Such a pattern inexorably leads to the inference of conspiracy.

This proceeding is governed by the Federal Trade Commission's Rules of Practice, rather than by the Federal Rules of Evidence. *See FTC* v. *Cement Institute,* 333 U.S. 683, 705–06 (1948). A final ground for the admissibility of these documents is based upon Rule 3.43(b) of the Commission's Rules of Practice.[55]

There is no doubt as to the relevancy or materiality of the documents. They point towards the same type of practices that respondents are charged with, and frequently refer to and make mention of AMA's Principles of Medical Ethics, its *Opinions and Reports* and other ethics pronouncements. The third-party medical society documents give rise to an inference of conspiracy that finds full support in the evidence described above.

The only question lies in the reliability of the documents.

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[55] Section 3.43(b) reads as follows:

> *Admissibility.* -Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded so far as practicable.

However, the documents largely consist of minutes of official meetings and correspondence generated during the normal course of operations and prepared contemporaneously with the transactions described therein. Documents such as these are akin to business records which are routinely admitted into evidence under an exception to the hearsay rule.[56] Evidence of this nature is traditionally accorded a high degree of reliability arising **[290]** out of the fact that such documents are among the types of materials that reasonable persons will rely upon in their daily business affairs. The authenticity of these documents has not been challenged. Therefore, they are admissible under Rule 3.43(b) and provide further evidence of conspiracy.

While AMA does not literally control its constituent or component medical societies, it exerts tremendous influence over them and, thus, over individual physicians, especially in the area of ethics complaints and inquiries. It is inappropriate to look at the relationship of AMA to state and local societies in terms of actual control. Medical societies are not corporations; there is no veil to be pierced.

The establishment of a conspiracy rests upon a strong factual showing. As various examples of the interdependence among the AMA and its constitutent and component medical societies along with individual incidents demonstrating the effects of their concerted activities are revealed, the record evidence builds increasingly to the finding of a conspiracy among physicians and medical societies to restrain physician competition in the United States. While there is no magical number denoting the quantum of evidence that is necessary to lead to the conclusion of conspiracy, in certain instances the cumulative import of facts adduced at trial will allow no other conclusion. The present case represents such a situation.

## V. ABANDONMENT OR DISCONTINUANCE

Respondent AMA contends that the basis for any decision in this case should be AMA's *current* position on advertising, solicitation and contract practice as reflected in the 1977 *Opinions and Reports* (RX 1), and that there is no need to inquire into the antitrust implications of earlier editions of the *Opinions and Reports* (AMA Conclusions of Law, pp. 72-76, 120-122; AMA Post-Trial Brief, pp. 29-36). AMA contends that the Commission should determine the lawfulness, not of obsolete statements of the AMA, but of the current position of the Association. A ruling based on outdated statements in the 1971 edition would amount to "a sterile exercise of the

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[56] *See, e.g.*, Fed. Rules Evid. Rule 803(6), 28 U.S.C.

Commission's power, an exercise engaged in simply to have an order on record" (AMA Post-Trial Brief, p. 34).[57] [291]

It is undisputed that AMA's Judicial Council did publish a 1977 edition of *Opinions and Reports* which differs from the 1971 edition. Complaint counsel contends, however, that AMA has not specifically rescinded the 1971 edition and that many of the restrictions on physician advertising, solicitation and contract practice have not been abandoned (Complaint counsel Brief, pp. 49–51; Complaint counsel Reply Brief, pp. 36–38; CPF pp. 276–281).

The facts of this record reveal complete reliance upon the 1971 *Opinions and Reports* by AMA and its constituent and component societies for interpretations of what is or is not ethical conduct in the areas of advertising, solicitation and contract practice. The 1971 edition has many detailed examples which can be followed in determining the ethical propriety of a physician's conduct; the 1977 edition is of a more summary nature (*Compare* CX 462 *with* RX 1). Based on the 1971 edition, many constituent and component societies promulgated codes and guidelines for their members. The AMA House of Delegates adopted the 1971 *Opinions and Reports* and other promulgations concerning ethical matters which were based on the 1971 edition; *i.e., Report on Physician-Hospital Relations* (CX 959) and "Guidelines on Telephone Directory Listings" (CX 534C–D, 533K, 673B–I). None of these publications has ever been specifically rescinded by the AMA House of Delegates, and the 1977 edition of *Opinions and Reports* has never been adopted by the AMA House of Delegates.

The 1977 edition of *Opinions and Reports* expressly "reaffirms the long-standing policy of the Judicial Council on advertising and solicitation by physicians" (RX 1, p. 30). The 1977 edition also states that, "The [Principles of Medical Ethics] proscribe the solicitation of patients" (RX 1, p. 30). There are other examples of equivocation in the 1977 edition, especially the use of "catch words" of limitation or restriction which were also utilized in the 1971 edition (F. 153, p. 229).

There has never been any communication from AMA to its constituent and component societies to revise or update their own ethical codes or guidelines so as to conform with the 1977 edition of the *Opinions and Reports*. The record is devoid of evidence that constituent and component societies [292] have revised, systematically or otherwise, their ethical codes and guidelines. In fact, the record contains a number of incidents which strongly establish that constituent and component societies are continuing to enforce AMA's ethical interpretations as contained in the 1971 edition of the *Opinions and Reports*. Several witnesses testified that their advertising policy still conformed to the 1971 interpretations (*See* F. 152-53, pp. 226–31, for detailed findings on the issue of discontinuance).

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[57] On January 14, 1977, AMA filed a Motion for Certification to the Commission of AMA's Motion to Reconsider Issuance of the Complaint because of changed circumstances—the issuance of the 1977 *Opinions and Reports*. After certification of the motion, the Commission, on April 26, 1977, denied the motion.

The message that the new *Opinions and Reports* conveys to AMA's component and constituent societies and to individual member physicians is not one of clear and unambiguous abandonment of the prior ethical restrictions. At no time has the AMA House of Delegates or the Judicial Council ever publicly and explicitly declared to its affiliated societies and members that its earlier ethical pronouncements have, in fact, been officially rescinded or superseded by issuance of the 1977 *Opinions and Reports*. The deeply imbedded hostility to advertising, solicitation and contract practice by physicians — apparent in the testimony of respondent AMA's own surrebuttal witnesses and in the recent activities of some of AMA's constituent and component societies[58] — confirms that respondents have not made an unequivocal and effective discontinuance of the challenged practices and cannot show with reasonable certainty that the challenged practices will not recur. Further, AMA's purported discontinuance or abandonment, *i.e.*, the publication of the 1977 *Opinions and Reports*, occurred subsequent to the issuance of the complaint in this matter on December 19, 1975. In November 1975, the AMA Judicial Council formally sanctioned an updated edition of the 1971 *Opinions and Reports*. On April 9, 1976, the Judicial Council issued a revised statement on physician advertising and solicitation. The content and format of the new edition of the *Opinions and Reports* was approved by the Judicial Council on June 25, 1976. The revised statement by the Judicial Council was published in the 1977 *Opinions and Reports* in March 1977 (F. 152, pp. 226–27).

From the above sequence of events it is apparent that any definitive action on revising the 1971 *Opinions and Reports* was taken *after* the complaint herein had issued. Failure of AMA to take more positive steps to ensure that a complete and unequivocal discontinuance of the challenged practices was effected, with the Commission's complaint outstanding, leads to the conclusion that a discontinuance or abandonment was never intended. [293]

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[58] See especially the inability of Florida physicians associated with an HMO to obtain low-cost malpractice insurance in 1977, through the Florida Medical Association because of the opposition of that Association and the Volusia County Medical Society to physicians associated in the contract practice of medicine. (F. 149, pp. 220-221).

## VI. THE REMEDY

Having found a conspiracy to restrain competition, the effects of which have been to deprive consumers of the free flow of commercial information that is indispensable in making informed economic decisions, and to interfere with the freedom of physicians to make their own decisions as to their employment conditions, it is necessary to devise a remedy that will open the channels of communication and prevent obstruction to physicians and, *inter alia*, HMOs in their contractual arrangements. It is well established that "the Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices" and that, so long as the remedy selected has a "reasonable relation to the unlawful practices found to exist," the courts will not interfere. *Jacob Seigel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611 (1946). *See also Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 726 (1948); *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *L. G. Balfour Co.* v. *Federal Trade Commission*, 442 F.2d 1 (7th Cir. 1971)[59] Having established a violation, the Commission must "be allowed effectively to close all roads to the prohibited goal, so that the order may not be by-passed with impunity." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). *See also Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 431 (1957). As the Supreme Court has explained, "[O]nce the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 334 (1961).

Recent Supreme Court decisions have emphasized the need for the free flow of commercial information. Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an [294] indispensible role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 364 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 765 (1976).

In acknowledging the significance of commercial speech to the public, the Court has not hesitated to strike down barriers that inhibit the dissemination of commercial information. The Court has also made it abundantly clear that Congress did not intend to exclude professional associations from antitrust regulation. *Professional Engineers*, 98 S. Ct. at 1362–68; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787 (1975). *Virginia State Board of Pharmacy* at 766-770.

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[59] The Supreme Court, in a very recent antitrust decision, stated: "[T]he standard against which the order must be judged is whether the relief represents a reasonable method of elininating the consequences of the illegal conduct." *National Society of Professional Engineers* v. *United States*, 98 S. Ct. 1355, 1368 (1978).

Purported justifications for withholding commercial information from the public have not been persuasive. The Court's position, clearly articulated in recent decisions, is that people will perceive their own best interests if they are well enough informed. The best way to accomplish this is to open the channels of communication, not close them. Information cannot be foreclosed from the public on the purported bases that the products or services might be harmful, or that the advertising information might be incomplete or some of it deceptive, or that the public might misunderstand the information. The solution is not to keep the public in ignorance, but to insure that opportunities are available to provide the public with more information.

AMA argues that it is not opposed to the dissemination of truthful, objective information about physicians' services that will be helpful to consumers. AMA contends that its position on advertising and solicitation is reasonable in that it combats deception, enhances the physician-patient relationship, and guards against a lowering of the quality of medical care received by patients (AMA Reply Brief, p. 54-55, 66). Even assuming that AMA's intentions are altruistic, the record shows that its restrictions have had the effect of depriving consumers of the information necessary to make an informed choice of health care and insulating physicians from the give and take of the marketplace. New methods of health care have been discouraged, restricted and, in some instances, eliminated. That some of the effects of respondents' ethical restrictions may have been to prevent inferior services or insure ethical behavior is not a sufficient justification for permitting respondents **[295]** to impose continuing restraint on competition. There are other methods to accomplish respondents' purported objectives without the substantial restraints on competition which inherently flow from respondents' ethical restrictions.

In fashioning a remedy, it is observed that the Supreme Court has indicated that there is a role for a professional society to play in the regulation of the ethical standards of its members. *Bates*, 433 U.S. at 369 n. 20, 373 n. 28, 379, 384; *Professional Engineers* at 1367–69. The Order which will be entered in this proceeding will take into account this expression by the Court. Respondents will be permitted to participate in setting ethical guidelines for the conduct of their members, after first obtaining the permission and approval of the Federal Trade Commission.

AMA has presented certain evidence that state boards of medical examiners and the Federal Trade Commission have neither the resources nor the inclination to regulate physician advertising (AMA Proposed Findings, pp. 440–448). The purpose of this evidence is to bolster the argument that governmental agencies are not adequate to protect the public from deceptive advertising and therefore medical society regulation is necessary to protect the public interest (AMA Conclusions of Law, p. 142; AMA Reply Brief, p. 64). The evidence presented by AMA is not persuasive.

The history of the Federal Trade Commission over the years is replete with proceedings concerning false and deceptive advertising and promotional practices involving drugs, cosmetics, devices and medical services, including such items as bust developers, hair preparations, bedwetting devices, arthritis cures and weight reducing and control devices and remedies.[60] The Wheeler-Lee amendment to the Federal Trade Commission Act,[61] passed in 1938, was enacted to broaden the powers of the Commission so as to provide more effective control over false advertisements of foods, drugs, devices and cosmetics.[62] For the first time, the Commission was given authority to enjoin false and deceptive advertising. Recent actions by the Commission in [296] this area of regulation include proceedings entitled *Simeon Management Corporation,* Docket 8996 [87 F.T.C. 1184] (weight reduction clinics), *Travel King Inc., et al.* Docket 8949 [86 F.T.C. 715] (physic surgeons), *Porter & Dietsch, Inc.,* Docket 9047 [90 F.T.C. 770] (weight control products), *American Home Products Corp.,* Docket 8918 [Initial Decision, Administrative Law Judge Hyun, dated September 1, 1978] (headache or pain remedies), and *Karr Preventative Medical Products Inc.,* Docket 9109 [94 F.T.C. 1080] [Complaint issued April 26, 1978] (acne remedy). The penalties provided for in the Federal Trade Commission Act may well be a substantial deterrent to false and deceptive advertising by physicians. As noted by the Commission in the recently issued trade regulation rule on the advertising of ophthalmic goods and services, all of the 50 states have laws prohibiting false and deceptive advertising. *Advertising of Ophthalmic Goods and Services,* 43 Fed. Reg. 23992, 23997 n. 89 (FTC June 2, 1978). Thus, it cannot be concluded in this proceeding or, indeed, in any proceeding that governmental regulation of false and deceptive advertising, although

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[60] *See* CCH Trade Reg. Rep. ¶¶ 7739, 7741, 7743, 7745, 7747, 7749, 7751, 7780–85.

[61] 52 Stat. 114, 15 U.S.C. 52, *et seq.*

[62] H.R. Rep. 1613, 75th Cong., 1st Sess.

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at times perhaps imperfect, must give way to private regulation to protect the public.

Respondent AMA argues that if any order is entered in this proceeding on the advertising aspect of this case, "it should be limited to prohibiting regulation of advertising when respondents have no reason to believe that such advertising is untruthful, deceptive, or otherwise lacking in information which would help consumers make an informed choice of physician" (AMA Conclusions of Law, pp. 8, 146–147). If an order is entered on contract practice issues, AMA contends that it should be limited to "remedying any specific violations that have been established" (AMA Conclusions of Law, p. 150). Respondents CSMS and NHCMA suggest that such respondents could be ordered not to restrict their members from publishing in the print media truthful, objective and verifiable information relating to physicians and their practices, or relating to routine services and procedures performed by the physicians (CSMS Conclusions of Law, pp. 36–37).

Respondents have contended throughout this proceeding that the only restrictions they have imposed on their members were intended to prevent deception of the public and to protect the quality of medical care, and that they have not opposed the dissemination of truthful information which will assist consumers in making an informed choice of a physician. The record evidence is otherwise, however, it establishes with clear conviction that respondents have prevented the dissemination of truthful, objective information that could provide substantial benefits to the public. These restrictions have been carried out over a long period [297] of time as a common understanding between AMA, CSMS and NHCMA and over 2,000 other medical societies throughout this country and their members. These restrictions must be completely eliminated and physicians must be given the unfettered opportunity to present to the public information which the public needs and is entitled to receive, subject only to governmental, not medical society, restrictions.

Since the unlawful restrictions have been effectuated through a conspiracy involving the constituent and component societies of AMA, it is necessary that any order entered in this proceeding eliminate the restrictions at all levels of the medical society federation. AMA strenuously objects to any provision in an order requiring it to instruct state and local societies to take or desist from taking action (AMA Conclusions of Law p. 9). AMA contends that subjecting independent and autonomous organizations to an order in a proceeding to which they were not parties "violates due process" (AMA Reply Brief, p. 64).

The restrictions with which this proceeding is concerned, and which the record shows to be unlawful, have involved constituent and component medical societies at the very heart of the ethics enforcement process. Local medical societies have been the initial enforcers of the ethical restrictions—this is the very core of the agreement or understanding. Leaving such societies free to carry on with the ethical restrictions would convert this proceeding into an empty exercise in futility. The order must provide an effective remedy that cannot be "by-passed with impunity." *Federal Trade Commission* v. *Ruberoid,* 343 U.S. at 473.

There is precedent for an order that will require state and local societies to abide by the Order entered herein if they desire to remain within the AMA federation of organizations. The order entered by the United States District Court in *Professional Engineers* required the national society to revoke the charter of, and to refuse affiliation to, any state society which engaged in conduct found to have been unlawfully engaged in by the national society in combination and conspiracy with its members and state societies (Complaint Counsel Reply Brief, Appendix pp. 1–8). This order provision was not overturned on appeal. *Professional Engineers,* 98 S. Ct. at 1368–69 (1978). [298]

In a recent proceeding, the Commission ordered respondents to cease and desist from dealing with parties who respondents knew were engaged in practices which the Commission found to be unlawful. *National Housewares, Inc.,* 90 F.T.C. 512, 596, 603 (1977). Furthermore, orders issued in antitrust proceedings in the courts and Commission orders entered in adjudicative proceedings often affect the rights of third-parties who were not parties to the proceedings. These orders have been upheld in the courts on review and found not to violate due process of any party. *See United States* v. *International Boxing Club of New York, Inc.,* 171 F. Supp. 841, 842 (S.D.N.Y. 1957), *aff'd.* 358 U.S. 242, 247 (1959); *L. G. Balfour Co.* v. *Federal Trade Commission,* 442 F.2d 1, 23 (1971).

Accordingly, the Order found to be necessary to remedy the unlawful conduct disclosed by the record and entered herein will require respondents to cease and desist from the practices found to be unlawful, to revoke and rescind any existing ethical principles or guidelines which restrict physicians' advertising, solicitation or contractual relations, to provide adequate notification to its members and affiliated societies of the terms of the Order and to deny affiliation to any society that engages in any practices which violate the terms of the Order. The Order will permit respondents to issue ethical guidelines affecting advertising and solicitation relations by physicians in the future with permission of and approval by the Federal Trade Commission, which has the organizational flexibility and know how to work with respondents and assure that such guidelines as are approved are in the public interest.

## Conclusions of Law

1. The Federal Trade Commission has jurisdiction over respondents and over the subject matter of this proceeding.

2. Each of the respondents is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act and is subject to the jurisdiction of the Federal Trade Commission.

3. The challenged acts, practices and methods of competition of respondents are in, and affect, commerce within the meaning of the Federal Trade Commission Act. [299]

4. Respondents American Medical Association, Connecticut State Medical Society, New Haven County Medical Association, Inc., constituent and component medical societies of the American Medical Association, component societies of Connecticut State Medical Society and members of respondents and such constituent and component medical societies have conspired, combined and agreed to adopt, disseminate and enforce ethical standards which ban physician solicitation of business, severely restrict physician advertising and prohibit certain contractual arrangements between physicians and health care delivery organizations and between physicians and nonphysicians.

5. The above conduct has hindered, restricted, restrained, foreclosed and frustrated competition in the provision of physicians' services throughout the United States and caused substantial injury to the public.

6. The aforesaid acts, practices and methods of competition engaged in by respondents American Medical Association, Connecticut State Medical Society and New Haven County Medical Association, Inc. in concert of action with each other, with constituent and component medical societies of the American Medical Association and Connecticut State Medical Society and with the members of respondents and such other constituent and component medical societies constitute unfair methods of competition and unfair acts or practices in or affecting interstate commerce and are in violation of Section 5 of the Federal Trade Commission Act.

7. The Order entered in this proceeding is necessary to remedy the violations of law which have existed and to protect the public now and in the future. [300]

## ORDER

### I.

*It is ordered,* That respondents American Medical Association, Connecticut State Medical Society and New Haven County Medical Association, Inc., and their delegates, trustees, councils, committees, officers, representatives, agents, employees, successors and assigns, directly or indirectly, or through any corporate or other device, in or in connection with the purchase, sale, distribution or delivery of physicians' services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the advertising or publishing by any person of the prices, terms or conditions of sale of physicians' services, or of information about physicians' services, facilities or equipment which are offered for sale or made available by physicians or by any organization with which physicians are affiliated;

B. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the solicitation through [301] advertising or by any other means, of patients, patronage, or contracts to supply physicians' services, by any physician or by any organization with which physicians are affiliated;

C. Restricting, regulating, impeding, advising on the ethical propriety of, or interfering with the commercial terms or conditions on which any physician contracts or seeks to contract for the sale, purchase or distribution of his or her professional services;

D. Restricting, interfering with, or impeding the growth, development or operations of any prepaid health care delivery plan or of any other organization which offers physicians' services to the public, by means of any statement or other representation concerning the ethical propriety of their operations, activities, or relationships with physicians; and

E. Inducing, urging, encouraging, or assisting any physician, or any medical association, group of physicians, hospital, [302] insurance carrier or any other nongovernmental organization to take any of the actions prohibited by Paragraphs A through D above. *Provided, however,* that nothing in this Order shall be construed to prohibit respondents, their constituent or component organizations or their members from reporting in good faith to governmental authorities any alleged violation of law, including but not limited to:

(1) Reporting to appropriate governmental authorities any advertising, solicitation or representation by a physician which they have a reasonable basis for believing is false or deceptive, along with the basis for such belief;

(2) Reporting to appropriate governmental authorities any case of uninvited, in-person solicitation of actual or potential patients who because of their special circumstances are vulnerable to harassment or duress. *Provided, further,* that after this Order has become final for two years, nothing herein shall prohibit respondents from formulating, adopting and [303] disseminating to their constituent and component medical organizations and to their members ethical guidelines governing the conduct of their members in respect to advertising and solicitation activities, if respondents first obtain permission from and approval of the guidelines by the Federal Trade Commission.

### II.

*It is further ordered,* That respondents:

A. Serve a copy of this Order by mail upon each of their present members and upon each constituent and component organization of respondents, within sixty (60) days after this Order becomes final.

B. Provide each new member of each respondent and each constituent and component organization of respondents with a copy of this Order at the time the member is accepted into membership.

C. Remove from respondent American Medical Association's Principles of Medical Ethics and the *Judicial Council Opinions and Reports,* and from the constitution and bylaws and any other existing policy statement or [304] guideline of respondents, any provision, interpretation or policy statement which is inconsistent with the provisions of Part I of this Order.

D. Require as a condition of affiliation with any respondent that any constituent or component organization agree by action taken by the constituent or component organization's governing body to be bound by the provisions of Part I of this Order.

E. Terminate their affiliation with any constituent or component organization which, after the effective date of the Order, to respondents' knowledge engages in any act or practice prohibited by Part I of this Order.

### III.

*It is further ordered,* That, within sixty (60) days after this Order becomes final:

A. Respondent American Medical Association publish a copy of this Order in the *Journal of the American Medical Association* and in *American Medical News;* [305]

B. Respondent Connecticut State Medical Society publish a copy of this Order in *Connecticut Medicine;* and

C. Respondent New Haven County Medical Association, Inc. publish a copy of this Order in *Issues and Insights.*

### IV.

*It is further ordered,* That respondents, within ninety (90) days after this Order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which they have complied with this Order. [306]

### APPENDIX A

**Constitutions and Bylaws of AMA's constituent and component medical societies providing that AMA's Principles of Medical Ethics shall govern the conduct of their members and that unethical conduct shall be grounds for expulsion:**

| Medical Society | Constitution and/or Bylaws |
|---|---|
| Allegheny County Medical Society | CX 2185, pp. 10, 13, 15, 17, 40, 42 |
| Arizona Medical Association, Inc. | 1871I, K-L |
| Bexar County Medical Society | 472C, G |
| California Medical Association | 477I, L, Z-6 |
| Camden County Medical Society of the State of New Jersey | 747L-M, R |
| Catawba County Medical Society | 2226C, G |
| Chattanooga and Hamilton County Medical Society, Inc. | 1904I, M, V |
| Chicago Medical Society: The Medical Society of Cook County | 2025M, N |
| Colorado Medical Society | 2307Z-9, Z-22, Z-27 |
| Connecticut State Medical Society | 991D, L-M (*See* 1404I, J) |
| Dallas County Medical Society | 1905D, F, W-X |
| Medical Society of the District of Columbia | 1976R-S, V [307] |
| Florida Medical Association | 2543C, K |

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|---|---|
| Hampden District Medical Society | 1990E, I |
| Hartford County Medical Association, Inc. | 1657A, G |
| Honolulu County Medical Society | 1828G, S |
| Illinois State Medical Society | 1915C, P, Q |
| Jackson County Medical Society | 1908A, D |
| Jefferson County Medical Society | 1872E, I-J |
| Johnson County Medical Society | 2020L, G-H |
| Kentucky Medical Association | 1827H-I, J |
| King County Medical Society | 1979E, R |
| Kitsap County Medical Society | 474B, G, J |
| Knoxville Academy of Medicine | 47G, H-I |
| Lane County Medical Society | 2131D, H, R |
| Lehigh County Medical Society | 2017H, F |
| Los Angeles County Medical Association | 476G, J, Z-15 |
| Louisiana State Medical Society | 1901Q, Z-33 |
| Maricopa County Medical Society | 1568E [308] |
| Medical and Chirurgical Faculty of the State of Maryland | 2050Z-22, Z-24 |
| Massachusetts Medical Society | 885E, Y |
| Michigan State Medical Society | 1833K, M |
| Missouri State Medical Association | 1877I |
| Multnomah County Medical Society | 1874E, L, Z-5 |
| Nashville Academy of Medicine and Davidson County Medical Society | 1825E, M |
| Medical Society of New Jersey | 1889O-P, U-V |
| New Mexico Medical Society | 1883Y, Z-14 |
| New Haven County Medical Association | 1404I |
| Medical Society of the County of New York | 1876T, X |
| Pennsylvania Medical Society | 1886H, J, R |

| | |
|---|---|
| Philadelphia County Medical Society | 756A, M, N |
| Pierce County Medical Society | 135A–B, F, H |
| Prince George's County Medical Society | 689K, D |
| Santa Clara County Medical Society | 748N |
| St. Louis Medical Society | 983E |
| Tarrant County Medical Society | 1894A, E **[309]** |
| Tennessee Medical Association | 14H, L |
| Texas Medical Association | 1899D, U |
| Travis County Medical Society | 1882B, N, Z–9 |
| Medical Society of Virginia | 1879Z–8, O–P, Z–5 |
| Volusia County Medical Society | 1961K, P, D–E |
| Washington State Medical Association | 475G–H, O, M–N |
| State Medical Society of Wisconsin | 1912B, G **[310]** |

## APPENDIX B

### State Statutes Regarding Physician Advertising and Solicitation

In 1975, at the commencement of the proceedings in this case, a substantial majority of states had statutes which prohibited or restricted advertising by physicians. Ten states declared any form of physician advertising to be illegal:

(a) Arizona, Ariz. Rev. Stat. §32–1401 (10)(C), §33–1451 (1976) (RX 706);
(b) Arkansas, Ark. Stat. Ann. §72–613(m) (1975) (RX 707);
(c) Florida, Fla. Stat. Ann. §458.1201(1) (f) (1976) (RX 710);
(d) Georgia, Ga. Code Ann. §84–916(a)(6) (1976) (RX 711);
(e) Louisiana, La. Stat. Ann. §37–1285(19) (1976) (RX 717);
(f) Michigan, Mich. Stat. Ann. §14.542(11) (1), (11)(27)(g), (1976) (RX 719);
(g) Missouri, Mo. Ann. Stat. §334.100(12) (1976) (RX 721);
(h) Ohio, Ohio Rev. Code Ann. §4731.22(b)(5) (1975) (RX 727);
(i) Tennessee, Tenn. Code Ann. §63–619 (1976) (RX 734); and,
(j) Utah, Utah Code Ann. §§58–12–36(4), 58–1–25(1) (1973) (RX 736).

Eight states prohibited advertising in an "unethical" manner:

(a) Delaware, Del. Code Tit. 24, §1741(9) (1974) (RX 709);
(b) Idaho, Idaho Code §54–1810(c) (1976) (RX 713); **[311]**
(c) Maine, Me. Rev. Stat. tit. 32, §3282(A)(B) (1977) (RX 718);
(d) Nebraska, Neb. Rev. Stat. §71–147(11)–(13) (1976) (RX 722);
(e) North Dakota, N.D. Cent. Code §43–17–31(11) (1960) (RX 726);
(f) Rhode Island, R.I. Gen. Laws §§5–37–4, 5–37.1–5 (1976) (RX 731);
(g) South Carolina, S.C. Code Ann. §40–47–200 (7) (1975) (RX 732); and,
(h) Wyoming, Wyo. Stat. §33–340 (1975) (RX 740).

Four states prohibited all advertising except notices of openings or closings of a practice or listing in a directory:

(a) Alaska, Alaska Stat. §§08.64303(b)(1), 08.64.380(3)(D) (1977) (RX 705);
(b) Illinois, Ill. Rev. Stat. ch. 91, §§16a(13), 16a-1 (1976) (RX 714);
(c) New Jersey, N.J. Stat. Ann. §45.9.16 (1976) (RX 723); and,
(d) Oklahoma, Okla. Stat. Ann. tit. 59 §§503, 509(2) (1977) (RX 728).

Sixteen states made it illegal for a physician to engage in misleading or deceptive advertising:

(a) Alabama Ala. Code §§34-24-90 (1975) (RX 704);
(b) Connecticut, Conn. Gen. Stat. §20-44 (1958) (RX 708);
(c) Hawaii, Haw.Rev.Stat. §§453-8, (5) (6) (1975) (RX 712);
(d) Iowa, Iowa Code Ann. §§147.55-(7) (1976) (RX 715);
(e) Kansas, Kan. Stat. §§65-2836(b), 65-2837(g) (1976) (RX 716); [312]
(f) Mississippi, Miss. Code §73-25-29(8)(c) (1976) (RX 720);
(g) New Mexico, N.M.Stat.Ann. §§67-5-9(9), (B)(9) (1975) (RX 724);
(h) North Carolina, N.C.Gen. Stat. §§90-14, 9014(8) (1975) (RX 725);
(i) Oregon, O.Rev.Stat. §677.190(10) (1971) (RX 729);
(j) Pennsylvania, Pa.Stat.Ann. tit. 63, §421.15 (a)(92) (1976) (RX 730).;
(k) Rhode Island, R.I.Gen.Laws §§5-37-4, 5-37.1-5 (1976) (RX 731);
(l) South Dakota S.D. Codified laws §§36-4-29, 36-4-30 (5) (1977) (RX 73
(m) Texas, Tex. Rev. Civ. Stat. Ann. art. 4505(6) (1976) (RX 735);
(n) Vermont, Vt. Stat. Ann. tit. §§ 1353(2), 1361 (1977) (RX 737);
(o) Virginia, Va. Code §§54-316, 54-317(4) (1977) (RX 738); and,
(p) Washington, Wash.Rev.Code §§18.72.030(4), 18.72.250 (1975) (RX 739).

Alabama also provides for suspension or revocation of a medical license for any violation of the Principles of Medical Ethics as set forth in the *Opinions and Reports of* the Judicial Council of the AMA (RX 704B).

## OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

The complaint in this case was issued on December 19, 1975, charging that the American Medical Association (AMA), the Connecticut State Medical Society (CSMS), and the New Haven County Medical Association, Inc. (NHCMA) violated Section 5 of the Federal Trade Commission Act ("Act")[1] through ethical restrictions on advertising and solicitation, as well as other competitive restrictions. The AMA is the largest medical and professional association in the world. (ID 6) Its membership includes approximately 200,000 physicians, representing 53 percent of all doctors in the nation and 72 percent of office-based practitioners. (RX 658) The AMA is a federation of 55 constituent associations, representing states, commonwealths, territories, and insular possessions. (RX 220, p.27, CX

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[1] 15 U.S.C. 45(a)(1)(1976).

990E) Each of these constituent societies has in turn chartered component societies representing smaller geographic areas such as counties. (CX 990E) There are approximately 2,000 component societies in the AMA. (RX 220, p.27) Membership in a component society is a prerequisite to membership in a constituent association and membership in a constituent association is a prerequisite to membership in the AMA. (ID 6) [2]

CSMS is a constituent society of AMA composed of eight component county medical societies, one of which is NHCMA. In 1975, CSMS had approximately 4,400 members, representing approximately 82 percent of the physicians registered in Connecticut. NHCMA had approximately 1,200 members in 1975, representing approximately 71 percent of the physicians registered in New Haven County. (ID 8–9)

The AMA House of Delegates, which is composed of delegates from each constituent or state society, is the official legislative and national policymaking body of AMA with authority to amend the AMA *Constitution and Bylaws*, and the *Principles of Medical Ethics ("Principles")*. (ID 7) The AMA operates eight standing committees on specific subjects, known as Councils. *Id.* One of these councils, the Judicial Council, has responsibility for interpreting the AMA *Constitution and Bylaws*, and the *Principles*. (Tr. 3982)

The case against respondents focuses upon their ethical code and interpretations of this code. The AMA adopted a *Code of Ethics* at its first meeting in 1847. (ID 102) With minor revisions, the language and concepts of the original code remained unchanged until 1957. In that year, AMA's House of Delegates adopted a shortened version of the *Code of Ethics*, entitled *The Principles of Medical Ethics*, consisting of ten brief sections. As noted above, the Judicial Council interprets the *Principles* and hears actions based on infractions of the *Principles*. *Id.* The Judicial Council's interpretations are periodically published under the title *Opinions and Reports of the Judicial Council ("Opinions and Reports")*.

The gravamen of the complaint in this case is that respondents, through their ethical canons, agreed to prevent or hinder their members from soliciting business, by advertising or otherwise, from engaging in price competition, and from otherwise engaging in competitive practices. The complaint alleged that these agreements constitute unfair methods of competition and unfair acts or practices in violation of Section 5.

Following an extended trial, the Administrative Law Judge (ALJ) concluded that the Commission possessed jurisdiction over the respondents' practices since each of the respondents is a "corporation" within the meaning of Section 4 of the Act, and because the challenged acts, practices, and methods of competition are in or affect commerce. With respect to the merits, the law judge found that respondents, their constituent and component medical societies, and their members have agreed to adopt, disseminate and enforce ethical standards that ban physician solicitation of business and severely restrict physician advertising. Additionally, the ALJ held that respondents have unlawfully sought to prevent or hinder certain contractual arrangements between physicians and health care delivery organizations and between physicians and nonphysicians. [3]

To remedy the violations found as well as to protect the public now and in the future, the ALJ issued an order that requires, *inter alia*, respondents to cease and desist from restricting advertising, solicitation, and certain contract practices of their members for a minimum of two years. At the end of this period, the order permits AMA to develop and disseminate ethical guidelines with respect to advertising and solicitation, on condition that respondents first obtain the Commission's approval of these guidelines.

Respondents argue in their appeal to the Commission that they are not "corporations" as defined in Section 4 of the Act. Although AMA concedes that its activities fall within and affect interstate commerce, CSMS and NHCMA urge the Commission to overrule the ALJ's finding of interstate commerce jurisdiction. All respondents object to the finding of a conspiracy, with AMA asserting that it should not be held accountable for the activities of its member societies and the Connecticut respondents attempting to disassociate themselves from proof involving AMA and unnamed state and local societies. With respect to the alleged restraints on advertising, solicitation and contractual arrangements, AMA rests its case primarily upon recent modifications to its ethical positions disseminated after issuance of the complaint and, together with the Connecticut respondents, challenges the sufficiency of the evidence to sustain the law judge's conclusions.

## I JURISDICTION

### A. Of "Corporations" Under Section 4

At the outset, the Commission must determine whether it has jurisdiction over the respondents. Section 5(a)(2) of the Act[3] extends the Commission's jurisdiction to "persons, partnerships, or corporations" and Section 4 defines "corporation" to include:

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[3] 15 U.S.C. 45(a)(2)(1976).

> any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.[3]

In analyzing whether this language applied specifically to respondents, the ALJ felt that the Commission could "assert jurisdiction over nonprofit organizations whose activities [4] engender a pecuniary benefit to its members if that activity is a substantial part of the total activities of the organization, rather than merely incidental to some non-commercial activity." (ID 238)[4]

Respondents challenge this formulation of the legal standard under Section 4, but their briefs reflect some differences regarding the standard to be applied. AMA argues that the sole inquiry under Section 4 should be to determine whether the respondent is carrying on business in order to accumulate gain for distribution to its shareholders or members. Focusing on the organization's purpose rather than its activities, NHCMA suggests that the proper test is whether the respondent has been organized for the purpose of engaging in business activities to provide gain to its members. Finally, CSMS urges a combination of the criteria suggested by the other respondents. It says that the test should be whether the respondent has been organized *and* operated to profit its members.

We are satisfied that the ALJ has articulated the proper test for examining whether respondent is a "corporation" within the meaning of Section 4. The substantiality test appropriately places the principal focus upon the nature of respondents' activities and is supported by precedent. *National Commission on Egg Nutrition,* 88

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[3] 15 U.S.C. 44 (1976).

[4] The following abbreviations will be used in this opinion:

ID - Initial Decision page number
Tr. - Transcript page number
CX - Complaint Counsel's exhibit number
RX - Respondent AMA exhibit number
RCX - Respondent's CSMS exhibit number
RNHX - Respondent's NHCMA exhibit number
RAB - Respondent AMA Appeal Brief
RCAB - Respondent NHCMA Appeal Brief
CAB - Complaint Counsel's Answering Brief
TROA - Transcript of Oral Argument before the Commission
App.A - Appendix A of this Opinion

F.T.C. 89, 177 (1976) *modified* 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 99 S. Ct. 86 (1978).[5] Clearly, Congress did not intend to bring "any and all nonprofit corporations regardless of their purposes and activities" within the Commission's jurisdiction. *Community Blood Bank of the Kansas City Area, Inc.* v. *F.T.C.*, 405 F.2d 1011, 1018 (8th Cir. 1969). On the other hand, the legislature did not provide a "blanket exclusion" from FTC jurisdiction for all nonprofit corporations, since it recognized that certain "corporations ostensibly organized not-for-profit, such as trade associations, were merely [5] vehicles through which a profit could be realized for themselves or their members." *Id.* at 1017. Thus, the "mere form" of incorporation is not dispositive; it is the "reality" of a respondent being in law and in fact a charitable organization (the determination of which must necessarily be conducted on an ad hoc basis) that places it beyond the Commission's reach. *Id.* at 1018–19.

Respondents contend that for the Commission to assert jurisdiction over them, it must find that they are engaged in some undertaking for the purpose of realizing gain for ultimate distribution to their members. They argue that it is improper for the Commission to focus upon activities which provide only an "economic benefit" for their members. (RAB 17–18) It is clear, however, that an organization may fall within the ambit of Section 4 even though it only "indirectly" pursues profit for its members. *National Commission on Egg Nutrition, supra*, 517 F.2d at 488.[6] Section 4 does not require a transfer or delivery of monetary profits to the members of a nonstock corporation, only that the activities of the corporation provide pecuniary benefits to its members. AMA itself concedes as much when it acknowledges that the Commission has exercised jurisdiction many times in the past over trade associations. (RAB 19)[7] Its effort to distinguish these cases on grounds that the entities involved were devoted primarily to enhancing the pecuniary benefit of their members implicitly recognizes that the degree of pecuniary benefit conferred is the fundamental issue, not whether the benefit is physically distributed. [6]

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[5] In the related preliminary injunction action, the district court held that the respondent was a "corporation" within the meaning of Section 4 by virtue of the fact that many of its members were connected with the egg industry and because its activities "directly promote[d], at least to some extent, the financial health of the egg industry." F.T.C. v. *National Comm'n on Egg Nutrition*, 1975-1 Trade Cas. (CCH) ¶60, 246 at 65,967 (N.D. Ill. 1974), *rev'd on other grounds*, 517 F.2d 485 (1975), *cert. denied* 426 U.S. 919 (1976).

There is some support for the notion that a respondent is subject to FTC jurisdiction if one of its purposes is noncharitable in nature, perhaps only to the extent of its noncharitable activities. *See Community Blood Bank, supra*, 405 F.2d at 1022. ("[W]e hold . . . [t]hat under § 4 the Commission lacks jurisdiction over nonprofit corporations without shares of capital, which are organized for and actually engaged in business for only charitable purposes, and do not derive *any* 'profit' for themselves or their members . . . ."). (Emphasis supplied.) In view of our determination, *infra*, that respondents are subject to the Commission's jurisdiction under the substantiality test, we need not determine whether jurisdiction might exist under some alternative test.

[6] The district court's opinion also supports the proposition that jurisdiction may attach even though there is no actual distribution of profits to the respondent's members. *National Comm'n on Egg Nutrition, supra*, 1975-1 Trade Cas. (CCH) ¶60, 246 at 65,967.

[7] This authority is well established. *E.g.*, *FTC* v. *Cement Inst.*, 333 U.S. 683, 687 (1948); *Fashion Originators' Guild of America* v. *FTC*, 312 U.S. 457, 461 (1941); *FTC* v. *Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927).

AMA may have abandoned the contention offered below that for an organization to be subject to the Commission's jurisdiction, profit-seeking must play a dominant role in its activities. *Compare* RAB 25 *with* TROA 101. The Connecticut respondents continue to maintain, however, that a respondent is exempt from prosecution if its activities are substantially educational, scientific, and charitable in nature, *i.e.*, even if its commercial activities predominate. RCAB 8; RNAB 4-5. This latter formulation turns the correct standard on its head, in our view, permitting a corporation to escape liability before the Commission for anticompetitive practices, despite the fact that a major portion of its operations provide a pecuniary benefit to its membership. While commercial activity which is only incidental to the eleemosynary functions of a nonstock corporation may not support a claim of jurisdiction, *Egg Nutrition*, 88 F.T.C. at 178-79; *cf. Community Blood Bank*, 405 F.2d at 1017, an organization which exists in substantial part for the pecuniary benefit of its members surely comes within Section 4.

On a slightly different tack, AMA asserts that the legislative history of the Act reveals a congressional intent not to subject professional societies to Commission jurisdiction. In support of this proposition, it cites a decision construing a provision of the Florida antitrust statute,[*] the absence of professional society testimony on the bills that became the Federal Trade Commission Act, and the fact that the 95th Congress failed to enact legislation which would have given the Commission jurisdiction over all nonprofit corporations. We think respondent makes too much of too little. In essence, AMA would have us infer an exemption from the Act for a particular class of organizations, persons and corporations based upon the absence of specific statutory language or legislative history reflecting a congressional desire to have the Act apply to this class. The incredible sweep of such a position and the extraordinary demands it would place upon the legislature perhaps explain why it is unsupported by any precedent of which we are aware.

With respect to the inaction of the 95th Congress, it is well-settled that "the views of a subsequent Congress form a hazardous basis for inferring intent of an earlier one."[9] The peril is particularly acute when the subject of congressional inaction is broader in scope than the point [7] for which it is cited. As noted by AMA, the legislation before the 95th Congress would have amended Section 4 to remove the nonprofit exemption altogether, exposing true charitable organizations to the jurisdiction of the Commission. Even assuming that the 95th Congress had some special insight into the intent of a Congress which preceded it by more than sixty years, it is impossible to fathom with any confidence the significance for this case of congressional inaction on the specific amendment recently considered.[10]

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[*] In *Feminist Women's Health Center, Inc.* v. *Mohammed*, 586 F.2d 530 (5th Cir. 1978), the court held that the medical profession was not "any person" within the meaning of the Florida antitrust law. In considering it unlikely that the 1915 Florida legislature intended its statute to apply to the medical profession, the court applied state law and, in so doing, relied heavily on a recent state appellate court interpretation to that effect. *Mohammed*, *supra* at 552-53. However, the court reversed a decision granting summary judgment to defendants on a Sherman Act count, following the holding of *Goldfarb* that the learned professions are not exempt from the Sherman Act.

We find no reason to differ with the ALJ's conclusion that respondents are engaged substantially in activities which confer a pecuniary benefit upon their members. AMA's own statements belie any suggestion that such activities are only incidental to eleemosynary functions. One of the purposes for which AMA was founded in 1847 was to promote "the usefulness, honor and interest of the medical profession. . . ."[11] The AMA's articles of incorporation, as amended in 1902, stated that one of the objects of the Association was "safeguarding the *material* interests of the medical profession. . . ." (CX 1355–H) (emphasis added). Additionally, the proceedings of AMA's House of Delegates in 1975 indicate that the association continues to exist as "an organization of and for the medical profession." (CX 1042J) [8]

Promotional literature and other material sent by AMA to its members sound the recurring theme that the Association is substantially engaged in protecting the rights and fostering the interests of American doctors. (CX 1532B, 1224, 1528, 1545D, 232D, 2630) For example, a pamphlet sent to AMA's membership in 1974, entitled "What Do You Get For Your Dues?", emphasizes the "remarkable range of tangible benefits and services" provided by AMA membership and describes these benefits and services as "invaluable - personally and professionally." (CX 259C, D) The same pamphlet specifically refers to insurance programs, AMA's retirement plan, physician placement service, publications (such as *Prism*, a socioeconomic magazine), authoritative legal information and guidelines, and "professional management information and guides to increase the productivity and profitability of your practice." (CX 259D)[12] The record provides ample substantiation for these promotional statements. (ID 57-59) Practice management programs warrant particular attention because they have been assigned a high priority by AMA and because they present some of the most "tangible benefits" to the association and its members. (CX 1543Z-10) We find it significant that expenditures for this program have more than doubled in the last three years. (ID 57)

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[9] *United States* v. *Price*, 361 U.S. 304, 313 (1960); *see also United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *United States* v. *United Mine Workers*, 330 U.S. 258, 281–82 (1947).

[10] The then Chairman of the Commission, Calvin J. Collier, testifying on behalf of the Commission, supported the amendment on grounds that it would avoid the often time-consuming proof necessitated by the *Community Blood Bank* analysis. Chairman Collier expressed the view that, where anticompetitive or deceptive behavior is involved, there was little reason for identifying "charitable" corporations, since the harm to the public is the same whether the corporation engages in such behavior for profit or for charity. H.R. Rep. No. 95–339, 95th Cong., 1st Sess. at 54 (1977). The excerpt from the Report of the House Committee on Interstate and Foreign Commerce, quoted by AMA, indicates only that certain minority members of the committee were concerned not that the Commission could properly exercise jurisdiction over an entity found to be "organized to carry on business for its own profit or that of its members," but rather that the proposed amendment would *extend* the Commission's jurisdiction to encompass genuine nonprofit organizations. *Id.* at 120.

[11] Memorandum in Support of Respondent American Medical Association's Motion for Summary Decision Dismissing the Complaint for Lack of Jurisdiction at 12–13 (March 24, 1976) (Quoting from the preamble to AMA's Constitution, adopted in May 1847).

AMA suggests that reliance upon references to the "interests" of physicians overlooks the fact that physicians have policy goals unrelated to profit maximization. While certain of these references are admittedly ambiguous, consideration of the record as a whole leaves little doubt that one of the purposes for which AMA was organized and for which it continues to operate is the economic betterment of its members.

According to AMA, the most important of all the tangible benefits and services they offer is the fact that a member has "an effective and influential national spokesman to represent [his/her] views, interests and rights." (CX 259Z-13) The record supports this assertion, describing legislative and lobbying efforts by AMA with respect to price controls on physicians' fees, Medicare, national health insurance, health maintenance organizations (HMOs), the Keogh Act, malpractice insurance legislation, and other issues affecting the financial health of AMA's membership. (See ID 41-49) AMA's intercession on behalf of its members with insurance carriers, such as Blue Shield, government medical care programs, and hospital administrators also provides economic benefits. (ID 50-53) The record of this proceeding documents additional pecuniary benefits in the form of litigation and substantial public relations activity in support of its legislative program. (ID 52-56)

Our determination that AMA engages in substantial activities for the economic benefit of its membership is intended in no way to denigrate the many valuable eleemosynary activities in which AMA is engaged. Respondent's educational, scientific, and public health efforts represent a laudable public service recognized by this agency and the country as a whole. Such activities do not, however, provide immunity from the laws designed to protect the public from anticompetitive practices. **[9]**

The record also persuades us that the Connecticut respondents exist in substantial part for the economic advantage of their members and that the law judge's finding in this regard should be upheld. (*See* ID 73–101, 241–51) Without reiterating all of the various economic activities referenced by the ALJ, we note that both CSMS and NHCMA have promoted the economic interests of their members through lobbying and legislative efforts, through sponsorship of insurance plans such as the Professional Liability Insurance Program, and through relationships with third-party payers. Moreover, both of these respondents have played key roles in the formation of "Foundations for Medical Care," an alternative to HMO's operating on a prepaid basis with fee-for-service physicians.[13]

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[12] See also CX 245D, reproduced at ID 40. It is noteworthy that AMA's "medicolegal" symposiums have frequently focused on the business practice aspects of the profession. (ID 58)

Record evidence concerning the CSMS *Relative Value Guide ("RVG")* provides added support to the ALJ's finding. The *RVG* provides a precise description and identification in coded form of the services rendered by physicians. (CX 1175D) When utilized with a conversion factor, a relative value guide can be used to generate a fee schedule. *Id.* CSMS first adopted the *RVG* in 1965, republished it in 1971, and distributed it to its membership and to third-party payers up until 1977. (I.D. 85–86) CSMS recommended no specific conversion factors, but did advise its members to check with other physicians in the community to derive an "appropriate" conversion factor. (CX 1171A) Although there is some evidence that third-party payers in Connecticut used their own or different relative value scales and that CSMS advised its members to use the precise coding approved by the specific third-party payer, the record also shows that the *RVG* was utilized by the NHCMA Peer Review Committee to decide complaints regarding members' fees and by the New Haven County Foundation for Medical Care. (CX 1178, 2424C, 2425, 2433) Based on this evidence, we conclude that the *RVG* provided important economic benefits to CSMS and NHCMA members.

The Connecticut respondents object to the law judge's finding that the benefits of AMA membership may be imputed to CSMS and NHCMA and that the benefits of CSMS membership may be imputed to NHCMA. This finding was based on the requirements that a physician must be a member of NHCMA in order to join CSMS and must be a member of both NHCMA and CSMS in order to join AMA. Clearly, little weight should be given to the fact that NHCMA was formed several years prior to CSMS or that both organizations predate the creation of the AMA. [10] AMA and CSMS provide valuable benefits to their members and membership in CSMS and/or NHCMA is the *sine qua non* of obtaining these benefits. The fact that approximately half of NHCMA's and CSMS' members chose to join the AMA provides some indication that these benefits were more than negligible. Consequently, we believe it proper to take into account the pecuniary advantages provided by the larger associations.

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[13] Respondents argue that the primary purpose of each of these functions is to advance societal welfare through better public health. We have already addressed the contention that to fall within the Commission's jurisdiction an association must exist primarily for the economic benefit of its members. Likewise, it is unnecessary for the Commission to find that the dominant purpose or effect of any particular activity is profit-making so long as the aggregate total of activities providing any pecuniary gain represents a substantial part of a respondent's overall operation.

In light of this evidence regarding the economic activities of all three respondents, the Commission finds it difficult to discern the "striking similarities" alleged to exist between the respondents in this docket and the Kansas City Area Hospital Association ("KCAHA"), a respondent in the *Community Blood Bank* case. By contrast to our findings here, KCAHA funds never "inured to the benefit of any of [its] members" and were utilized "exclusively" for educational and charitable purposes. *Community Blood Bank, supra,* 405 F.2d at 1020. Here, there is abundant record evidence that respondents have engaged in activities providing pecuniary benefits to their members. Respondents' membership serves to distinguish them from the hospital association involved in *Community Blood Bank,* providing further evidence that they exist in substantial part for the profit of their members. Of the 43 member hospitals of KCAHA, 21 were incorporated as not-for-profit charitable or religious associations, 12 were instrumentalities of federal, state, or local governments, and only 2 were organized as proprietary corporations. *Community Blood Bank, supra,* 70 F.T.C. at 767, 405 F.2d at 1020 n. 16.

The KCAHA also differs from respondents in that it is exempt from Federal income tax as a charitable organization pursuant to 26 U.S.C. 501(c)(3)(1976), whereas respondents qualify for an exemption under 26 U.S.C. 501(c)(6)(1976).[14] [11] The latter provision exempts "business leagues, chambers of commerce, real estate boards, boards of trade or professional football leagues. . . ."[15] By contrast, the KCAHA and the American Medical Association Education and

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[14] Affidavit of John F. Kelly at 2 (April 5, 1976), attached to Complaint Counsel's Memorandum in Opposition to Respondent's Motion for Summary Decision Dismissing the Complaint for Lack of Jurisdiction (April 8, 1976) ("Kelly Affidavit"); CX 1393.

[15] Section 1.501(c)(6)-1 of the Internal Revenue Regulations defines a "business league" as:

> . . . an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. It is an organization of the same general class as a chamber of commerce or board of trade. Thus, its activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. Treas. Reg. §1.501(c)(6)-1 (1968).

Research Foundation, an AMA subsidiary, come within Section 501(c)(3) of the Code, 26 U.S.C. 501(c)(3)(1976).[16] This provision exempts from Federal income tax:

> Corporations, and any community chest, fund, or foundations, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . ., or for the prevention of cruelty to children or animals . . . .

Respondents contend that it makes no difference under what provision an organization is tax-exempt, so long as it is not required to pay any tax. We recognize that a respondent's status as either a §501(c)(3) or (6) tax-exempt organization does not obviate the relevance of further inquiry into a respondent's operations and goals. Nevertheless, the tax-exempt status is certainly one factor to be considered. Rulings of the Internal Revenue Service are not binding upon the Commission, *Ohio Christian College,* 80 F.T.C. 815, 848 (1972), but a determination by another Federal agency that a respondent is or is not organized and operated exclusively for eleemosynary purposes should not be disregarded. Here, respondents' inability to qualify under §501(c)(3) simply means that the IRS does not consider them to be organized and operated "exclusively" for charitable goals, a fact that sets them apart from the KCAHA.[17] [12]

AMA and NHCMA also appeal from the ALJ's determination that their ethical restrictions on advertising, solicitation and contract practice provide a substantial economic benefit to their members. In AMA's view, the law judge's finding amounts to the circular contention that a corporation is subject to Commission jurisdiction whenever it engages in anticompetitive behavior.[18] This argument has potential merit only in a case in which the jurisdictional finding is premised solely upon respondent's illegal acts, and in which the illegal activity does not confer a substantial economic benefit upon the respondent's members.[19] We cannot adopt the view that challenged acts and practices which provide some pecuniary benefit to an organization's membership should not be judged against the substantiality criterion along with other activities simply because such acts and practices coincidentally violate Section 5.

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[16] *Kelly Affidavit* at 2.

[17] Of course, failure to qualify as tax exempt under §501(c)(3) does not by itself necessarily mean that a respondent is within the reach of Section 4 of the FTC Act, since, as we have discussed *supra,* the pecuniary benefit of its activities to its members must constitute a substantial part of its activities under Section 4.

[18] AMA also references its arguments, considered *infra,* that it has not imposed the alleged restrictions and that there is no evidence that these restrictions have affected its members' financial position. NHCMA simply states that the ALJ's finding is a conclusion on the merits and not a proper finding on the jurisdictional issue.

[19] A respondent could also come within Section 4 based on the alleged illegal activity alone if that activity conferred economic benefits upon its members and represented a substantial portion of its overall operations. Cf. *National Comm'n on Egg Nutrition, supra,* 517 F.2d at 488.

Finally, AMA charges that the law judge improperly rejected the budgetary analysis which it offered to quantify the proportion of its activities devoted to the economic benefit of members. At trial, AMA offered the testimony and report of its expert witness, Dr. Frederick Sturdivant, who classified respondents' activities as follows:

(1) Category A - education, scientific, and association activities;[20]
(2) Category B - indirect economic benefit;
(3) Category C - direct economic benefit;
(4) Category D - miscellaneous (RX 743, p. 5)

Dr. Sturdivant then analyzed each of AMA's 318 project request forms from 1977 and, after consulting with appropriate AMA officials where necessary, assigned each project to a specific category. (Tr. 6428, 6459) Dr. Sturdivant's [13] report indicates that AMA allocated 90.6% of its budget to Category A activities,[21] leading him to conclude that AMA "is a professional association engaged overwhelmingly in scientific and educational activities." (RX 743, p. 28) Dr. Sturdivant's analysis indicates that 5.8% of the budget had a direct or indirect economic benefit to members (Categories B and C), and 3.6% belonged in the miscellaneous group (Category D). *Id.*

Dr. Paul Feldstein, complaint counsel's expert witness, criticized the Sturdivant Report generally on grounds that a budgetary approach is unsuitable for examining the economic relationship of an association of health professionals to its members. (CX 2586-C, -D) Dr. Feldstein also found certain specific deficiencies with the Sturdivant Report. The correction of these deficiencies led him to the conclusion that between 35 and 43 percent of AMA's budget provides economic benefit to its members. (CX 2586-D)

The resource allocation decisions of an organization certainly provide one perspective on the purposes of that organization. However, there are analytical problems with such an approach, since a small budget allocation may have a disproportionate benefit to members. Additional difficulties arise when the focus is a professional association, inasmuch as the activities of such a group do not fit neatly into economic and non-economic pigeonholes. Certain legislative and lobbying activities, for example, may have economic as well as public health or welfare objectives.[22] Likewise, a professional association's legal counsel may be essential to achievement of that association's eleemosynary goals, yet spend a significant portion of time advising members on the commercial aspects of their profession. These observations are especially applicable to AMA. (CX 2586 O-Q, Tr. 8882, 8988, 9066-71, 9082-83, 9128) Indeed, disaggregation of AMA's budget into economic and non-economic components is especially problematic due to the fact that AMA has consolidated many of its programs in recent years, reducing the number of programs from 583 in 1975 to 318 in 1977 and presumably enlarging the number of distinct activities contained in individual programs. (Tr. 6428-29) [14]

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[20] Category A was further subdivided as follows:
1) lay public education;
2) journals and scientific publications;
3) scientific policy;
4) other scientific;
5) data on physicians and health care;
6) medical quality control and education;
7) government interface; and
8) organizational maintenance and operations. (RX 743, p.7)

[21] The percentages set forth in the text reflect our recalculation of Dr. Sturdivant's percentages to take account of the nine projects omitted from his original computations and noted at RX 743, p. 8. Seven of the nine projects not classified by Dr. Sturdivant have been allocated to Category D.

Apart from some general discomfort with application of the budgetary approach to this case, we entertain certain reservations as to the validity of Dr. Sturdivant's findings. At the outset, we note that Dr. Sturdivant had done no previous work with respect to the medical profession or, for that matter, any professional or not-for-profit association. (Tr. 6416-17) Because of his background and because proper classification of each of AMA's activities necessitated an understanding of those activities, Dr. Sturdivant was compelled to rely upon the program descriptions contained on the AMA request forms prepared after the complaint was filed[23] and on supplemental information provided by AMA officials. (Tr. 6431, 6459) In view of the clear opportunity for manipulation of the input to Dr. Sturdivant's study and the absence of any procedural safeguards to minimize the likelihood of manipulation, we are particularly reluctant to give his report any weight. *See Philadelphia Carpet Co.*, 64 F.T.C. 762, 776 (1964), *aff'd per curiam*, 342 F.2d 994 (3d Cir. 1965).

In addition to these problems, we find Dr. Sturdivant's report deficient in a number of other respects. First, we do not view it as appropriate to consider organization maintenance in the non-economic benefit category. Most of these activities are neutral in nature and should be excluded from the calculation. Others, such as the funds allocated to the Advisory Committee on Services to Young

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[22] The Commission considers Dr. Sturdivant's decision to include all legislative and lobbying efforts in Category A as particularly suspect. As we indicated *supra*, a number of these activities have a direct economic impact on AMA's members. Moreover, Dr. Sturdivant conceded that he had conducted only a summary review of AMA's legislative positions and was unaware, for example, of the AMA's activities with respect to the Keogh Act. (Tr. 6458-59)

[23] These forms were prepared in May or June 1976. Dr. Sturdivant testified that he did not know what instructions had been given to the individuals who prepared the project descriptions. (Tr. 6431)

Physicians might, upon examination of its recommendations, be included in Category B or C.[24] Second, Dr. Sturdivant failed to include expenditures by entities established by the AMA with Association funds, such as the American Medical Assurance Company,[25] which perform significant economic services for AMA's membership. (Tr. 6451) The Sturdivant Report is also vulnerable to charges that the classification criteria were not applied in a consistent fashion. (CX 2586-M) Lastly, the wide variations in expenditures for legislative and political activities by AMA from year to year may make it inappropriate to use any single year as a basis for a budgetary analysis of the AMA. (CX 2586-K, L) [15]

Accordingly, we affirm the ALJ's finding that respondents are "corporations" within the meaning of Section 4.

### B. Interstate Commerce Jurisdiction

Although the AMA admits that its challenged activities fall within the Commission's interstate commerce jurisdiction, (Tr. 2120, 2124) CSMS and NHCMA contend that they are local organizations with local concerns and that their acts and practices cannot be considered, as they were by the ALJ, to be in or to affect commerce. We find little merit in these arguments. CSMS and NHCMA were not charged with acting independently to restrict the practices of Connecticut physicians. The complaint alleges and the Commission finds, *supra* at 18, that all three respondents have conspired with others to restrict advertising, solicitation, and certain contract practices of their members throughout the United States. The participation of respondents along with other AMA constituent and component societies in this nationwide conspiracy, taken together with AMA's stipulation that its acts and practices are in and affect interstate commerce, thus leave little room for doubt that the alleged activities of CSMS and NHCMA also fall within interstate commerce. As the Supreme Court has stated:

> The Commission would be rendered helpless to stop unfair methods of competition in the form of interstate combinations and conspiracies if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of a single state. (*FTC* v. *Cement Institute*, 333 U.S. 683, 696 (1948).)

Even apart from the involvement of the Connecticut respondents in this national conspiracy, there is ample proof of an interstate commerce nexus in the aggregation of factors cited by the law judge. (ID 252) Foremost among these is the impact the restrictions have upon out-of-state public and private funds providing payment for medical services rendered in Connecticut. Respondents' ethical restrictions affect the volume and destination of these payments, which total several million dollars per annum. (ID 10, 252) Although CSMS and NHCMA concede the substantiality of these payments, they argue that they relate to the practice of medicine by their members, not to their own challenged acts, and that the record merely demonstrates that individual activities of their members may affect interstate commerce. In our view, respondents' argument reflects a misunderstanding of the applicable law and unduly cabins the jurisdiction of the Commission, contrary to the recently expressed intent of Congress. [16]

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[24] Dr. Sturdivant included this in Category A because he saw it as an aspect of attracting and retaining young physicians in the AMA. (Tr. 6571) Under this approach, almost any project providing economic benefit to AMA's members could be considered part of the organization's maintenance activities.

[25] This company provides reinsurance for medical liability insurance companies owned by state medical societies. (ID 54)

The legislative history of the Magnuson-Moss Act[26] reveals that Congress broadened the Commission's jurisdiction so that it would encompass "acts or practices which, although local in character, affect interstate commerce." H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. at 45 (1974).[27] Since Section 1 of the Sherman Act has been held to apply to contracts, combinations, or conspiracies which, however local their immediate objectives, substantially and adversely affect interstate commerce, *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948), acts or practices within Sherman Act jurisdiction must a fortiori be subject to FTC jurisdiction. Accordingly, it is instructive to look to cases construing the Sherman Act for initial guidance as to the reach of Section 5.[28]

Such cases provide substantial precedent for the ALJ's conclusion. In *Hospital Bldg. Co.* v. *Rex Hospital Trustees*, 425 U.S. 738 (1976), for example, the Court reversed a summary dismissal on jurisdictional grounds since the complaint alleged that petitioner's purchases of out-of-state medicines and supplies and its revenues from out-of-state insurance companies would be less than they otherwise would be if respondents and their co-conspirators succeeded in blocking petitioner's planned hospital expansion. Assuming in this case that each of respondents' members does not have an equal desire to advertise or solicit customers (TROA 32), the revenues of some physicians subject to the alleged restrictions unquestionably will be affected by those restrictions.

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[26] Pub. Law No. 93-637, 88 Stat. 2183 (1974).

[27] One of the reasons for the amendment was to obviate the inordinate expenditure of time and effort required to marshal evidence needed to satisfy purely jurisdictional technicalities.

[28] Of course, practices that affect commerce in a less than substantial way may nonetheless be within the Commission's jurisdiction.

A year earlier in *Goldfarb, supra,* 421 U.S. at 783, the Court determined that a minimum fee schedule for title examinations imposed by the county bar association had a sufficient nexus with interstate commerce because a substantial portion of mortgage funds used to purchase homes in the county came from outside the state. The Court further noted that substantial loan money was guaranteed by the United States Veterans Administration and the Department of Housing and Urban Development, both of which were headquartered out-of-state. Because lenders require title examinations as a condition of making loans, the Court held that the legal services at issue were an integral part of an interstate transaction and that a restraint on those services substantially affected commerce under the Sherman Act. *Id.* at 784–85. [17] Just as the minimum fee schedule deprived consumers of free competition in the title search market, respondents' ethical restrictions have a significant impact upon the volume, price, and distribution of medical services in the State of Connecticut. And, whereas the financing of property in *Goldfarb* was affected only indirectly by the restraint through the title examination requirement, the restraint here affects the very services being financed by out-of-state funds. Rather than a restriction going to an integral but collateral service, as was involved in *Goldfarb,* the restraint before us is more analogous to a restriction intended to prohibit the sale of property that would otherwise be financed with out-of-state funds.[29]

The Sherman Act real estate cases cited by respondent are distinguishable because they do not involve the broader jurisdictional standard of Section 5. In addition, these cases are factually different from the case at bar. Unlike physicians, whose services are the principal cause of interstate health insurance payments, real estate brokers have been found to be neither necessary nor integral participants in the interstate aspects of realty financing and insurance. *McLain* v. *Real Estate Bd. of New Orleans,* 583 F.2d 1315 (5th Cir. 1978), *cert. granted,* 99 S. Ct. 2159 (1979). In *Bryan* v. *Stillwater Bd. of Realtors,* 578 F.2d 1319 (10th Cir. 1977), plaintiff's contention that he had been unlawfully expelled by the defendant was found to have no logical nexus with allegations that the defendant's conduct occured in interstate commerce. In *Income Realty & Mortgage, Inc.* v. *Denver Bd. of Realtors,* 578 F.2d 1326 (10th

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[29] In *State of Arizona* v. *Maricopa Medical Soc'y,* 1979-1 Trade Cas. (CCH) ¶62,694 (D. Ariz. 1979), a medical society was found to be affecting commerce through alleged price fixing. The court there found that while the sales by physicians of their services were not interstate transactions, ¶62,694 at 77,894, the alleged price-fixing affected the sale of services by physicians and the sale of services by physicians directly affected the health insurance premiums and claim payments that cross state lines. *Id.* at 77,894–95. The restraints involved in this case have much the same effect upon health care payments. *See also United States* v. *American Soc'y of Anesthesiologists, Inc.,* 1979-2 Trade Cas. (CCH) ¶62,739 (S.D.N.Y. 1979).

Cir. 1978), plaintiff's allegation was limited to the conclusory statement that the parties were engaged in the interstate brokerage of real estate.

We therefore concur in the ALJ's finding that the challenged practices of the Connecticut respondents are in and affect interstate commerce. [18]

## II LIABILITY

The focus of this case is the legality under Section 5 of respondents' restrictions upon the advertising, solicitation, and contractual practices of their members. The nature, scope, and impact of these restrictions are specifically at issue. All respondents challenge the adequacy of the evidence to sustain a finding that they have unreasonably and unfairly restricted physicians' advertising, solicitation, and contractual arrangements. While AMA does not directly defend its 1971 guidelines, which were in effect at the time this proceeding was commenced, it argues that our focus should be upon ethical guidelines adopted *pendente lite* and that, in any event, it is not responsible for enforcement actions taken by state and local medical societies. CSMS and NHCMA both emphasize their individual autonomy and assert that the evidence is insufficient to connect them in a conspiracy with AMA. They further allege that they were given insufficient notice of the allegation of conspiracy involving their members. We address each of these issues below, beginning with the conspiracy allegations.

### A. Conspiracy

Evidence adduced at trial provides substantial proof of a conspiracy to impose the challenged ethical restrictions: first, between and among respondents and other constituent associations and component societies, and second, between respondents and their members. We note at the outset that the structure of respondent's organization—a single national organization, state or constituent associations, and local or component societies—is conducive to development of system-wide consensus on ethical matters to which all members must adhere. The governing structure of the AMA reflects this hierarchical system in that members of the AMA House of Delegates are selected by constituent associations and members of the constituent societies' ruling bodies are selected by their respective component societies. (ID 7)

The record also describes the various steps taken by respondents to insure that all of their members follow the same or substantially similar ethical guidelines. The constitutions and bylaws of AMA, CSMS, and NHCMA, as well as most of AMA's other constituent and component medical societies make compliance with AMA's *Principles of Medical Ethics* a requirement of continued membership. (CX 990I, 991D, 1404I, ID 306-09) Although state associations may apply their own principles of professional conduct to their members, those principles may not be inconsistent with the *Constitution and By-Laws* of the AMA. (CX 1435Z-20)[30] Moreover, AMA has said that a physician acts "unethically" when he or she disregards "local custom," and has urged its [19] component societies to "exercise great caution to insure full compliance with the spirit and intent of the *Principles*. (CX 210, 462Z-9) Although the Connecticut respondents argue to the contrary, AMA has stated that county societies are required to apply all of the interpretations contained in the *Opinions and Reports* (CX 489). It is evident, therefore, that the *Principles* and the *Opinions and Reports* play a central role in delineating the ethical standards for physicians in this country.

In addition to promulgation and distribution of broad ethical pronouncements to constituent and component societies, AMA has provided ethical advice to local societies in specific situations. (CX 54, 168, 768B, 1287)[31] AMA refers complaints and inquiries on ethical matters to the appropriate state or local societies and constituent associations refer complaints and provide guidance to component societies. (ID 105) In short, the record of this proceeding substantiates the involvement of respondents, as well as affiliated medical societies, in the enforcement of the challenged ethical restrictions. (See ID 118-24, 133-44, 146-48, 152-60, 172-76, 187-94, 198-99, 212-21, 223-26) These enforcement activities were fully consistent with the *Principles* and interpretations of the *Principles* found in AMA's *Opinions and Reports*. Indeed, there is no evidence before us that state or local medical societies have ever strayed far from the ethical norms established by AMA.

Measured against recent decisions involving conspiracy allegations in a professional association context, there can be little dispute over the law judge's findings on the conspiracy issue.[32] In *Goldfarb*,

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[30] A member of the AMA must comply with the *Principles* in order to retain his or her membership. (CX 990I)

[31] On occasion, AMA's advice has ventured beyond ethical interpretations to guidance regarding enforcement action. For example, Mr. Edwin J. Holman, then secretary to AMA's Judicial Council, suggested that the Saginaw County Medical Society advise a physician that a sign posted on his lawn advertising medical treatments should be removed. (CX 91A) Alternatively, Mr. Holman suggested that the local society promulgate guidelines and, if the offending physician did not remove the sign after an appropriate period of time, bring charges of unethical conduct against the physician. (CX 91A, B)

[32] Respondents' reliance upon *UMW* v. *Coronado Coal Co.*, 259 U.S. 344 (1921) and *Coronado Coal Co.* v. *UMW*, 268 U.S. 295 (1924), is misplaced. The Court there rejected claims of a conspiracy between the International and its local unions in connection with damage caused to the Coronado Coal Company's Prairie Creek mine, finding that the interference with the coal company was neither initiated, participated in, or ratified by the International. *Id.*,

(Continued)

*supra*, 355 F. Supp. 491, [20] 494–96 (E.D. Va. 1973), the district court found that the Virginia State Bar and the Fairfax County Bar Association had agreed to fix prices. The district court noted that the Virginia State Bar had played only a minor role in the matter. However, holding that defendants were engaged in a "classic illustration of price fixing," 421 U.S. at 783, the Supreme Court dispelled any doubt as to the culpability of the state defendant:

> Of course, an alleged participant in a restraint of trade may have so insubstantial a connection with the restraint that liability under the Sherman Act would not be found, see *United States* v. *National Assn. of Real Estate Boards*, 339 U.S., at 496; however, that is not the case here. The State Bar's fee schedule reports provided the impetus for the County Bar, on two occasions, to adopt minimum-fee schedules. More important, the State Bar's ethical opinions provided substantial reason for lawyers to comply with the minimum-fee schedules. Those opinions threatened professional discipline for habitual disregard of fee schedules, and thus attorneys knew their livelihood was in jeopardy if they did so. Even without that threat the opinions would have constituted substantial reason to adhere to the schedules because attorneys could be expected to comply in order to assure that they did not discredit themselves by departing from professional norms, and perhaps betraying their professional oaths. (421 U.S. at 791 n. 21).

It is noteworthy that the record in *Goldfarb* was devoid of proof that the state association had sent letters or referred complaints to the county bar associations. Nor was there any evidence that the state bar had coordinated the activities of its constituent societies with respect to specific fact situations. In fact, the uncontradicted evidence showed, as it does here with respect to AMA, that the Virginia State Bar had never taken any disciplinary action against an attorney for failing to adhere to the fee guidelines. *Goldfarb*, *supra*, 355 F. Supp. at 496. The case thus stands for the proposition that a professional association may take part in a conspiracy in restraint of trade even though its participation is limited to promulgating ethical guidelines with the intent that affiliated societies will enforce those guidelines and that members will follow them.[33] [21]

A conspiracy involving a professional society, affiliated national

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259 U.S. at 393. Indeed, the union's constitution provided that no district was permitted to engage in strikes involving all or a major portion of its members without sanction of the International, and that a district could order local strikes only on their own responsibility. *Id.*, 259 U.S. at 384–85. AMA's role in the promulgation and enforcement of the ethical restrictions at issue in this proceeding is considerably more extensive than the role of the International in the Prairie Creek incident.

[33] As such, the conspiracy here is different in character from that considered in *Interstate Circuit* v. *United States*, 306 U.S. 208 (1939), where a conspiracy was inferred, in large measure, from the fact that without "substantially unanimous" action on the part of all distributors there was a risk of a substantial loss of business and goodwill. *Id.* at 222. By contrast, promulgation of a code of ethics implies agreement among the members of an organization to adhere to the norms of conduct set forth in the code. The extent to which members abide by the ethical standards does not bear upon the existence of a conspiracy, rather it indicates how effective the conspiracy has been in carrying out its objectives.

and state societies, and its members, was established in the *Professional Engineers* case, a case remarkably similar to the facts in this docket. *United States* v. *National Society of Professional* Engineers, 389 F. Supp. 1193, 1201 (D.C.C. 1974), *vacated*, 422 U.S. 1081 (1975) *aff'd on rehearing*, 404 F. Supp. 457 (D.D.C. 1975), *aff'd and modified*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd* 435 U.S. 679 (1978).[34] The National Society of Professional Engineers (NSPE), which counted as members 17 percent of the registered engineers in the United States, was affiliated with professional engineering societies in each state. *Id.* at 1195. Enforcement of the NSPE Code of Ethics was principally left to these state societies, although NSPE developed disciplinary procedures for the state societies to follow and played a significant role in coordinating and encouraging state society enforcement efforts. *Id.* at 1196.[35] State societies were autonomous in the sense that NSPE had no authority to compel an affiliated society to take any action or to refrain from taking any action; NSPE's only power over affiliated societies was the power to withdraw their charters of affiliation. *Id.* at 1213. NSPE's actions were characterized as successful by the district court, inasmuch as there were few significant defections by NSPE members from the ethical restriction upon bidding practices. *Id.* at 1196.

AMA attempts to distinguish the *Professional Engineers* case by suggesting that NSPE was found to have violated the antitrust laws on the basis of its own code of ethics, not on the basis of actions by state or local affiliates. AMA Reply Brief at 14. Such an argument, however, misperceives the thrust of that case, since, as in the instant matter, the conspiracy determination in *Professional Engineers* was supported by evidence that the NSPE promulgated the anticompetitive ethical guidelines and assisted state officials in enforcing those guidelines.[36] [22]

We further reject the notion proffered by AMA that the autonomy f its constituent and component societies and their voluntary doption of an ethical code precludes a finding of conspiracy. The law s clear that a conspiracy may be found whether or not one conspirator exercises control over the actions of its co-conspirators. FTC v. *Cement Institute*, 333 U.S. 683 (1948); *cf. United States* v.

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[34] *See also United States* v. *Texas State Bd. of Public Accountancy*, 464 F. Supp. 400 (D.Tex. 1978), *aff'd and odified*, 592 F.2d 919 (5th Cir. 1979) (conspiracy found between the state board and accountants holding permits practice in Texas on basis of acquiescence of permit holders in ban on competitive bidding under threat of sciplinary action by state board).

[35] Authoritative interpretations of NSPE's Code of Ethics are contained in the opinions of NSPEC's Board of thical Review. *Professional Engineers*, *supra*, 389 F. Supp. at 1214.

[36] The district court noted that NSPE officials had promoted and coordinated enforcement with officials from filiated societies in the District of Columbia, Pennsylvania, North Carolina, West Virginia and Kentucky in nnection with a West Virginia airport project. *Id.* at 1210–12.

*Texas State Bd. of Public Accountancy, supra,* 464 F. Supp. at 403. Certainly, the autonomous status of the affiliated societies in the *Professional Engineers* case did not absolve the NSPE of liability in the face of evidence showing that the NSPE encouraged and coordinated state and local enforcement activity. *Professional Engineers, supra,* 389 F. Supp. at 1196, 1201, 1213.[37]

The Connecticut respondents argue that the trial record does not even contain "slight evidence"[38] connecting CSMS and NHCMA to the alleged conspiracy of AMA and other medical societies. Both respondents further maintain that they were afforded insufficient notice of the second prong of complaint counsel's conspiracy theory charging a conspiracy between respondents and their members.[39]

In our view, the evidence is more than sufficient to connect the Connecticut respondents to the conspiracy involving AMA and other medical societies restricting the advertising, solicitation, and contract practices of their members. As the ALJ noted (ID 283-87), there is not only evidence generally of the ties between AMA and its member societies on ethical matters, from which an inference can be drawn as to the Connecticut respondents' involvement in the conspiracy, but there is also independent evidence of specific actions by these respondents directly linking them to the conspiracy. Moreover, the evidence of affirmative acts by the Connecticut respondents is bolstered by the absence of any proof whatsoever demonstrating that CSMS and NHCMA ever took any position in conflict with AMA's challenged restraints. [23]

The CSMS has adopted the *Principles* (CX 991D). While it has not formally adopted the *Opinions and Reports,* it has indicated that the "policies of the AMA are guides to our action" (Tr. 8282) and has cited the recommendations of the Judicial Council in discouraging a senior citizen discount program for medical services. (CX 30) Moreover, CSMS has stated that "advertising is prohibited by medical ethics." (CX 30) Consistent with this position, the vice president of CSMS filed a complaint in his official capacity with NHCMA, charging Dr. Leon Zucker with unethical publicity in connection with a newspaper article reporting surgery performed by Dr. Zucker. (CX 2006A, *see also* ID 167-68.) In another incident, a member of the CSMS Council, the executive body of CSMS, filed a complaint with the NHCMA against Dr. Sugn Liao, regarding newspaper and TV advertising for an acupuncture clinic opened by Dr. Liao. (CX 701A; *see also* ID 160.) With respect to the contract practice allegations, the record shows that the CSMS House of Delegates approved resolutions disparaging the corporate practice of medicine and supporting the traditional fee-for-service method of compensation. (CX 1344Z–9, –10, –11)

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[37] We note that local societies are not so autonomous that they are permitted to have less stringent restrictions upon advertising or solicitation than those found in the 1977 edition of *Opinions and Reports.* (App. A, p. 1)

[38] Once a conspiracy is established, only "slight evidence" is needed to connect a particular participant with that conspiracy. *United States* v. *Cadillac Overall Supply Co.*, 568 F.2d 1078, 1087 (5th Cir. 1978), *cert. denied* 437 U.S. 903 (1978); *United States* v. *Consolidated Packaging Corp.*, 575 F.2d 117, 126 (7th Cir. 1978).

[39] AMA apparently does not contest the finding of a conspiracy between it and its members. (RAB 33-47; but *see* TROA 17)

The evidence concerning respondent NHCMA is equally incriminating. NHCMA bylaws provide that "[t]he principles of medical ethics of the AMA as reflected in the Judicial Council shall govern the conduct of members," (CX 1404I) creating a strong inference that members of NHCMA are bound by the *Opinions and Reports* as well as the *Principles*. While this evidence alone is sufficient to sustain a finding of liability against NHCMA, the record also documents the actions taken by NHCMA against Drs. Zucker and Liao, (ID 160, 167-68)[40], and investigation by NHCMA of a radiology clinic to determine if it was soliciting patients (CX 782–86), action against Dr. Zucker on another occasion for telephone directory listings outside the area in which Dr. Zucker's office was located, (CX 136A, B) and efforts by NHCMA to limit announcements of office openings and relocations to one newspaper insertion. (CX 81)[41] [24]

With respect to the Connecticut respondents' position regarding inadequate notice of a conspiracy between them and their members, we note that the complaint alleged a conspiracy between "respondents and others." (Complaint ¶¶6–7) Complaint counsel's trial brief explained, however, that the case-in-chief would only challege "an agreement among respondents and their affiliated medical societies to hinder competition among medical doctors." Trial Brief of Counsel Supporting the Complaint at 1 (April 18, 1977). Although complaint counsel described AMA as "a collective body of individual entrepreneurs" during the case-in-chief, (Tr. 503–04) this brief reference was clearly inadequate to correct the impression previously conveyed in the trial brief. An articulation of the alternative theory, i.e., a conspiracy between respondents and their members, is found in complaint counsel's conspiracy memorandum filed prior to defense hearings, but even this statement conflicts with other sections of the memorandum. Memorandum on Conspiracy Law and Related Evidence Questions at 2, 19 n., 26 (November 7, 1977).

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[40] The testimony of Dr. Tierney, who received the complaints against Dr. Zucker as president of NHCMA, reflects some concern regarding the accuracy of the headline of the article which formed the basis for the complaint. (Tr. 8483) This headline characterized the operation performed by Dr. Zucker as "rare," whereas Dr. Tierney felt the term "uncommon" to be a more appropriate description of its frequency of occurrence. *Id.* The minutes of the NHCMA Board of Censors meeting with Dr. Zucker, however, reflect a concern with "personal aggrandizement," and do not allude in any respect to a deception problem. (CX 695C,D)

[41] NHCMA's reliance upon the advice of AMA and AMA's dependence upon NHCMA for enforcement action is also well-documented. (CX 672–73A, 783, 784A, 785)

Complaint counsel's proposed findings submitted to the ALJ after trial contain the first clear statement of the alternative conspiracy theory. Proposed Findings of Fact and Conclusions of Counsel Supporting the Complaint at 260 (July 27, 1978). Respondents had an opportunity to address this theory before the law judge and before the Commission on appeal from the initial decision and in fact addressed the evidence in support of this theory in their appeal briefs. (RCAB at 48; RNAB at 38) Moreover, respondents do not allege and we do not understand how the allegation of a conspiracy between them and their members would necessitate the introduction of evidence additional to that already offered to rebut the alleged conspiracy between respondents and other constituent and component societies. We conclude, therefore, that any incertitude which may have existed with respect to complaint counsel's conspiracy allegations during trial did not prejudice CSMS and NHCMA since all facts relevant to the alleged unlawful acts were fully litigated. *See Golden Grain Macaroni* v. *FTC*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973); *Armand Co., Inc.* v. *FTC*, 84 F.2d 973 (2d Cir. 1936), *cert. denied*, 299 U.S. 597 (1936). [25]

### B. Restrictions on Advertising and Solicitation

As its principal defense to the charge of unlawfully restricting the advertising and solicitation of its members, AMA asserts that it should not be judged on the basis of what it characterizes as "obsolete" positions contained in the 1971 *Opinions and Reports*, but rather that the Commission should consider instead the statements contained in the 1977 *Opinions and Reports*. Respondent contends that the appropriate standard for judging this ethical code is the rule of reason. Analyzed according to this standard, AMA suggests that the record is devoid of proof establishing that it has unlawfully suppressed competition. With respect to its prior ethical position, as articulated in the 1971 *Opinions and Reports*, AMA argues that it neither enforced this position nor engaged in a conspiracy with constituent and component societies (TROA 29, 34). It concedes, however, that some statements contained in the 1971 *Opinions and Reports* could be construed as prohibiting price advertising and that state and local societies might have violated the law. (TROA 30-31, 33).

Before examining the facts of record, it is necessary to determine whether respondent's restrictions should be tested under a *per se* standard or according to the rule of reason. The ALJ found it unnecessary to consider whether AMA's restrictions constituted a *per se* violation of Section 5 since he concluded that the rule of reason was clearly violated. Complaint counsel agree with this assessment but nonetheless urge that the restrictions on advertising and solicitation imposed by respondents should be considered illegal on their face. (TROA 91-92)

These restrictions do represent a restraint upon price advertising (ID 118-22, 132, 154, 193), and it is true that restraints on the advertising of prices have previously been considered *per se* illegal by some courts. *United States* v. *Gasoline Retailers Association, Inc.*, 285 F.2d 688 (7th Cir. 1961); *United States* v. *The House of Seagram, Inc.*, 1965 Trade Cas. (CCH) ¶71,517 (S.D. Fla. 1965). Moreover enforcement of these restrictions by disciplinary action that threatens or results in the loss of valuable privileges associated with membership has earmarks of a group boycott, long considered a violation of the antitrust laws without regard to business justifications. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457 (1941).[42] [26]

But while *per se* rules are considered a valid and valuable tool of antitrust enforcement, *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 99 S. Ct. 1551, 1556 (1979), we are not prepared to classify the challenged restraints as *per se* illegal in this instance and thereby preclude analysis of procompetitive justifications offered on their behalf. Professional restraints on advertising and solicitation have not previously been subject to extensive scrutiny under the antitrust laws, and the courts have been reluctant to classify practices as *per se* violations before acquiring sufficient experience with them. *Broadcast Music, supra*, 99 S. Ct. at 1556-7. In addition, we recognize that professional services may differ in some respects from other businesses. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 696 (1978); *Goldfarb, supra*, 421 U.S. at 788-89 n.17. Arguments suggesting that competition is contary to the public interest are not cognizable under the rule of reason, but other justifications for ethical norms, such as the facilitation of nondeceptive advertising, may be procompetitive and must be taken into account. *Professional Engineers, supra*, 435 U.S. at 692, 696.

We turn then to consideration of the reasonableness of respondents' advertising and solicitation guidelines.[43] The test of legality is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918); *Professional Engineers*, *supra*, 435 U.S. at 691. To assess the legality of the restrictions under a rule of reason analysis, we must examine their nature, purpose and effect on competition, including in the calculus any possible procompetitive impact. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). As the Court observed in *Professional Engineers*, *supra*, the unreasonableness of trade restrictions can be based either

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[42] These restrictions further evince in certain respects the characteristics of a horizontal allocation of customers, (ID 171-73) also considered to be *per se* illegal under the antitrust laws. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211 (1899).

[43] While it is unnecessary in this case for us to distinguish between the analysis required under Section 1 of the Sherman Act and Section 5, it is important to note that acts or practices that fall short of violating the Sherman Act may nonetheless traverse the more encompassing standard of illegality defined by Section 5.

> (1) on the nature or character of the contracts, or
> (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. (435 U.S. at 690)

Thus, the contours of the analysis required under the rule of reason will vary somewhat depending upon the nature of the restraint. [27]

Evaluation of AMA's *Principles of Medical Ethics*, the 1971 *Opinions and Reports*, and assertions of AMA, state and local medical society officials, allows little latitude for dispute over the nature and scope of respondents' restrictions at the time the complaint was issued.[44] The *Principles* make clear that physicians should "uphold the dignity and honor of the profession" and "should not solicit patients."[45] All solicitation, whether direct or indirect, is forbidden, and "solicitation" is defined in the 1971 *Opinions and Reports* as any "attempt to obtain patients or patronage by persuasion or influence." (CX 462Z-6)[46] Hence, it is fair to say that almost all advertising and promotional activity is proscribed, with a few narrowly circumscribed exceptions. *See, generally* ID 115-118. A doctor may only furnish the public with information regarding his or her name, type of practice, location of office and office hours, and this information must be communicated through the "accepted local media," which includes "telephone listings, office signs, professional cards, and dignified announcements." (CX 462Z-6) Although the guidelines in theory permit listing in a physician or telephone directory, or the sending of announcements regarding follow-up treatments or the opening or removal of an office (CX 462Z-6, -7, -8), the AMA has strictly limited the manner in which its members may utilize these media for solicitation of new patients. [28]

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[44] We reject respondents' suggestion that the focus for determining liability should be ethical positions or statements disseminated after issuance of the complaint. AMA does not contend that this case is moot. Consequently, its 1977 edition of *Opinions and Reports* is properly assessed in the context of relief rather than of liability. *See infra* at 45-57.

[45] AMA's first *Code of Ethics*, adopted in 1847, contained the following section:

> It is derogatory to the dignity of the profession to resort to public advertisements or private cards or handbills, inviting the attention of individuals affected with particular diseases—publicly offering advice and medicine to the poor gratis, or promising radical cures; or to publish cases and operations in the daily prints, or suffer such publications to be made;—to invite laymen to be present at operations,—to boast of cures and remedies,—to adduce certificates of skill and success, or to perform any other similar acts. These are highly reprehensible in a regular physician. (*Percival's Medical Ethics*, App. III at 226 (C. Leake ed. 1927).)

[46] Our discussion here also encompasses solicitation restraints applicable to medical organizations through contract practice restrictions imposed upon physicians. (CX 462Z-13)

Analysis of the effect of these far-reaching restraints upon the health care market necessitates an awareness of the role advertising and solicitation play in the efficient operation of a competitive economy. Advertising serves to disseminate "information as to who is producing and selling what product, for what reason, and at what price." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976). Advertising thus performs an indispensable function in the allocation of resources in a free enterprise system. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 364 (1977).[47] Bans on advertising increase the difficulty of finding the lowest cost seller of acceptable ability or quality, isolating sellers from competition and reducing the incentive to price competitively. *Id.* at 377. Entry barriers are often lower with advertising than they would be in its absence, allowing new competitors to penetrate the market. *Id.* at 378. As a result of easier entry and lower search costs, prices are often lower when advertising is unrestrained. *Id.* at 377.

Given the integral function of advertising and other forms of solicitation to the workings of competition in our society, we begin with the recognition that AMA's broad proscription of advertising and solicitation has, by its very essence, significant adverse effects on competition among AMA's members. *See Professional Engineers, supra* 435 U.S. at 692-93; *Smith* v. *Pro Football, Inc., supra*, 593 F.2d at 1183; *Mardirosian* v. *American Institute of Architects*, 1979-2 Trade Cas. (CCH) ¶62,745 (D.D.C. 1979). While the nature or character of these restrictions is sufficient alone to establish their anticompetitive quality, the record contains additional corroborative evidence of significant anticompetitive effects. [29]

The ALJ's initial decision documents at great length the impact that respondents' restraints have had in several specific situations and we need not reiterate the details of each incident. (ID 118-52, 154-56, 160-68, 171-97, 258-63) This evidence is susceptible to no interpretation other than that ethical principles of the medical profession have prevented doctors and medical organizations from disseminating information on the prices and services they offer, severely inhibiting competition among health care providers. Because prepaid health care plans and other alternative providers depend heavily on advertising to announce their existence and explain their programs (Tr. 478, 482-84, 1556), the advertising restrictions have had an even harsher impact on such organizations.

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[47] The Court has also stated:

> The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. (*Professional Engineers, supra*, 435 U.S. at 695.)

Clearly, a patient does not have the opportunity to select among alternative offers if, because of ethical bans, he or she is ignorant of the choices available.

AMA's principal argument on the issue of anticompetitive effects is that the record contains no evidence that its restrictions have raised prices. In particular, respondent claims the record contains no systematic study of prices. Moreover, AMA suggests a number of factors which militate against a price impact, including the ready availability of fee information by word-of-mouth, the significance of professional reputation, accessibility, and patient satisfaction, the impact of public and private health insurance, and the unresponsiveness to price advertising of demand for emergency and specialty care. (RAB 53-54)

We do not agree with AMA that an impact upon physician fees must be demonstrated in order to characterize respondent's ethical restraints as unreasonably anticompetitive. Nor do we accept the contention that proof of an effect upon fees can only be shown by means of a full-blown econometric study. The task of identifying the precise impact of the restrictions and segregating fully effects owing to other forces in the marketplace may render such a study infeasible.

Nevertheless, the record evidence is sufficient, in our view, to establish an adverse effect upon fees. First, there is proof that advertising of low cost services has been suppressed. (ID 118-22, 124-43) Moreover, physician directories entered into evidence by respondents demonstrate that prices vary widely for such basic services as initial office visits, return office visits, and house calls, even among physicians in the same specialty. (RX 267 at 8, 407, 666 at App. C, RNHX 149) There are also substantial variations for off-hour physician's services and diagnostic and operative procedures. (Tr. 633-36, 1357-58, 1815) Price variations among family and general practitioners sometimes exceed 500 percent for such basic services as immunizations, pap smears, pelvic examinations, and urinalysis. (RX 666, App. C) [30]

The evidence indicates, moreover, that specific fee information is important to consumers, that consumers lack access to fee and other information necessary to make an informed choice of a physician, and that information obtained by word-of-mouth does not fill this need. (ID 110, 112-14) Given these circumstances, economic theory suggests that price differences for equivalent services would diminish with price advertising and the concomitant reduction in search costs.[48]

AMA's attempt to discount the impact of its effective ban on price advertising is not wholly without merit. To be sure, other factors, such as reputation for quality service and referrals, accessibility, need for emergency care, and even bedside manner, are likely to weigh heavily in the choice of a physician and effect some disparity in prices.[49] Furthermore, the extent to which medical services are covered by Medicare, Medicaid, or private health insurance will reduce *pro tanto* the patient's interest in fee information. A patient requiring immediate attention is not apt to seek out the lowest-priced emergency room. But these considerations do not fully explain the vast price disparity evidenced in the record, nor do they contradict the record evidence demonstrating the value of fee information to most consumers. At most, they imply that consumer sensitivity to price is a function of their out-of-pocket expenses[50] and that other factors may be paramount over price considerations in specific situations.[51] [31]

Inquiry into the purpose of the challenged ethical restrictions lends additional support to our finding of substantial anticompetitive effects. We recognize respondents' concern about false and deceptive advertising, but their objectives go far beyond this concern. Indeed, the record describes several instances in which a disdain for competition, not false or deceptive advertising, appears to be the sole motivation for suppressing promotional activities. AMA and local medical society officials have repeatedly spoken out against physicians "competing against each other for selfish, personal reasons" (CX 272B) and against "overly aggressive competition." (CX 10B) For example, Dr. Stephen C. Biering, Chairman of AMA's section on medical schools, testified that it would be inappropriate for physicians to compete with other physicians on the basis of price, quality, and service and that doctors should not compete in the commercial sense under any circumstances. (Tr. 9544-45, 47-48; *see also* ID 174, 193, 212-13, 256-57)[52]

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[48] G. Stigler, "The Economics of Information," *The Organization of Industry*, 186-87 (1968). This is not the first time that evidence of price disparity has been attributed to advertising restraints. *See Bates, supra*, 433 U.S. at 377; *Virginia Pharmacy, supra*, 425 U.S. at 754 n.11, 763-64.

[49] Advertising may affect the importance of these factors to a patient. For example, without advertising, reputation information may be difficult or costly to obtain, as may information about the availability of new services.

[50] Third party payments accounted for 69.7% of personal health care expenditures in 1977. U.S. Dep't of Health, Education, and Welfare, *Health, United States, 1978*, at Table 153 (1978). However, it is not known what percentage of the population has full or nearly full coverage for medical expenses.

[51] Between 10 and 25% of all physician contacts occur on an emergency basis. (Tr. 6116-17)

[52] When asked by AMA's counsel what he meant in saying that physicians should not compete in the commercial sense, Dr. Biering replied:

> I mean by that that a physician would say, come to my office. You can get better, quicker and at less

*(Continued)*

Our finding of substantial adverse effects on competition is supported, therefore, by the underlying nature of the restrictions, extensive evidence of direct competitive injury cited by the ALJ, proof of price disparity for physician services, and evidence concerning the purpose of the restraints. In order to determine whether the restraints are unreasonably anticompetitive, however, it is necessary to balance the alleged procompetitive virtues of the challenged restraints against these anticompetitive evils. We are hampered somewhat in this task since AMA does not really defend the statements contained in the 1971 edition. Instead, it essentially limits its defense to justification of the 1977 *Opinions and Reports,* maintaining that this later position regulates and thereby promotes competition among physicians. Respondent contends that competition flourishes when consumers receive truthful information, but that dissemination of false or deceptive information is ultimately anticompetitive. (RAB 57-58) Because there are many similarities between the 1971 and 1977 *Opinions and Reports,* it is fair to take into [32] consideration in adjudicating the legality of AMA's ethical restrictions those arguments offered in connection with post-complaint modifications of these restrictions.

In *Professional Engineers, supra,* the Court considered the Society's claim that competitive pressure to offer low-price engineering services would encourage deceptive bidding and adversely affect the quality of the work, thereby impairing public health and safety. In responding to these contentions, the Court emphasized the competitive focus of a Rule of Reason analysis:

> Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions. (435 U.S. at 688.)

In rejecting the Society's defense, the Court further explained:

> Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society's argument in this case is a far cry from such a position. We are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. Certainly, the problem of professional deception is a proper subject of an ethical canon. But, once again, the equation of competition with deception, like the similar equation with safety hazards, is simply too broad; we may assume that

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> expense. I use a less expensive hospital and so on than my colleague across the street, which precisely is what commercial advertising does. It exhorts the public to buy something because it is cheaper, better, more available, etc. And physicians, simply, are not in the business of selling a product or guaranteeing results. (Tr. 9548)

While any claim that results are guaranteed would raise obvious problems, Dr. Biering's objection to advertising is clearly much broader.

> competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition. (435 U.S. at 696). (Footnote omitted.)

Ethical restraints can be justified under the rule of reason, therefore, only if they promote competition, rather than merely other social goals, and if they are not overly broad.[53]

In view of this background, we accept the contention that an ethical precept narrowly directed toward false or deceptive advertising and unfair solicitation may enhance competition by insuring the communication of accurate information in a manner that allows it to be processed unburdened by unscrupulous practices. Respondent's restrictions are of a different kind, however, reflecting a belief that the best way to interdict false and deceptive advertising and overreaching [33] by physicians is to proscribe practically the full spectrum of advertising and solicitation activities. The evidence confirms that the restrictions have been applied as an absolute ban governing situations in which the dangers contemplated by respondent are imperceptible if they exist at all. For example, a form letter from *Anthropometrics* to approximately 50 presidents of corporations announcing establishment of an Executive Fitness Control Center to provide comprehensive physical exams and follow-up therapy to corporate executives was considered unethical solicitation. (ID 146) In another instance, the AMA indicated that a letter from a group of radiologists to physicians was objectionable if it was designed to solicit referrals. (CX 783A) It is evident from these examples that AMA's effective ban on advertising and solicitation applies "with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers." *Professional Engineers, supra*, 435 U.S. at 692.

Implicit in AMA's argument is the proposition that any less inhibitory restraint on advertising or solicitation will be likely to encourage false and deceptive advertising and unfair practices by physicians. But AMA has simply not demonstrated that a broad ban is necessary to ensure that advertising is nondeceptive and that solicitation is inoffensive to vulnerable classes of consumers. We note initially that the record does not document widespread abuses among the 47.4% of licensed physicians in the United States who are not members of AMA. (RX 658, 660)[54] Moreover, a substantial majority of states have statutes governing advertising by physicians as well as medical licensing boards that can take action against physicians in the event abuses occur. (ID 108-10, 310-12) And we think it fair to presume that the vast majority of physicians will advertise their prices and services in a nondeceptive fashion and will avoid solicitation practices that take unfair advantage of their patients. *See Bates, supra*, 433 U.S. at 379.[55]

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[53] *See also Smith* v. *Pro Football, Inc.*, *supra*, 593 F.2d at 1187; *Mardirosian*, *supra*, 1979-2 Trade Cas. (CCH) at ¶78,247. In *Smith*, the D.C. Circuit suggested that a practice could survive the rule of reason only if it has positive, economically procompetitive benefits that offset its anticompetitive effects, "or, at the least, if it is demonstrated to accomplish legitimate business purposes and to have a net anticompetitive effect that is *insubstantial*." *Smith*, *supra*, 593 F.2d at 1188–89 n. 68 (emphasis in original).

[54] *See* AMA's Proposed Findings of Fact, 330–369.

We conclude, therefore, that AMA's justification for the challenged restraints bears no reasonable relationship to legitimate, procompetitive concerns and that such justification is entitled to little weight in the overall balance of competitive effects. Whether viewed alone, or in conjunction with other evidence of purpose and effect, AMA's restraints on advertising and solicitation unreasonably impede competition. We accordingly find that these restrictions are unfair methods of competition in violation of Section 5. [34]

In addition to finding AMA's restrictions on advertising and solicitation to be unfair methods of competition, the Commission concurs with the ALJ's determination that the same restraints also constitute unfair acts or practices. The Commission may, like a court of equity, consider "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.'" *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1971).[56]

AMA offers nothing to undermine the finding that the position on advertising and solicitation espoused in the 1971 *Opinions and Reports* results in substantial harm to consumers and offends public policy.[57] We doubt that it could do more on this record even if it wished. As noted before, there is considerable evidence that consumers lack access to information important in choosing a physician. (ID 110-14) AMA's wholesale restrictions on advertising and solicitation impede communication of this information resulting in significant fee disparity and economic harm to consumers. Many patients, unable to locate a physician, turn to emergency rooms for care that could be provided at less expense in a doctor's office. (ID 154, CX 959Y-Z1, Tr. 2312, 5415-16, RX 72 at 76) While it is impossible to quantify precisely how much of the aggregate annual expenditures for physician services[58] represents consumer injury attributable to the challenged restrictions, we are convinced that the record in this case supports a finding of substantial injury.

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[55] A state, acting on behalf of the interest of its citizens, is undoubtedly entitled to greater latitude in preventing deception and unfair practices than a professional association representing the interests of horizontal competitors. *Compare Friedman* v. *Rogers*, 99 S. Ct. 887 (1979) *with Professional Engineers, supra*, 435 U.S. at [illegible] *see also American Medical Ass'n* v. *United States*, 130 F.2d 233, 247-50 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943).

[56] In footnote 5, the Court stated:

> The Commission has described the factors it considers in determining whether a practice which is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:
>
> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." (405 U.S. at 244-45 n.5.) (Citation omitted.)

*See also Spiegel, Inc.* v. *FTC*, 540 F.2d 287, 293 (7th Cir. 1976).

[57] AMA seeks instead to have the Commission adjudicate the fairness of the 1977 edition. AMA Reply Brief [illegible]-25.

Nor can it be questioned that broad bans on advertising and solicitation are inconsistent with the nation's public policy. "Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange." [35] *Bates, supra,* 433 U.S. at 376. And "[i]t is a matter of public interest that [purchasers'] decisions, in the aggregate, be intelligent and well informed." *Virginia Pharmacy, supra,* 425 U.S. at 765. Apart from its economic function, commercial advertising may convey important information of general public interest. *Bates, supra,* 433 U.S. at 364; *Virginia Pharmacy, supra,* 425 U.S. at 764. On a more individual level, restraints on the advertising of medical services, like the suppression of prescription drug price information, have a disproportionate effect on the poor, the sick, and the aged. *Id.* at 763. Given the prevailing disparity of prices, information as to who is charging what "could mean the alleviation of physical pain or the enjoyment of basic necessities." *Id.* at 764. [36]

### C. Contract Practice

The complaint in this docket also challenges under Section 5 certain restrictions imposed by respondents with respect to the contractual activities of their members. The *Principles* state that:

> A physician should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care. (CX 462Z-12)[59]

Several provisions of the 1971 *Opinions and Reports* interpreting this precept are alleged by complaint counsel to have anticompetitive effects and to be unfair acts or practices. They concern three general categories of activities:

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[58] $19 billion was spent in 1974. (CX 989D)

[59] The AMA *Principles* had a provision on contract practice as early as 1912. That provision stated:

> It is unprofessional for a physician to dispose of his services under conditions that make it impossible to render adequate service to his patient or which interfere with reasonable competition among the physicians of a community. To do this is detrimental to the public and the individual physician, and lowers the dignity of the profession. (*Percival, supra,* App. V at 268-69)

The current language was apparently adopted in 1957. (CX 1435Z-19)

1) contractual arrangements which affect the adequacy of fees, involve underbidding, or preclude the free choice of a physician;

2) compensation of physicians on a basis other than the traditional fee-for-service norm; and

3) physician arrangements with non-physicians.

For the reasons set forth below, we conclude that each of AMA's restrictions addressed to these activities is an unreasonable restraint of trade and hence an unfair method of competition.[60] Though the *Principles* couch the ethical standard in terms of preventing impairment of medical judgment and deterioration of medical care, the interpretations, [37] as reflected in the *Opinions and Reports*, bear little relation to those objectives. Whatever the extent to which quality of care concerns are cognizable under the antitrust laws—*e.g.*, where the restrictions have procompetitive virtues or have little effect on competition, *cf. Professional Engineers*, *supra*, 435 U.S. at 696, n.22—the restraints here go far beyond anything that might be reasonably related to the goal of preventing use of improper medical procedures. Moreover, as will be pointed out below, some of the restrictions are similar to practices that have long been condemned as unreasonably anticompetitive.

1) Adequacy of Fees, Underbidding, and Free Choice

Opinion 3 of Section 6 of the *Opinions and Reports* lists several contractual restrictions that are unfair or unethical. These are:

(1) When the compensation received is inadequate based on the usual fees paid for the same kind of service and class of people in the same community.

(2) When the compensation is so low as to make it impossible for competent service to be rendered.

(3) When there is underbidding by physicians in order to secure the contract.

(4) When a reasonable degree of free choice of physicians is denied those cared for in a community where other competent physicians are readily available.

(5) When there is solicitation of patients directly or indirectly. (CX 462Z-12, -13)

The use of the above-described standards for determining whether a contract is ethical received the approval of the House of Delegates

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[60] We reject the notion, however, that these restrictions also constitute unfair acts or practices. Complaint counsel has simply not adequately articulated a theory by which these ethical restraints can be considered under the *S&H* standard. *Sperry & Hutchinson*, *supra*, 405 U.S. 244.

1927. (CX 1435S,T) Although the record does not indicate the
otivation for the 1927 action, AMA's anticompetitive purpose is
vident in the Minority Report to a 1932 report of the Committee on
e Costs of Medical Care, entitled "Medical Care for the American
eople." (CX 2085Z–32–65) The Minority Report, which was endorsed
y the House of Delegates in 1933 as "expressive, in principle, of the
llective opinion of the medical profession," (CX 1435Z–42) provides
valuable insight into the thinking of the AMA at a point in time
asonably contemporaneous with incorporation of the five stan-
rds into the *Opinions and Reports.* After reiterating the five
ctors noted above, the Minority Report states:

> One of the strongest objections to industrial medical services, mutual benefit
> ociations, so-called health and hospital associations, and other forms of contract
> ctice is that there has been found no means of preventing destructive competition
> tween individuals or groups concerned with these [38] movements. This injects a
> pe of commercialism into medical practice which is harmful to the public and the
> dical professions and results in inferior quality of medical service.
>
> One of the pernicious effects of contract practice schemes is that each of them
> mulates the launching of other similar schemes until there are many in the field
> mpeting with each other. The first may have safeguards against many of the abuses
> contract practices, but as new ones are formed the barriers are gradually broken
> wn in order to secure business.
>
> * * * * *
>
> The minority recognizes the advantage of group practice under certain conditions,
> pecially in communities where practically all of the physicians can be joined in one,
> at the most, two groups. (CX 2085Z–39, –40, –44)

ith respect to the voluntary insurance systems operated through
ntracts with organized groups of the medical profession, the
inority Report stated that these systems were:

> . giving rise to all the evils inherent in contract practice . . . . Wherever they are
> ablished there is solicitation of patients, destructive competition among profession-
> groups, inferior medical service, loss of personal relationship of patient and
> ysician, and demoralization of the professions. It is clear that all such schemes are
> ntrary to sound public policy and that the shortest road to commercialization of the
> ctice of medicine is through the supposedly rosy path of insurance. (CX 2085Z–46;
> also CX 2085Z–40, –42, –57, –58)

ith this background in mind, we turn to consideration of the
ecific restrictions encompassed within Opinion 3.[61]

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[61] The restraints on solicitation by organizations with which a physician has contracted are considered above in
junction with AMA's general restraints on advertising and solicitation.

AMA's ethical restrictions regarding the adequacy of compensation received by physicians received brief attention at trial.[illegible] However, the law is clear that agreements [39] that seek to place a floor under price are illegal *per se*. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *Goldfarb, supra*, 421 U.S. at 781-83. Although there is no evidence that these provisions have had the effect of raising physicians' fees or preventing fees from falling below a particular level, an actual impact on prices need not be found in order to establish a conspiracy to fix prices. "[A] conspiracy to fix prices violates §1 of the [Sherman] Act . . . though it is not established that the conspirators had the means available for accomplishment of the objective. . . ." *Socony, supra*, 310 U.S. at n. 59.

It is evident from a facial examination of AMA's ethical provisions and from evidence concerning adoption of these restraints that they are designed to limit price competition among doctors. Respondent does not suggest any alternative motive cognizable under the antitrust laws. Moreover, the existence of a restriction on underbidding alongside these ethical precepts reinforces the perception that a physician is to a large degree insulated from price competition. *See Goldfarb, supra*, 421 U.S. at 781-82. Respondent's argument that it has never made any attempt to enforce these provisions is irrelevant, since "subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." *United States* v. *National Ass'n of Real Estate Bds.*, 339 U.S. 485, 489 (1950); *see also Goldfarb, supra*, 421 U.S. at 781, 791 n.21. We believe that this restriction is so akin to the more traditional forms of price fixing that it should be treated in the same fashion. Accordingly, we hold that the provisions governing adequacy of compensation are *per se* unreasonable and hence unfair methods of competition.

AMA's ban on "underbidding by physicians in order to secure [a] contract" (CX 462Z-13) also requires a little discussion. An interpretation of this restriction approved by AMA's Judicial Council (CX 539B) makes clear that the only bidding activity permitted is a bid submitted in answer to a personal request when the physician knows that his or hers is the only quote requested:

> However, when a form letter is sent through the mails requesting a medical doctor to bid against what could be a large group of the local medical society, several ethical questions are raised. The first question, in order of importance, is whether or not an

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[illegible] The record does show that as late as 1974, the Judicial Council was distributing a model contract for emergency room physicians, approved by the House of Delegates, which required fees to "conform generally with those customarily charged in the locality and nearby localities for comparable services." (CX 868, 869A-D, 964C; see *also* CX 1155E, AMA's model partnership agreement for members of hospital medical staffs, which includes a parallel provision on usual and customary fees.)

> affirmative response to such a general invitation to bid for use of the physician's professional services would be within keeping of the dignity of the medical profession? Secondly, a doctor would know by the type of request tendered to him that he probably is going to be competing against many of his associates for a specific contract or employment. Wouldn't this be a competitive force of so great a magnitude that it would cause a deterioration of the quality of the medical service rendered? . . . .
>
> Thirdly, wouldn't such a request, if answered, make an inroad into the concept of professionalism in that it reduces the profession to a business? . . . . [40]
>
> . . . [I]t is also my opinion that where the request lowers the dignity of the medical profession and causes or *reasonably* could cause a deterioration in medical service, then a bid in answer to such a request would be unethical. (CX 1158D) (Emphasis in original.)

This explanation leaves little room for doubt that the ban on "underbidding" has both the purpose and the intrinsic effect of suppressing competition even in the absence of formal enforcement efforts. As with the competitive bidding ban considered in *Professional Engineers,* "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Professional Engineers, supra,* 435 U.S. at 692; *see Texas State Bd. of Pub. Accountancy, supra,* 464 F. Supp. at 402. Again, the record is devoid of any procompetitive justification offered by respondent and we are aware of none. Thus, we are compelled to conclude that the restriction on bidding by physicians is an unreasonable restraint of trade and an unfair method of competition.

Respondent's 1971 edition of *Opinions and Reports* states that in a community where other competent physicians are readily available, a contract to deliver medical services is unethical unless there is a reasonable degree of free choice of physicians. (CX 462Z–13; *see also* 462L–N) This position, which also traces its origin to the House of Delegates' action of 1927, was reaffirmed in a Judicial Council decision of 1947 (CX 1435Z–57) and in a 1959 House of Delegates action. (RX 308 at 29) The 1932 Minority Report makes clear that the purpose of this provision is primarily the anticompetitive one of suppressing the activities of competitors, not solicitude for the rights of patients.[63] Given this background, it is logical to infer that the ethical restriction has had the effect of impairing competition from alternative providers in the medical service market by discouraging use of innovative arrangements that can deliver services at lower cost. In the absence of mitigating evidence of procompetitive effects, we find the restriction unreasonably restrictive of competition and an unfair method of competition. [41]

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[63] Indeed, this restraint is but another way of accomplishing the objectives of the restriction on non-fee-for-service compensation.

### 2) Non-Fee-for-Service Compensation

AMA's support of the fee-for-service method of compensation is extensively documented in the record of this proceeding. The 1971 *Opinions and Reports* state that:

> A physician should not dispose of his professional attainments or services to any hospital, corporation or lay body by whatever name called or however organized under terms or conditions which permit the sale of the services of that physician by such agency for a fee. (CX 462Z-13; *see also* CX 462Z-14)[64]

While such a restriction does not have a direct impact on price, it clearly limits the ability of hospitals, prepaid health plans, and other lay organizations to dealing with physicians on the traditional basis of fee-for-service and precludes the use of salaries or other arrangements that may be more cost efficient. The purpose of this restriction is manifest: to retain for the physician the full profit generated by his or her services and to preclude competition by group health plans, hospitals and other organizations not directly under the control of physicians.[65] The record is replete with instances in which this restriction has been applied, including enforcement action taken after issuance of the complaint in Texas and Florida. (ID 219-21; *see also* [42] ID 212-18)[66] This evidence corroborates the anticompetitive nature of the restraint.

AMA argues generally that there has been a failure of proof with respect to the contract practice aspect of the case, yet it does not directly dispute the evidence referenced above. Indeed, AMA's emphasis on the 1977 position suggests that it all but concedes the illegality of earlier statements effective as of issuance of the complaint. Respondent does point to the competitive vitality of Health Maintenance Organizations (HMOs) in general, arguing that a Staff Report to the Commission entitled, "The Health Maintenance Organization and Its Effects on Competition" (1977) demonstrates the commercial success of HMOs. Apart from the fact that the report was not admitted into evidence for the truth of its contents, (Tr. 7754) its conclusions have little relevance to this proceeding. That opposition to HMOs may have lessened over time does not negate the fact that the restrictions exist and have been enforced with anticompetitive effects. Moreover, complaint counsel's case with respect to the fee-for-service restriction is not limited to HMOs but includes evidence regarding group [43] health plans (CX 580), corporations (ID 213-14, CX 822-24), hospitals (ID 215-18), and a medical clinic (CX 814-15).[67]

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[64] This restriction was also published in AMA's 1974 *Report on Physician-Hospital Relations.* (CX 959Z-2, -4)

[65] Respondent's purpose is set forth with unusual clarity in the 1971 *Opinions and Reports*:

> There are insurance companies administering workmen's compensation benefits wherein the salaries or fees paid to the physician by the insurance company are so much below the legal fees on which the premium paid by the industry is based as to furnish a large direct profit to the insurance company. Certain hospitals are forbidding their staffs of physicians to charge fees for their professional services to 'house cases' but are themselves collecting such fees and absorbing them in hospital income. Some universities, by employing full-time hospital staffs and opening their doors to the general public, charging such fees for the professional care of the patients, as to net the university no small profit, are in direct and unethical competition with the profession at large and their own graduates. They are making a direct profit by a practice of questionable legality, from the professional care. (CX 462Z-13)

[66] In *American Medical Ass'n* v. *United States*, 130 F.2d 233 (1942), *aff'd*, 317 U.S. 519 (1943), the AMA and the Medical Society of the District of Columbia were convicted of a conspiracy to hinder and obstruct operations of Group Health Association, Inc. Group Health was a non-profit corporation organized by government employees to provide medical care and hospitalization on a risk-sharing prepayment basis, utilizing salaried physicians. In reinstating the indictment, the court of appeals noted that the conspiracy reflected AMA's long opposition to risk-sharing plans for medical service as well as the fear of its members of competition from doctors connected with such plans. *United States* v. *American Medical Ass'n*, 110 F.2d 703, 707 (D.C. Cir. 1940).

It is not clear from the reported opinions whether AMA's hostility toward Group Health was premised upon the fact that it employed physicians as opposed to general fears regarding competition posed by risk-sharing plans. Nevertheless, we think AMA's prior conviction is relevant background to the contract practice issues of this case and the evidence demonstrating continued opposition by the medical profession to alternative providers of medical care.

Once again, in light of the anticompetitive character of the restraints and the absence of any countervailing justifications, we find that respondent's efforts to prevent the use of alternatives to the fee-for-service concept are unreasonable and constitute an unfair method of competition in violation of Section 5.

### 3) Arrangements between Physicians and Non-Physicians

Partnerships and similar relationships between physicians and non-physicians, which involve the sharing or splitting of professional fees, are unethical according to *The Principles of Medical Ethics* and the 1971 *Opinions and Reports*. (CX 1189A, 462Z-15, -16, 1153-54, 1196) The *Opinions and Reports* also state that physicians may form professional associations and professional corporations only if ownership and management of the affairs of the corporations remain in the hands of licensed physicians. (CX 462Z-15, -16) According to AMA, these provisions were designed to avoid problems that can occur when a non-physician partner or associate advocates medically unsound treatment which the physician is powerless to oppose. They are also ostensibly intended to prevent consumers from believing that the non-physician partner or associate has skills or training equal to that of the physician or that the physician is supervising all work when he or she is not.[68] [44]

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[67] The AMA disclaims any involvement in the difficulties of the Florida Health Care Plan (FHCP). (RAB 8, 59) While direct action was taken against FHCP by the state and county medical societies, this action was premised upon AMA's ethical guidelines concerning contract practice for the profit of lay groups. (*See* CX 825, 2544, 2564-65, 2572E.) AMA's participation in state and local efforts to hinder operation of the FHCP is also seen in its transmittal of "anti-HMO" information to the county society. This material was provided in order to give the society and its members "all of the necessary information and 'ammunition' to rebut HMO activities in your area." (CX 2101A) Dr. Davis, the President of FHCP, interpreted AMA's offer of assistance to mean: "We don't like you and we are going to do all we can to destroy you." (Tr. 9219)

[68] AMA's Proposed Conclusions of Law at 139.

Complaint counsel's proof regarding these restrictions shows that they were enforced and that association with a non-physician can benefit doctors.[69] Admittedly, the competitive effects of these restrictions may not be as severe as some of the contractual restraints previously discussed. Nevertheless, the organizational impediments at issue here preclude on their face a wide variety of professional ventures by physicians that may involve some financial or other type of association with non-physicians (be they lay persons or other health care professionals). It is difficult to see how such sweeping ethical proscriptions are needed to prevent deception or to prevent non-physicians from having undue influence over medical procedures,[70] and, not surprisingly, respondent offers no satisfactory explanation. Moreover, these restrictions overlap to some extent with the restraints on non-fee-for-service forms of practices, since in both instances lay persons will derive financial benefits from their association with physicians. Indeed, the requirement that all corporations and associations be owned and managed by physicians could be used to prevent physicians from associating with many HMOs or prepaid health care plans, irrespective of quality or deception factors.

By keeping physicians from adopting what may be more economically efficient business formats in particular situations—as evidenced in part by the examples cited in the record—the restraints inevitably have an adverse effect on competition. Due then to the overbreadth of these restrictions and their inherent anticompetitive characteristics, we hold that they constitute unfair methods of competition under Section 5. [45]

## III RELIEF

### A. Abandonment

AMA maintains that the Commission should accord considerable weight to its voluntary abandonment of the positions outlined in the 1971 edition of *Opinions and Reports* and should judge respondent on the basis of its current positions contained in the 1977 edition of *Opinions and Reports,* relevant excerpts of which are set forth in Appendix A of this opinion. AMA does not assert that the case is moot; instead, it argues that there is no cognizable danger of recurrent violation.

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[69] Complaint Counsel's Proposed Findings at 256-59.

[70] In fact, of those provisions of the 1971 *Opinions and Reports* interpreting Section 6 of the *Principles of Medical Ethics,* only Opinion 6 (dealing with relationships between psychiatrists and psychologists) is specifically limited to the issue of allocating responsibility for matters involving professional judgment. That Opinion states that "[i]n relationships between psychiatrists and practicing licensed psychologists, the physician should not delegate to the psychologist any matter requiring the exercise of professional medical judgment."

The record of this proceeding reveals, however, that at the time of issuance of the complaint in December 1975 (six months after *Goldfarb*), AMA's Judicial Council had only begun to review its ethical guidelines. Hence, abandonment took place, if at all, after commencement of this lawsuit. The limited, ambiguous steps undertaken by AMA subsequent to issuance of the complaint, ostensibly to bring its ethical code into conformity with the law, provide further justification for an order in this case. Far from assuring that the ethical restrictions found violative of Section 5 have been completely abandoned by respondent, the 1977 edition of *Opinions and Reports* is itself evidence that there is a perceptible risk of a recurrence of the practices adjudicated in this case.

We think AMA attaches unwarranted significance to the actions that it undertook prior to issuance of the complaint and apparently without knowledge of the Commission's investigation. Minutes of the Judicial Council meeting of September 12, 1975, almost three months after *Goldfarb* was decided, state that the Council considered the issue of advertising and solicitation to be "a matter which would require its continued attention and concern with the possibility of updating prior Opinions and Reports in the future to clarify the important ethical considerations involved." (CX 504C) The scope of this possible "updating" is indicated by other minutes of the meeting. These show that the Council continued at this time to consider solicitation and advertising by doctors to be improper. (CX 504A, C) And, according to its Secretary, the Judicial Council felt at its September meeting that a major revision of the profession's position on advertising was unnecessary and inadvisable. (RX 627(a), (b))[71] [46]

The Judicial Council was no more specific with regard to its plans at the time of its meeting of November 29 and 30, 1975. The minutes reveal that the Judicial Council decided to prepare an updated report on advertising for the upcoming Annual Convention "indicating the profession's responsibility to the public to circumvent deceptive trade practices by reasonable restrictions and the importance of state statutes in this area." (CX 503I) While this minute indicates that the Judicial Council intended the updated report to focus on deception, another minute reports that the Council's restrictive Guidelines on Telephone Directory Listings were transmitted to an official of the Hartford County Medical Association.[72]

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[71] With respect to community professional directories, prepaid health plans, and HMOs, Mr. Nortell noted that "certain information may be disseminated, if it is not used in a self-aggrandizing manner or to make qualitative judgment about physicians." (RX 627(a)) He also referred to letters printed in the *ABA Journal* emphasizing "the anticompetitive impact that advertising could have on a profession as well as the difficulty of distinguishing between deceptive and nondeceptive advertising." (RX 627(b))

All we can learn from the record, therefore, is that prior to issuance of the complaint, the Judicial Council was sensitive to legal questions regarding professional advertising and solicitation but had formed no clear idea, nor analyzed in any detail, the extent to which existing guidelines should be modified. Thus, the first official statement of AMA's post-*Goldfarb* position on advertising and solicitation is found in the Statement of the Judicial Council on Advertising and Solicitation, ("Statement"), which was discussed and approved by the Council at its meeting of April 9, 1976, nearly four months after initiation of this proceeding. The minutes of this meeting make clear that the Council did not consider the Statement to be a departure from past position.[73] [47]

Before examining the precise language of the 1977 edition, it is instructive to point out that respondent has not modified the *Principles of Medical Ethics* at all since their adoption in 1957. Section 4 of the *Principles* continues to state that "[p]hysicians should . . . uphold the dignity and honor of the profession and accept its self-imposed disciplines." (RX 1, p.4) Section 5 still cautions that physicians "should not solicit patients." (RX 1, p.5) Since these statements have been the subject of extensive AMA explication in the past, they carry important connotations in a medical ethics context. For example, the 1971 edition of *Opinions and Reports* sets forth what the "dignity . . . of the profession" mandates with respect to advertising:

> Respecting the dignity of their calling, physicians should resort only to the most limited form of advertising and then only to the extent necessary to serve the common good and improve the health of mankind.[74]

[48] This statement has been repeated without modification since 1955. (CX 463R, 464R, 465R, 466V, 467Z-3) Hence, republication of the unchanged *Principles* inherently meant that anything more than

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[72] (CX 503H) The Guidelines on Telephone Directory Listings apparently were not superceded by the 1976 Statement on Advertising and Solicitation since the Judicial Council authorized its Secretary to send both documents in response to a telephone listing inquiry. (CX 501D)

[73] The minutes state that "the Council unanimously voted to issue a statement to reaffirm the long-standing policy of the Judicial Council on Advertising and solicitation by physicians. . . ." (CX 502A) At its June 28, 1976 meeting, the Judicial Council approved a new edition of *Opinions and Reports*, incorporating the Statement. (CX 501F) Up until that point, the Judicial Council was apparently still distributing copies of the 1971 edition. (Tr. 4361) The new edition was published in March 1977. (Tr. 4335)

[74] The 1971 edition also uses the words "dignity," "dignified," or "honor" in connection with physician announcements, open houses, and statements of professional qualifications. (CX 462Z-6, -7, -9) With respect to the use of signs, the 1971 edition states that "the physician . . . and his component society should fully observe the precept of the Principles: "A physician is expected to uphold the dignity and honor of his vocation." (CX 462Z-10) "Professional dignity" is also used in the context of purveyal of medical services to the direct profit of lay organizations. (CX 462Z-13) Similar references are sprinkled throughout the 1958, 1960, 1964, 1965, and 1966 editions of *Opinions and Reports*. (*See, e.g.*, CX 463P-T, V, 464P-T, V, 465P-T, V, 466U-X, Z-1, 4, 467Z-3, 4, 7, 8, 11)

the "most limited form of advertising" was contrary to professional dignity.[75] [49]

AMA asserts that the Judicial Council's 1977 *Opinions and Reports* reflect a reinterpretation of the *Principles.* However, respondent has never unequivocally indicated to its members that the purportedly "archaic" interpretations of the *Principles* contained in the 1971 *Opinions and Reports* have been superceded or rescinded.[76] (ID 230-31) The preface to the 1977 edition did note that some items in past editions of *Opinions and Reports* were withdrawn "because they did not adequately reflect current conditions of medical practice or legal requirements." (RX 1, p.1) But those items found to be inconsistent with prevailing legal requirements were never specified. Such vagueness stands in stark contrast to past occasions in which AMA specifically notified its members that it was toughening its stance on advertising. (CX 463P, 465P) More importantly, the 1977 edition expressly "reaffirms the long-standing policy of the Judicial Council on advertising and solicitation by physicians." (App.A, p.1) Such a statement implicitly invites members of the AMA and its constituent and component societies to retain and to rely upon the more detailed ethical pronouncements included in the 1971 edition.[77] Likewise, AMA's characterization of the 1977 edition as an "updating" of the *Opinions and Reports* is susceptible to the interpretation that additional guidelines have been included only to address new issues of medical ethics, and that most existing precepts retain their currency. (RX 4, p.52)

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[75] The term "solicit" also comes encumbered with meaning acquired over the years. Based on a 1957 opinion, the 1958 and 1960 editions take an approach to advertising and solicitation remarkably similar to the approach taken in the 1977 edition:

> The Principles of Medical Ethics do not proscribe advertising as such; they proscribe the solicitation of patients. Advertising, in its broad sense, means the act of making information, fact, or intention known to the public. Solicitation, as used in the Principles, means the attempt to obtain patients by persuasion or influence. Advertising, as distinguished from solicitation, is not in itself unethical. (CX 466W, 467Z-4, App. A, p. 1)

However, this statement was expressly superceded in the 1964 edition which states:

> The Principles of Medical Ethics proscribe the solicitation of patients or patronage. Solicitation, as used in the Principles, means the attempt to obtain patients or patronage by persuasion or influence. However, the public is entitled to know the names of physicians, the type of their practices, the location of their offices, their office hours and the like. The doctor may ethically furnish this information through the accepted local media of communication, which are open to all physicians on like condition. Telephone listings, office signs, professional cards, dignified announcements, all are acceptable media of making factual information available to the public. The particular use to be made of any medium of communication and the extent of that use are, however, matters to be determined according to local ideals. What constitutes an excess, what is not in keeping with the ideals of medicine and what amounts to solicitation are questions of fact. The application of this principle is to be made locally. (CX 465P, Q)

The latter position, in which solicitation swallows up any prior distinction with advertising, was repeated in the 1966 and 1971 editions. (CX 464P, 463P, 462Z-6) AMA's resurrection of the 1955 opinion thus suggests that, despite some semantic variations, nothing has really changed.

[76] To withdraw from a conspiracy one must take affirmative action to disavow or defeat the purpose of the conspiracy. *Hyde* v. *United States,* 225 U.S. 347, 369 (1912). *See also United States* v. *Parke, Davis & Co.,* 362 U.S. 29, 47-48 (1960). ("It does not appear even that Parke Davis has announced to the trade that it will abandon the practices we have condemned.")

[77] AMA's assertion in a caveat to the 1977 edition that distribution of the previous edition of *Opinions and Reports* had been suspended is not equivalent to a rescission of the earlier edition. A reasonable construction of this announcement is that additional copies of the earlier edition were no longer available. Had AMA wished to advise its members not to rely upon copies of the 1971 edition in their possession, a straightforward, cautionary statement to this effect would have been simple to make.

Exegesis of AMA's 1977 *Opinions and Reports* reveals an important discrepancy between these guidelines and the position of AMA described at oral argument, a discrepancy that brings into sharp focus the extent to which AMA has attempted to comply with the law.[78] Counsel for respondent [50] stated that the 1977 edition would permit physicians to advertise in newspapers the price of routine services. (TROA 8) A physician would have great difficulty, in our view, reaching the same conclusion from a reading of the 1977 edition. That publication mentions fee advertising only in the context of a "reputable directory." (App. A, p.1) Fee information might be included within the class of "other useful information that the public is entitled to know." However, "other useful information" is to be furnished through the "accepted local media," which includes "office signs, professional cards, dignified announcements, telephone directory listings and reputable directories." (App. A, p.1) Newspapers are notably omitted from this enumeration. Since the 1977 edition was published eight months before the Supreme Court decision in *Bates, supra*, 433 U.S. 350, we cannot fault respondent for failing to anticipate the disposition of that case.[79] Nevertheless, AMA's professed "good faith" efforts to comply with the developing law in the area of professional restraints must be measured against the fact that its position on physician advertising has not changed to any significant degree.

Further examination of the 1977 *Opinions and Reports* in light of the 1971 edition demonstrates the extent to which physician advertising and solicitation continues to be circumscribed by AMA. As noted earlier, the *Principles* continue to proscribe, without exception, any solicitation of patients. However, the meaning of "solicitation" has been narrowed somewhat. "Solicitation" is defined in the 1971 *Opinions and Reports* as an "attempt to obtain patients or patronage by persuasion or influence," and it is clear that traditional advertising as well as personal solicitation of patients is prohibited by that language.[80] By contrast, the 1977 edition redefines "solicitation" in terms of statements or claims that: [51]

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[78] Counsel for AMA conceded that there were "problems" with the 1977 edition and that "it could have been phrased differently." (TROA 26)

[79] In defending the reasonableness of its advertising and solicitation revisions, AMA claims that the Court in *Bates* cited with approval AMA's new advertising code. To be sure, the Court in that case contrasted the restrictions imposed by the State Bar of Arizona with those adopted by respondent, observing that "it appears that even the medical profession now views the alleged adverse effect of advertising in a somewhat different light from the appellee." 433 U.S. at 369, n. 20. It is obvious, however, that the Court was simply illustrating, by way of comparison, the extremely rigid position of the Arizona Bar. Clearly, the Court was not attempting to pass judgment on the constitutional or antitrust merits of respondent's advertising restrictions.

> (1) contain testimonials,
> (2) are intended or likely to create inflated or unjustified expectations of favorable results,
> (3) are self-laudatory and imply that the physician has skills superior to other physicians engaged in his field or specialty of practice, or
> (4) contain incorrect or incomplete facts, or representations or implications that are likely to cause the average person to misunderstand or be deceived. (App. A, p.2)

"Advertising," although never fully defined, is technically permitted under the new guidelines, and "solicitation," which is defined to cover various forms of advertising, including any self-laudatory claims as well as deceptive representations, is forbidden.

Since all advertising is to some degree self-laudatory, the 1977 edition suggests that beneath respondent's rhetoric, ethical precepts with respect to advertising haven't changed very much. This view finds support in AMA's argument to the Commission.[81] Respondent's counsel defended the ban on self-laudatory and superiority claims on grounds that such claims convey no useful information and can only be misleading, since they are not susceptible to any kind of measurement. (TROA 22-23) This characterization of claims as misleading on the basis of their utility to consumers or ease of measurement illustrates the potential scope of respondent's ban on "solicitation."

Similarly, the 1977 edition ban on superiority claims could have far-reaching implications. Such a ban proscribes all forms of comparative advertising, no matter how truthful. More importantly, because any advertisement of a doctor's skills or experience may imply superiority, the 1977 edition confirms that AMA wishes to interdict a vast spectrum of advertising practices based on its view that such practices are inherently deceptive.

The overbreadth with respect to other claims encompassed by the "solicitation" definition exacerbates the difficulty of discerning precisely what representations, if any, will be tolerated under the new rules. The first category makes clear that any and all testimonials regarding physician services are inherently misleading. (TROA 24) Clearly, a testimonial pertaining to medical care could well present the potential for deception if, for example, the experience of the endorser did not represent the typical experience of other patients, or if, due to the infrequency and complexity of such care, results could not be predicted with any degree of accuracy in other cases. However, AMA's ban would also cover nondeceptive testimonials. For example, testimonials directed toward aspects [52] of a physician's practice other than quality or efficacy, such as accessibility or courteous service, would be prohibited.[82]

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[80] The 1971 edition states:

> Solicitation of patients, directly or indirectly, by a physician, or by groups of physicians, is unethical. This principle protects the public from the advertiser and salesman of medical care by establishing an easily discernible and generally recognized distinction between him and the ethical physician. (CX 462Z-5; *see also* CX 778A)

[81] It should also be noted that the Judicial Council's 1974 Report on Community Professional Directories, which is still in effect (Tr. 3998), states that directory listings shall not include any "self-aggrandizing statement." (RX 5)

The phrase "incomplete facts" is also troublesome. Such facts must be supplemented in order to prevent a claim from being considered "solicitation." Inasmuch as there is no requirement that these facts be material to a patient's decision to utilize a physician's services, or that the absence of such facts would be deceptive, the spectre of lengthy, burdensome disclosures is raised for any doctor who contemplates advertising. Indeed, the danger here is enhanced by the apparent overlap of claims identified by the second and fourth categories. Finally, we note that the fourth category implies that representations directed to a sophisticated group of consumers might nonetheless be unethical if "they are likely to cause the average person to misunderstand or be deceived." This overbreadth is worrisome in view of the fact that AMA and its local societies have taken action to restrict physician advertising to other physicians or otherwise sophisticated recipients. (ID 146–47)

The Judicial Council's discussion of medical directories represents a marked improvement over the 1971 edition.[83] Unfortunately, respondent has imposed new and unnecessary conditions upon the use of such directories. Fee information may not be included in a directory unless "disclosure is made of the variable and other pertinent factors affecting the amount of the fee specified." Again, the ambiguity concerning what will be considered "pertinent factors" at the local level could lead to the imposition of onerous disclosure requirements or chill the exercise of individual discretion.

The uncertainty of the 1977 edition with respect to advertising and solicitation is compounded by the statement that "[l]ocal, state, or specialty medical associations, as autonomous organizations, may have ethical restrictions on advertising, solicitation of patients, or other professional conduct of physicians that exceed the Principles of Medical Ethics." (App. A, p.1) Thus the extremely limited guidance [53] conveyed by the 1977 edition regarding permissible advertising is subject to the caveat that such advertising could nevertheless lead to disciplinary action if it offends local custom or usage. Moreover, this statement creates another clear link with the 1971 edition. That document placed substantial emphasis upon local custom and usage with respect to permissible communications media, announcements, signs, and open houses. (CX 462Z-7, -8, -9, -10) Given this background, the Judicial Council's reaffirmation of AMA's longstanding policy on advertising and solicitation, (App. A, p.1) and the strong inference that local societies cannot have less restrictive ethical guidelines, it is inevitable that many physicians will be deterred from advertising, whether or not local societies take any specific action in this area.

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[82] The Commission has issued Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. 255 (1979).

[83] App. A, p.1. The 1971 *Opinions and Reports* stated:

> Most, if not all, listings of physicians by specialty in directories published by commercial concerns, are but subtle ways of avoiding the pronouncement of the Principles of Medical Ethics concerning solicitation. . . . A physician who uses or permits the use of his name in a commercial directory that fails to include on like terms and without discrimination the names of all licensed physicians practicing in the area served by the directory has the burden of proving that his action is in keeping with the Principles. (CX 4622–8)

Respondent's negative attitude toward physician advertising is confirmed by other segments of the 1977 edition. Physicians, as distinguished from commercial enterprises, are not free to engage in advertising "puffery" or to be "baldly self-laudatory" in making superiority claims. (App. A, p.2) And they are permitted to have their photographs published only in connection with a meeting of a recognized medical organization, when elected to office, or when quoted by name on matters of general interest, not related to care of a specific patient. (RX 1, p. 35) "Photographs of physicians in connection with social or civic affairs, not related to medical news or the care of patients, may be published unless the frequency of such photographs bespeaks self-exploitation." *Id.* Another section, entitled "Advertising, Solicitation, and HMOs," states that HMO or prepaid health care plan advertising may not identify any particular physician unless the entire roster of physicians is disclosed. (App. A, p.3) Respondent explains that this restriction is necessary to prevent patients from believing that the physician would be routinely available to all subscribers when this is not the fact. However, AMA does not explain why a simple disclaimer regarding the limited availability of named physicians would not suffice.[84]

We do not mean to imply that precise guidance regarding what claims are false and deceptive is feasible for all kinds of physician advertising. The facts and circumstances of each representation will ultimately be determinative. Moreover, what may be false and deceptive for doctors may be permissible for sellers of other products and services. Harmless puffery for a household product may be deceptive in a medical context. But a doctor would have great difficulty distinguishing between innocuous representations and an abridgement of ethical norms. AMA provides no assistance whatsoever in making this distinction, and its studied ambiguity overall is likely, in our view, to deter truthful ads unnecessarily. [54]

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[84] AMA also defends this language by citation to the language contained in 42 U.S.C. 300e-10(b) (1976). However, that section pertains to state laws and does not immunize private restrictions on advertising by HMOs.

The equivocal language of the 1976 Statement and its often antagonistic tone toward advertising and solicitation, taken together with AMA's decision not to amend the *Principles of Medical Ethics*, has sent a clear signal to the medical profession. It is hardly surprising that many constituent and component societies continued to rely upon the 1971 *Opinions and Reports* even after issuance of the 1976 Statement. (ID 227-28) Indeed, there is evidence that AMA's own officials failed to comprehend the alleged change of position urged upon respondent's counsel. The Chairman of AMA's Board of Trustees testified that it is AMA's position that advertising must be tasteful as well as factually correct. (Tr. 9660-61) A member of the House of Delegates testified that a clinic could be disciplined for advertising the services it performs because it is soliciting business and subject to misinterpretation by the patient. (Tr. 9718)

With respect to the contract practice aspect of this case, AMA argues that the "archaic" statements in the 1971 edition of *Opinions and Reports* have either been voluntarily eliminated or substantially revised in the 1977 edition. The Commission recognizes that the discussion of contractual relationships and free choice contained in the 1977 *Opinions and Reports* represents a significant improvement over earlier versions. (App.A, pp.2, 3)[65] For example, the 1977 edition makes clear that "free choice" is not intended to preclude the use of alternative health care delivery systems, including closed panel systems, that limit the patient's choice to those physicians employed by those kinds of plans. (App. A, p.3) However, by contrast to the AMA's position on advertising and solicitation, there is no evidence that AMA or its Judicial Council even reviewed its position on contract practice issues prior to issuance of the complaint. Indeed, counsel for AMA stated in January 1977 that respondent's current policies on contract practice are "best reflected . . . in the 1974 *Report on Physician-Hospital Relations.*"[86] Like the 1971 edition of *Opinions and Reports,* the 1974 *Report on Physician-Hospital Relations* has never been expressly rescinded. Nor has the AMA communicated to its members its current belief that this document contains positions which are now obsolete. [55]

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[65] The 1977 edition provides that physicians working for prepaid plans "should not be subjected to lay interference on professional matters . . . ." (App.A, p.3) This represents a laudable change from the 1971 edition, which forbade employment with prepaid plans altogether and required that ownership and management of professional associations and corporations remain in the the hands of licensed physicians. (CX 462Z-15, -16 Nevertheless, the sweep of AMA's past ethical pronouncements creates some uncertainty regarding the scope of "professional matters" under the new guidelines.

On balance, we are persuaded that the overwhelming weight of the record evidence contradicts respondent's abandonment argument. Further supplementing this evidence is the law judge's decision to render adverse findings against AMA based upon its refusal to comply with a duly authorized subpoena *duces tecum.*[87] AMA's contention that the Commission lacks authority to make adverse findings pursuant to Section 3.38(b)(1) of the Commission's Rules of Practice is without merit. The adverse inference rule has a solid foundation in the common law,[88] is part of the Federal Rules of Civil Procedure,[89] and has been applied in the context of administrative proceedings.[90] The cases cited by respondent deal not with adverse findings but rather with the Commission's authority to seek penalties for noncompliance of compulsory process. Those decisions are inapposite here.

Application of the adverse inference rule may only be made when the party's failure to produce documentary or other evidence is not adequately explained. *Evis Mfg. Co.* v. *FTC,* 287 F.2d 831, 847 (9th Cir. 1961); *cert. denied,* 368 U.S. 824 (1961). Thus, the adverse inference rule makes the conduct of the person withholding the material an evidentiary fact in and of itself. The resulting inference may be strong or weak, depending on the person's conduct and the surrounding circumstances. *See* 2 J. Wigmore, *Evidence* §285 (3d ed. 1940); *McCormick's Handbook of the Law of Evidence* §272 at 659 (2d ed. 1972). For example, an inference drawn against a respondent offering a weak explanation for its refusal to produce relevant evidence will be stronger than an inference drawn against a respondent providing a more plausible explanation.

It is necessary, therefore, to evaluate respondent's contention that its failure to comply with the administrative subpoena was based upon a "good-faith" attempt to establish a pre-trial test of the jurisdictional issue in this case. [56] The weight of case precedent supports the view that the Commission's jurisdiction should be judicially reviewed only after agency action has been completed and not in a subpoena enforcement action. *E.g., Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 211-14 (1946); *FTC* v. *Markin*, 532 F.2d 541 (6th Cir. 1976). The only decision cited by AMA in support of its asserted right to raise the jurisdictional question in the enforcement proceedings is *FTC* v. *Miller*, 549 F.2d 452 (7th Cir. 1977). That case suggests the following exceptions to the *Oklahoma Press* rule:

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[86] Motion to Certify to the Commission the Motion of Respondent American Medical Association to Reconsider Issuance of the Complaint in this Docket at 6-7 (Jan. 14, 1977).

[87] The ALJ found that:

> AMA's conduct with respect to the formal and informal promulgation, distribution and enforcement of the "Principles of Medical Ethics," established by the record as existing prior to 1975, continued thereafter.

Order Ruling on Complaint Counsel's Motion for Adverse Rulings and Other Relief Due to Noncompliance with Subpoena *Duces Tecum* by Respondent the American Medical Association at 10 (Feb. 25, 1977).

[88] *Armory* v. *Delamirie,* 1 Str. 505 (K.B. 1722); 2 J. Wigmore, *Evidence* §285 (3d ed. 1940).

[89] Fed. R. Civ. P. 37(b)(2)(A).

[90] *International Union (UAW)* v. *NLRB,* 459 F.2d 1329, 1338-39 (D.C. Cir. 1972); *Charles of the Ritz Dist. Corp.* v. *FTC,* 143 F.2d 676, 679 (2d Cir. 1944).

> (1) where the agency has clearly violated a right secured by statute or agency regulation;
>
> (2) where the issue involved is a strictly legal one not involving the agency's expertise or any factual determinations; or
>
> (3) where the issue cannot be raised upon judicial review of a later order of the agency. *Id.* at 460.

Respondent does not disclose the exception upon which it would have relied, but it is clear to us that AMA would have had considerable difficulty relying upon any of these exceptions. First, because the status of AMA is unclear on the facts, it could not establish that the Commission had clearly violated its alleged right to be immune from FTC proceedings. Second, the jurisdictional issue—whether AMA is organized to carry on business for its own profit or that of its members—is not a strictly legal issue but one requiring a factual determination for its resolution. Finally, the Commission's jurisdiction to enter an order against AMA is an issue that may be raised upon judicial review of any such order, as it has been raised in AMA's appeal to the Commission from the initial decision.

Since it therefore seems likely that AMA's contemplated challenge on jurisdictional grounds to enforcement of the subpoena would have failed, respondent's refusal to comply with the subpoena is not sufficiently explained. It is noteworthy that AMA complied with every other subpoena issued in this proceeding save the one directed at its principal defense. In view of this fact and the absence of a strong explanation for noncompliance, we think the most plausible reason for AMA's refusal is that the evidence sought would have been unfavorable to its cause. Accordingly, we believe the law judge properly exercised his discretion under Rule 3.38(b)(1).[91] [57]

The Commission concludes, therefore, that there is no evidence that AMA clearly and effectively abandoned the practices at issue here prior to commencement of this proceeding. We also reject AMA's contention that publication of the 1977 *Opinions and Reports* after issuance of the complaint demonstrates that there is no cognizable danger of recurrent violation. Abandonment of illegal practices during trial does not diminish the Commission's discretion to enter an appropriate cease and desist order. *See United States* v. *Parke, Davis & Co.,* 362 U.S. 29, 47–48 (1960); *Giant Food, Inc.* v. *FTC,* 322 F.2d 977, 987 (D.C. Cir. 1963); *Spencer Gifts* v. *FTC,* 302, F.2d 267 (3d Cir. 1962). That is particularly true where the purported abandonment consists of equivocal statements and efforts to reinterpret central principles in a manner contrary to their commonsense and historical meaning, suggesting that the practices, if abandoned at all, may be resumed. [58]

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[91] Whether the inference standing alone would be sufficient to rebut AMA's abandonment claim is an issue we need not decide. Suffice it to say, the inference drawn here is consistent with other evidence, such as AMA's 1977 *Opinions and Reports*, which independently supports the need for a cease and desist order.

## B. Order

The ALJ issued an order which, *inter alia,* prevents respondents from policing the advertising and solicitation activities of their members for a period of two years. At the end of that period, respondents may formulate, adopt and disseminate ethical guidelines governing advertising and solicitation only if these guidelines have been approved by the Commission. Complaint counsel supports this order, contending that the medical atmosphere with respect to advertising is so inflamed at present that a two-year cooling-off period is warranted. (TROA 61–62) AMA argues that the government should not preclude it from dealing with the difficult problem of deception in medical advertising because, as a professional society, AMA has a responsibility to regulate deceptive practices by its members. (RAB 70; TROA 15–16) AMA further argues that the provision requiring the AMA to obtain prior Commission approval before publishing ethical standards on advertising or solicitation constitutes a prior restraint on speech that is beyond the authority of the Commission. (RAB 72–80)[92]

We have modified the order issued by the ALJ in light of our conviction that the AMA has a valuable and unique role to play with respect to deceptive advertising and oppressive forms of solicitation by physicians. As modified, the order will permit AMA to adopt and enforce reasonable ethical guidelines concerning advertising that is false or deceptive within the meaning of Section 5. In view of the potential overreaching that may occur in the absence of professional regulation, the order will also permit AMA to disseminate guidelines proscribing uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstance, are vulnerable to undue influence. *See Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978).[93] [59]

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[92] Counsel for AMA observed at oral argument that "[i]f Hippocrates were alive today, he would have to come here to get your stamp of approval before he wrote the Hippocratic Oath." (TROA 13) We hasten to point out that the Oath of Hippocrates contains no provision dealing with advertising or solicitation. (RX 1, p. 51) Indeed, Thomas Percival's *Medical Ethics,* upon which AMA's first *Code of Ethics* was based (RX 1, p. 2), contains no mention of advertising or solicitation. *Percival, supra.*

The Commission recognizes that the deception standard incorporated into the order does not delineate with absolute precision the latitude which we have given AMA to prescribe new ethical restrictions. If the Commission were capable of such precision, it could draft the new guidelines itself and exclude AMA from any role in their formulation. We are persuaded, however, that AMA is capable of applying general principles of deceptive advertising law in a medical context taking into account the substantial body of law construing Section 5 of the FTC Act. Additionally, our analysis of AMA's 1971 and 1977 *Opinions and Reports* provides considerable guidance regarding the deficiences of past pronouncements. Moreover, pursuant to Section 3.61(d) of the Commission's Rules of Practice, the Commission will be available upon request to provide advice as to whether a proposed course of action, if pursued by respondent, will constitute compliance with the order. *See FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394 (1965).

We cannot emphasize too strongly that AMA's discretion with respect to solicitation and advertising is limited to "reasonable" ethical guidelines. The list of particular items of information helpful to consumers in choosing a physician, set forth in the Initial Decision (ID 110-11), is illustrative of the kind of information which should be permitted in most cases without additional qualification. It is especially important that price advertising remain as unfettered as possible. Where ads merely state the price of medical services, particularly services that are routine or fairly well standardized, there is little need for restrictions to prevent deception. Where restrictions, such as affirmative disclosures, are justified, they should be reasonably related to the goal of preventing deception. Across-the-board bans on entire categories of representations or general restrictions applicable to any representation made through a specific medium are highly suspect.

At the same time, the order permits AMA to deal effectively with all forms of deceptive advertising, including unsubstantiated representations, affirmative misrepresentations (express or implied), and representations that are deceptive for failure to disclose a material fact. The FTC has held under Section 5, for example, that if health claims are not intended to embrace all interpretations reasonably attributable to them, then they must be specifically limited by express qualifying language. *Grove Laboratories, Inc.*, 71 F.T.C. 822, 835 (1967).[94] **[60]**

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[93] We fail to perceive any comparable danger of harassment or duress with respect to solicitation which occurs via written communication or other media. *Contra*, *Adler, Barish, Daniels, Levin & Creskoff* v. *Epstein*, 393 A.2d 1175 (Pa. 1978), *appeal dismissed and cert. denied*, 99 S. Ct. 2817 (1979).

The Commission's order allows the AMA no discretion with respect to unfairness other than the authority already mentioned with respect to solicitation. The history of this proceeding, and in particular AMA's 1977 *Opinions and Reports*, underlines the danger of permitting the medical profession broad discretion to proscribe unfair practices. In the event AMA is able to define with specificity unfair acts or practices that should be addressed in ethical guidelines, it may petition the Commission for modification of the order pursuant to Section 3.72(b)(2) of the Commission's Rules of Practice. *See Professional Engineers, supra*, 435 U.S. at 699.

Moreover, in the event that AMA (or a constituent or component society) becomes concerned with an advertising or solicitation practice which is beyond the scope of its power under the terms of the Commission's order, but which the association believes presents a threat to the public, it is of course not entirely without recourse. As we noted earlier, the states are well-equipped to respond to abuses through their medical licensing boards (I.D. 310-12), and the order does not prevent AMA from referring serious incidents to these public authorities when necessary.

We have also included a requirement that AMA afford any member charged with a violation of ethical standards promulgated in conformity with this order due notice and an opportunity for a hearing. *Silver* v. *New York Stock Exchange*, 262 U.S. 341, 361-63 (1963). In fact, this kind of requirement was suggested by AMA as an alternative to the prior approval provision in the ALJ's order, should the Commission issue an order allowing respondent to regulate deceptive advertising. This provision is intended to give members a reasonable chance to contest the charges, including adequate time to prepare and present evidence in their behalf.

The Commission believes that a disaffiliation provision patterned after a similar provision in the ALJ's order is essential to prevent recurrence of the practices documented by the record in this proceeding.[95] AMA's claim that it does not have the power to

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[94] We also note that an ad's capacity for deception under Section 5 must be judged in light of the understanding and the corresponding potential for misunderstanding of the audience to which the ad is directed. *ITT Continental Baking Co., Inc.* v. *FTC*, 532 F.2d 207 (2d Cir. 1976); *Aronberg* v. *FTC*, 132 F.2d 165, 167-68 (7th Cir. 1942); *Travel King Inc.*, 86 F.T.C. 715, 773 (1975).

[95] As modified, the order affords AMA 120 days to determine whether a constituent or component organization

*(Continued)*

disaffiliate state and local medical societies is without merit. The House of Delegates adopted a resolution in 1855 asserting that no state or local society that had not adopted the *Code of Ethics* would be entitled to representation in AMA. (CX 1435Z–15, –16) [61] In addition, an AMA official has rendered an opinion indicating that there is no legal impediment to a bylaw provision permitting expulsion of a state association under certain circumstances. (CX 1958A, B) The legal arguments in opposition to the disaffiliation provision are equally unconvincing. Similar provisions were imposed in *Professional Engineers, supra,*[96] and in *National Housewares Inc.*, 90 F.T.C. 512 (1977).

We agree with counsel for the Connecticut respondents (TROA 107) that the inclusion of a disaffiliation provision with respect to AMA renders it unnecessary to bind CSMS and NHCMA to a similar order in order to obtain effective relief. Accordingly, the Commission exercises its discretion to omit respondents CSMS and NHCMA from the cease and desist order.

We have modified those order provisions dealing with the contract practice aspects of this case in order to focus more precisely on the restrictions substantiated by the record in this proceeding. With respect to the restrictions relating to underbidding, the adequacy of fees, or compensation on a basis other than the traditional fee-for-service norm, the order prohibits AMA from interfering in any way with the consideration received by physicians in exchange for their services. The order also includes specific prohibitions on ethical pronouncements or representations addressing the propriety of closed panel or other limited choice arrangements as well as physician arrangements with non-physicians.

Finally, we have included in the order a requirement that for five years AMA maintain records sufficient to describe any action taken with respect to conduct covered by the order and provide the Commission with an annual report of such activities. [62]

## IV POST-ARGUMENT MOTIONS

### A. Motion to Dismiss

In a motion filed subsequent to the oral argument in this case, AMA urges the Commission to dismiss the proceeding on account of

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must be disaffiliated. This interval should be sufficient in most cases to evaluate the facts and circumstances surrounding the conduct considered contrary to Part I, II or III of the Order. Again the Commission is available to advise AMA pursuant to Rule 3.61(d) and will consider a request for tolling of the 120 day period where appropriate.

[96] The district court's unreported order is found in the Appendix to Complaint Counsel's Post-Trial Reply Brief filed August 25, 1978. The disaffiliation provisions of this order were not modified by the court of appeals or by the Supreme Court.

the Commission's acceptance of a consent agreement in *American Dental Association et al. (ADA),* Docket No. 9093.[97] The consent agreement provides that, upon entry of a final adjudicated order in the *AMA* case, the Commission would issue an order against the *ADA* respondents incorporating the relevant provisions of the *AMA* order conformed so as to be applicable to the *ADA* respondents. It also provides that the *ADA* complaint will be dismissed in the event that the final adjudicated order in the *AMA* case results in a dismissal of the complaint on the merits or for lack of jurisdiction. Prior to final resolution of the *AMA* case, the agreement provides interim relief concerning the dental associations' ethical restrictions on advertising and solicitation.

AMA contends that the consent agreement deprives it of a fair proceeding because the existence of the agreement will influence the Commission, preventing it from basing its decision in this case on the facts of record. AMA further believes that the existence of both cases demonstrates the Commission's concern with announcing a general policy on the role of dental and medical societies with respect to advertising and solicitation, and that rulemaking rather than adjudication should be used to announce such a policy.

The mere fact that respondents in the *ADA* matter have reached a settlement with the Commission in which they agree to be bound by the disposition of issues here does not mean that the Commission will abandon its responsibility to decide this case on the record of this proceeding. A similar issue arose in *American Home Products Corporation* v. *FTC,* 420 F.2d 232 (6th Cir. 1968) Respondent there complained that the Commission deprived it of a fair hearing by allowing other sellers of the same type of product to stipulate that their cases should be decided on the basis of the record in respondent's case. The court of appeals held that this [63] assertion of unfairness was unfounded and that the respondent had not been prejudiced by the procedure. *Id.* at 238.[98]

The Commission does not find persuasive AMA's assertion that rulemaking rather than adjudication is required here. Rulemaking is not required simply because the Commission has reason to believe that more than one party has engaged in similar or identical violations of §5 of the Federal Trade Commission Act. The choice between rulemaking and adjudication lies primarily in the informed discretion of the agency. *See NLRB* v. *Bell Aerospace Company*, 416 U.S. 267, 294 (1974); *SEC* v. *Chenery Corporation*, 332 U.S. 194, 202-203 (1947).

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[97] By motion filed on June 18, 1979, CSMS and NHCMA joined in AMA's motion.

[98] It is not unusual for respondents to agree to a consent order that contains provisions that relate to some occurrence outside that case, including provisions that are contingent on the disposition of other litigated matters. *See, e.g., International Paper Company,* 84 F.T.C. 9, 14 (1974) (consent order provides that if a final order is entered against other companies or if the complaint against them is dismissed, settling parties have the option to accept such order as dismissed in lieu of consent order); *Ford Motor Company,* Docket No. 9073 (Decision and Order, March 29, 1979) [93 F.T.C. 402] (consent order provides that if related cases result in adjudicated or consent orders with less restrictive standards, settling parties may petition for conforming modification of order).

Accordingly, respondents' motion to dismiss the proceeding is denied. [**64**]

B. Connecticut Respondents' Motion To Reopen and Supplement the Record

Respondents CSMS and NHCMA move that the record in this proceeding be reopened to admit into evidence an article printed in the *Waterbury Sunday American* on April 29, 1979, entitled: "Doctor's Methods Stir Controversy." The article relates to Dr. Leon Zucker, a witness for complaint counsel, describes his opthalmology practice, and quotes his patients as well as various physicians familiar with him or the medical techniques he utilizes. Two of the sources quoted in the article, Drs. Jerome Freedman and David W. Parke, filed the complaints regarding Dr. Zucker's publicity which led to NHCMA's investigation. (CX 694B, 695C)[89] Neither man was called as a witness by counsel for the Connecticut respondents.

We decline to grant respondents' motion because it is not at all clear why the Connecticut respondents could not have called as witnesses during trial those persons quoted in the article. Had respondents done so, the testimony of these individuals would have been received subject to the traditional safeguards of the oath, cross-examination, and analysis by the trier of fact. Instead, we are asked to admit what is in essence uncorroborated hearsay evidence highly prejudicial to complaint counsel.

For these reasons, the motion of the Connecticut respondents to reopen and supplement the record is denied.

An appropriate order is attached.

## APPENDIX A

### EXCERPTS FROM 1977 EDITION OF AMA'S OPINIONS AND REPORTS (RX 1)

Advertising and Solicitation (¶6.00)

This statement reaffirms the long-standing policy of the Judicial Council on advertising and solicitation by physicians. The Principles of Medical Ethics are intended to discourage abusive practices that exploit patients and the public and interfere with freedom in making an informed choice of physicians and free competition among physicians.

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[89] Dr. Freedman, now president of CSMS, filed his complaint against Dr. Zucker in his previous capacity as vice president of CSMS. (CX 2006A) Dr. Parke filed his complaint in his former capacity as president of the Connecticut Society of Eye Physicians. (CX 2006B, C)

*Advertising.* The Principles do not proscribe advertising; they proscribe the solicitation of patients. Advertising means the action of making information or intention known to the public. The public is entitled to know the names of physicians, the type of their practices, the location of their offices, their office hours, and other useful information that will enable people to make a more informed choice of physician.

The physician may furnish this information through the accepted local media for advertising or communication, which are open to all physicians on like conditions. Office signs, professional cards, dignified announcements, telephone directory listings, and reputable directories are examples of acceptable media for making information available to the public.

A physician may give biographical and other relevant data for listing in a reputable directory. A directory is not reputable if its contents are false, misleading, or deceptive or if it is promoted through fraud or misrepresentation. If the physician, at his option, chooses to supply fee information, the published data may include his charge for a standard office visit or his fee or range of fees for specific types of services, provided disclosure is made of the variable and other pertinent factors affecting the amount of the fee specified. The published data may include other relevant facts about the physician, but false, misleading, or deceptive statements or claims should be avoided.

Local, state, or specialty medical associations, as autonomous organizations, may have ethical restrictions on advertising, solicitation of patients, or other professional conduct of physicians that exceed the Principles of Medical Ethics. Furthermore, specific legal restrictions on advertising or solicitation of patients exist in the medical licensure laws of at least 34 states. Other states provide regulation through statutory authority to impose penalties for unprofessional conduct.

*Solicitation.* The term "solicitation" in the Principles means the attempt to obtain patients by persuasion or influence, using statements or claims that (1) contain testimonials, (2) are intended or likely to create inflated or unjustified expectations of favorable results, (3) are self-laudatory and imply that the physician has skills superior to other physicians engaged in his field or specialty of practice, or (4) contain incorrect or incomplete facts, or representations or implications that are likely to cause the average person to misunderstand or be deceived.

*Competition.* Some competitive practices accepted in ordinary commercial and industrial enterprises—where profit-making is the primary objective—are inappropriate among physicians. Commercial enterprises, for example, are free to solicit business by paying commissions. They have no duty to lower prices to the poor. Commercial enterprises are generally free to engage in advertising "puffery," to be boldly self-laudatory in making claims of superiority, and to emphasize favorable features without disclosing unfavorable information.

Physicians, by contrast, have an ethical duty to subordinate financial reward to social responsibility. A physician should not engage in practices for pecuniary gain that interfere with his medical judgment and skill or cause a deterioration of the quality of medical care. Ability to pay should be considered in reducing fees, and excessive fees are unethical.

Physicians should not pay commissions or rebates or give kickbacks for referral of patients. Likewise, they should not make extravagent claims or proclaim extraordinary skills. Such practices, however, common they may be in the commercial world, are unethical in the practice of medicine because they are injurious to the public.

Freedom of choice of physician and free competition among physicians are prerequisites of optimal medical care. The Principles of Medical Ethics are intended to curtail abusive practices that impinge on these freedoms and exploit patients and the public.

Contractual Relationships (¶4.05)

The contractual relationships that physicians assume when they enter prepaid group practice plans are varied.

Income arrangements may include hourly wages for physicians working part time, annual salaries for those working full time, and share of group income for physicians who are partners in groups that are somewhat autonomous and contract with plans to provide the required medical care. Arrangements also usually include a range of fringe benefits, such as paid vacations, insurance and pension plans.

Physicians may work directly for plans or may be employed by the medical group or the hospital that has contracted with the plan to provide services. The AMA recognizes that under proper legal authority such plans may be established and that a physician may be employed by, or otherwise serve, a medical care plan without violating the Principles of Medical Ethics. It believes that in the operation of such plans physicians should not be subjected to lay interference on professional matters and that their primary responsibility should be to the patients they serve.

Advertising, Solicitation, and HMOs (¶6.01)

It is not unethical for a physician to provide medical services to members of a prepaid medical care plan or to members of a health maintenance organization which seeks members (or subscribers) through advertising its services, facilities, charges, or other non-professional aspects of its operation as long as such advertising does not identify, refer to, or make any qualitative judgment concerning any physician who provides service to the members or subscribers.

The foregoing qualification is intended to discourage deceptive advertising which would lead prospective members (or subscribers) to believe that the services of a named physician who has a reputation for outstanding skill would be routinely available to all members (or subscribers) having need for his kind of services if in fact this is not so. However, the publication by name of the roster of physicians who provide services to members, the type of practice in which each is engaged, biographical and other relevant information as outlined in "Advertising and Solicitation" above is not a deceptive practice.

Free Choice (¶6.28)

Free choice of physicians is the right of every individual. The individual may select and change at will the physicians who serve him, or he may choose a medical care plan such as that provided by a closed panel or group practice, or he may choose to obtain medical care by becoming a subscriber of a health maintenance or service organization. The freedom of the individual to select his preferred system of medical care and free competition among physicians and alternative systems of medical care are prerequisites of ethical practice and optimal medical care.

## FINAL ORDER

This matter having been heard by the Commission upon the appeals of respondents from the Initial Decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to deny the appeal of respondent American Medical Association and to grant the appeal in part of respondents

Connecticut State Medical Society and New Haven County Medical Association, Inc.,

*It is ordered,* That the Initial Decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent inconsistent with the accompanying Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

*It is further ordered,* That the following Order to Cease and Desist be, and it hereby is entered. [2]

## I.

*It is ordered,* That respondent American Medical Association, and its delegates, trustees, councils, committees, officers, representatives, agents, employees, successors and assigns, directly or indirectly, or through any corporate or other device, in or in connection with respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the advertising or publishing by any person of the prices, terms or conditions of sale of physicians' services, or of information about physicians' services, facilities or equipment which are offered for sale or made available by physicians or by any organization with which physicians are affiliated;

B. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the solicitation, through advertising or by any other means, including but not limited to bidding practices, of patients, patronage, or contracts to supply physicians' services, by any physician or by any organization with which physicians are affiliated; and

C. Inducing, urging, encouraging, or assisting any physician, or any medical association, group of physicians, hospital, insurance carrier or any other non-governmental organization to take any of the actions prohibited by this part.

Nothing contained in this part shall prohibit respondent from formulating, adopting, disseminating to its constituent and component medical organizations and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence. [3]

## II.

*It is further ordered,* That respondent American Medical Association, and its delegates, trustees, councils, committees, officers, representatives, agents, employees, successors and assigns, directly or indirectly, or through any corporate or other device, in or in connection with respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Restricting, regulating, impeding, advising on the ethical propriety of, or interfering with the consideration offered or provided to any physician in return for the sale, purchase or distribution of his or her professional services;

B. Restricting, interfering with, or impeding the growth, development or operations of any entity that offers physicians' services to the public, by means of any statement or other representation concerning the ethical propriety of medical service arrangements that limit the patient's choice of a physician;

C. Restricting, interfering with, or impeding the growth, development or operations of any entity that offers physicians' services to the public, by means of any statement or other representation concerning the ethical propriety of participation by non-physicians in the ownership or management of said organization; and

D. Inducing, urging, encouraging, or assisting any physician, or any medical association, group of physicians, hospital, insurance carrier or any other non-governmental organization to take any of the actions prohibited by this part.

## III.

*It is further ordered,* That respondent American Medical Association cease and desist from taking any formal action against a person alleged to have violated any ethical standard promulgated in conformity with this Order without first providing such person with:

A. Reasonable written notice of the allegations against him or her;

B. A hearing wherein such person or a person retained by him or her may seek to rebut such allegations; and

C. The written findings or conclusions of respondent with respect to such allegations. [4]

## IV.

*It is further ordered,* That respondent American Medical Association:

A. Send by first class mail a copy of a letter in the form shown in Appendix A to this Order to each of its present members and to each constituent and component organization of respondent, within sixty (60) days after this Order becomes final.

B. For a period of ten years, provide each new member of respondent and each constituent and component organization of respondent with a copy of this Order at the time the member is accepted into membership.

C. Within ninety (90) days after this Order becomes final, remove from respondent American Medical Association's *Principles of Medical Ethics* and the Judicial Council's *Opinions and Reports,* and from the constitution and bylaws and any other existing policy statement or guideline of respondent, any provision, interpretation or policy statement which is inconsistent with the provisions of Parts I and II of this Order and, within one hundred and twenty (120) days after this Order becomes final, publish in the *Journal of the American Medical Association* and in *American Medical News* the revised versions of such documents, statements, or guidelines.

D. Require as a condition of affiliation with respondent that any constituent or component organization agree by action taken by the constituent or component organization's governing body to adhere to the provisions of Parts I, II, and III of this Order.

E. Terminate for a period of one year their affiliation with any constituent or component organization within one hundred and twenty (120) days after learning or having reason to believe that said constituent or component organization has engaged, after the date this Order becomes final, in any act or practice that if committed by respondent would be prohibited by Parts I, II or III of this Order.

## V.

*It is further ordered,* That respondent American Medical Association: [5]

A. Within sixty (60) days after the Order becomes final publish a copy of this Order with such prominence as feature articles are regularly published in the *Journal of the American Medical Association* and in *American Medical News* or in any successor publications.

B. Within one hundred and twenty (120) days after this Order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this Order.

C. For a period of five (5) years after this Order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Parts I and II of this Order, including but not limited to any advice or interpretations rendered with respect to advertising, solicitation, or contract practice involving any of its members.

D. Within one year after this Order becomes final, and annually thereafter, for a period of five (5) years, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with the activities covered by Parts I and II of this Order, including but not limited to any advice or interpretations rendered with respect to advertising, solicitation or contract practice involving any of its members.

## VI.

*It is further ordered,* That respondent American Medical Association shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this Order.

## APPENDIX A

Dear Doctor:

As you know, the Federal Trade Commission issued a complaint against the AMA on December 19, 1975, challenging the AMA's ethical restrictions on the advertising, solicitation, and contractual practices of its members. The complaint also named the Connecticut State Medical Society and the New Haven County Medical Association, Inc. as respondents.

In an opinion issued on [insert issue date], the FTC held that the AMA, the two Connecticut medical societies, and other state and local medical associations have unlawfully restricted the advertising, solicitation, and contractual practices of their members in violation of Section 5 of the Federal Trade Commission Act.

In conjunction with that opinion, the Commission issued an order which has now become final. This order is printed in the [insert issue date] issue of the *Journal of the American Medical Association*, the [insert issue date] issue of *American Medical News* and may be obtained from the AMA headquarters or from your state or local medical society.

Among other things, the order forbids any action by AMA that would:

- Restrict its members; solicitation of patients by advertising, submission of bids or other means.

- Interfere with either the amount or the form of compensation provided a member in exchange for his or her professional services.

- Characterize as unethical the use of closed panel or other health care delivery plans that limit the patient's choice of a physician.

- Characterize as unethical the participation of non-physicians in the ownership or management of health care organizations that provide physician services to the public.

However, the order does not prohibit the AMA from formulating and enforcing reasonable ethical guidelines governing deceptive advertising and solicitation (including unsubstantiated representations). The AMA may also issue guidelines concerning uninvited, in-person solicitation of patients who, because of their particular circumstances, are vulnerable to undue influence.

Finally, the order requires the AMA to amend the *Principles of Medical Ethics* and the Judicial Council's *Opinions and Reports* and to sever all ties for one year with any state or local medical society that engages in conduct of the type prohibited under the order.

Thank you for your cooperation.

Sincerely,

President

## IN THE MATTER OF

# FORBES HEALTH SYSTEM MEDICAL STAFF

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2994. Complaint, Oct. 15, 1979 — Decision, Oct. 15, 1979*

**This consent order, among other things, requires a Pittsburgh, Pa. medical association (Medical Staff), to cease engaging in actions having the purpose or effect of excluding from appointment to Medical Staff applicants who are associated with a Health Maintenance Organization (HMO), or who practice on an other than fee-for-service basis. The association is further prohibited from unreasonably delaying final recommendations on staff privilege applications, and from according discriminatory treatment to HMO-associated members, which may prevent them from providing effective patient care at Forbes. Additionally, respondent would be required to change its Bylaws to conform with the terms of the order.**

## *Appearances*

For the Commission; *Barbara K. Shapiro* and *James E. McCarty.*

For the respondent: *Eric F. Stoer* and *Daniel Masur,* Pittsburgh, Pa.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Forbes Health System Medical Staff has violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The Forbes Health System Medical Staff (hereinafter "Medical Staff") is an unincorporated association, organized and existing under the laws of the Commonwealth of Pennsylvania, and located at 500 Finley St., Pittsburgh, Pennsylvania. It is composed of the more than 300 medical physicians, osteopathic physicians, dentists, and podiatrists who have been granted privileges by the Forbes Health System to attend patients in the Forbes Health System.

PAR. 2. The Forbes Health System (hereinafter "Forbes") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. The physical facilities of Forbes consist of

East Suburban Health Center and Columbia Health Center, each of which is a general hospital, and Pittsburgh Health Center, presently being converted from a general hospital to a skilled nursing center. Each of these facilities is in the greater Pittsburgh area.

PAR. 3. A "Health Maintenance Organization" (hereinafter "HMO") is an organization which, in return for advance periodic payments, accepts contractual responsibility to provide or arrange for the provision of a stated range of health care services to an enrolled population. There are two principal types of HMOs, Individual Practice Associations (hereinafter "IPA") and closed panel group practices. An IPA is an HMO generally open to participation by all members of a defined class of physicians practicing within the IPA's marketing area; usually such physicians are compensated by the IPA primarily on a fee-for-service basis. A closed panel group practice is an HMO in which participation is generally limited to a number of physicians determined by the HMO and selected by the HMO to render service to HMO enrollees on a full or part time basis; usually such physicians are compensated in substantial part without regard to the type or amount of services rendered to individual enrollees of the HMO.

PAR. 4. Except to the extent that competition has been restrained as hereinafter alleged, and depending on their specialties, physicians are in competition with each other and with HMOs, and HMOs are in competition with each other. It is important for the success of HMOs and to the successful practice of their physicians that HMO physicians be granted privileges at hospitals convenient to them and to their patients.

PAR. 5. The Medical Staff has engaged in activities relating to the economic aspects of the practice of medicine, as a result of which activities it is organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. In the course and conduct of their business, HMOs and physicians in the greater Pittsburgh area charge fees and collect payments which, in substantial part, are paid directly or indirectly with federal funds or funds received interstate from insurance companies, employers, and Blue Cross and Blue Shield plans. The flow of said funds is affected by competition among physicians and HMOs in the greater Pittsburgh area and by the acts and practices of the Medical Staff and its members as hereinafter alleged, as a result of which said acts and practices are in and affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 7. Appointment to the Medical Staff is a prerequisite to regular utilization by a physician of the facilities of Forbes. Applications for appointment are reviewed by the Medical Staff, and the recommendation of the Medical Staff is usually followed by the governing body of Forbes, which makes the final decision on staff privileges applications.

PAR. 8. The Medical Staff and its members individually, collectively, and collusively delayed action upon applications for appointment to the Medical Staff and refused to recommend such appointments for the purpose, and with the effect, of preventing and forestalling competition with the Medical Staff's members and an IPA in which its members might participate from the applicants and a closed panel group practice for which the applicants provided medical services.

PAR. 9. As a result of the acts, practices, and methods of competition hereinabove alleged, in the greater Pittsburgh area:

(a) competition among physicians has been restrained;

(b) competition among HMOs has been restrained;

(c) entry of HMOs into physician services markets and the growth of HMOs have been restrained;

(d) HMO physicians have been denied access to important hospital facilities; and

(e) consumers under the care of HMO physicians have been denied access to important hospital facilities.

PAR. 10. The acts, practices, and methods of competition alleged herein, individually and in conjunction with each other, constitute unfair methods of competition and unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act by the respondent herein.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said judgment is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent, Forbes Health System Medical Staff, is an association organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and located at 500 Finley St., Pittsburgh, Pennsylvania.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

## ORDER

### I.

*It is ordered*, That the following definitions shall apply in this order:

A. "Respondent" or "the Medical Staff" means the Forbes Health System Medical Staff, its successors and assigns. The Medical Staff is an unincorporated association consisting of that group of medical physicians, osteopathic physicians, dentists and podiatrists who are granted privileges by the Forbes Health System to attend patients in the Forbes Health System.

B. "Forbes" means Forbes Health System, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania.

C. "Health Maintenance Organization" means an organization which, in return for advance periodic payments, accepts contractual responsibility to provide or arrange for the provision of a stated range of health care services to an enrolled population.

D. "Applicant" means any medical physician, osteopathic physician, dentist or podiatrist who applies for appointment to the Medical Staff to attend patients in the Forbes Health System.

E. "Effective date of this order" means the date of issuance of the Commission's decision and order with respect to this matter.

F. "Completed application" means submission of the application form and all documentation required by the Bylaws of the Medical Staff.

## II.

*It is further ordered,* That respondent shall not directly or indirectly enter into, adhere to, promote or follow any course of conduct, practice or policy, or any agreement or understanding, having the purpose or effect of

(a) excluding any applicant from appointment to the Medical Staff by reason in whole or in part of the fact that such applicant practices medicine, osteopathic medicine, dentistry, or podiatry to any extent on other than a fee-for-service basis, or by reason in whole or in part of the fact that such applicant is associated in any way with a Health Maintenance Organization;

(b) delaying final recommendation by the Medical Staff on the appointment to the Medical Staff of any applicant beyond the first regular quarterly Medical Staff meeting which is eighty or more days after the completed application is submitted, or if the completed application is submitted less than 80 days prior to a regular quarterly medical staff meeting, beyond the end of the next calendar quarter following that in which the completed application is submitted, but in no event beyond 180 days following submission of the completed application; or

(c) according different treatment to a class of Medical Staff members associated in any way with a Health Maintenance Organization, as a result of which the Health Maintenance Organization or any Medical Staff member associated in any way with it may be hindered in or prevented from providing effective patient care at Forbes; *provided, however,* that individual day-to-day hospital staff administrative decisions, such as scheduling and departmental duty assignments on a seniority basis, shall not constitute a violation of this section unless they constitute a pattern of different treatment.

## III.

*It is further ordered,* That within sixty (60) days following the effective date of this order the respondent shall revise the Medical Staff's By-Laws to conform with the requirements of this order.

## IV.

*It is further ordered,* That commencing thirty (30) days after the date of this order the respondent shall mail a copy of this order and of the complaint in this proceeding to each officer and member of the Medical Staff and to each applicant for appointment to the Medical Staff.

## V.

*It is further ordered,* That the respondent shall, within sixty (60) days following the effective date of this order, and thereafter on the first anniversary date of the effective date of this order, and at such other times as the Commission may by written notice to the respondent require, file or cause to be filed with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

## VI.

*It is further ordered,* That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the Medical Staff that may affect compliance obligations arising out of this order.

## VII.

*It is further ordered,* That unless altered, modified, or set aside in accordance with Sections 3.71 and 3.72 of the Commission's Rules of Practice or such similar rules as may be in effect from time to time, this order shall remain in effect for ten (10) years after the effective date of this order.

## IN THE MATTER OF

## INDIANA FEDERATION OF DENTISTS

*Docket 9118. Interlocutory Order, Oct. 16, 1979*

### ORDER GRANTING INTERVENTION TO STATE OF INDIANA

On August 17, 1979, the United States District Court for the Southern District of Indiana issued a judgment ordering the Commission to allow the State of Indiana, by its Attorney General, to intervene in the above-captioned proceeding. In compliance with that judgment we reverse our earlier denial[1] of intervention.

*It is ordered,* That the Commission's order of February 5, 1979, is reversed and that the application for intervention by the State of Indiana be, and hereby is, granted.

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[1] Order Denying Petition of State of Indiana to Intervene, Dkt. 9118 (February 5, 1979) [93 F.T.C. 231].

## IN THE MATTER OF

## HASTINGS MANUFACTURING COMPANY

*Docket 4437. Interlocutory Order, Oct. 22, 1979*

### ORDER DENYING RESPONDENT'S REQUEST FOR CONFIDENTIAL TREATMENT OF ITS PETITION TO REOPEN AND RELATED FILINGS

At the close of its Reply filed on July 31, 1979, respondent Hastings Manufacturing Company requested that its petition to reopen this proceeding and related filings be kept confidential. It argued that the filings "outline areas of vulnerability in Hastings' ability to compete, *i.e.*, the inability to offer a stock lift," and that such information, if made public, could be used by Hastings' competitors to "seriously injure" the firm. The Commission immediately placed the documents *in camera* pending consideration of Hastings' request. On September 6, 1979, the Commission ordered the parties to rebrief the question, *inter alia*, of what legal or factual basis might exist for granting the confidentiality request. Hastings filed additional briefs pursuant to this order on October 1 and 15, 1979, but in them declined to elaborate on the conclusory rationale for confidential treatment that it had advanced earlier.

The Commission's Rules of Practice and the case law establish a strong presumption in favor of opening adjudicative proceedings to the public and making pleadings, exhibits, and other papers in such proceedings available for public inspection. 16 C.F.R. 3.41(a), 4.9(b)(4); *E. Griffiths Hughes, Inc.* v. *FTC*, 63 F.2d 362, 363-64 (D.C. Cir. 1933); *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1186 (1961). The presumption can be overcome, and information placed *in camera*, "only in those unusual and exceptional circumstances when good cause is found on the record." 16 C.F.R. 3.45(b).

Respondent Hastings has failed to establish the presence of such circumstances here. The information that Hastings seeks to protect – namely, references to its inability to offer stock lifts to its customers — has long been a matter of public record. Hastings' inability to offer stock lifts is the direct result of a Commission cease-and-desist order specifically prohibiting the practice. The public has continuously had access to that order for over 30 years through the official published reports of the Commission and the Court of Appeals. *Hastings Manufacturing Co.*, 39 F.T.C. 498 (1944), *aff'd*, 153 F.2d 253 (6th Cir. 1946). Indeed, Hastings has not even attempted to argue that placing the petition and related filings on the public record would disclose a theretofore confidential fact. Instead, Hastings has asserted that such an action would unfairly spotlight and "further emphasize" the fact.

The Commission is aware of no precedent or legal authority for placing adjudicative filings *in camera* in such circumstances, and respondent has pointed to none in its briefs. In fact, since the petition and related filings appear to contain no information that would fall within any of the exemptions to the Freedom of Information Act (5 U.S.C. 552(b)), the Commission would be obliged to produce them to any member of the public who requested access to them.

For the above reasons, the Commission hereby denies respondent's request for confidential treatment of the petition and related filings. Accordingly,

*It is ordered*, That five days from the date of this order, the Secretary shall place on the public record this order, respondent's petition to reopen this proceeding and all subsequently filed briefs, orders, and other papers relating to the petition.

*It is further ordered*, That immediately upon issuance of this order, the Secretary shall telephone respondent's counsel and read the order to such counsel.

### IN THE MATTER OF

# TRANS WORLD ACCOUNTS, INC., ET AL.

### MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9059. Final Order, Oct. 25, 1977 — Modifying Order, Oct. 25, 1979*

**This order further modifies the Commission's July 25, 1979 "Modified Order to Cease and Desist," 44 FR 49650, 94 F.T.C. 141, by inserting paragraph 3 which had been omitted pending its reformulation in accordance with the March 29, 1979 mandate of the Court of Appeals for the 9th Circuit.**

## ORDER ON REMAND

This matter is before the Commission upon remand from the Ninth Circuit Court of Appeals, which affirmed the Commission's findings of violation and enforced the order entered by the Commission save for paragraph 3 thereof. As to that paragraph, the Court remanded to the Commission for reformulation.

The Commission found, *inter alia,* that Trans World Accounts has misrepresented the imminency of legal action in its form collection letters, implying therein that legal action would be taken within very short periods of time following refusal by the alleged debtor to pay a debt, when, in fact, the only response to nonpayment by Trans World would be to send another letter in its form series.

Paragraph 3 of the Commission's order prohibited both misrepresentations of the imminency of legal action, *and* of its likelihood. This was intended to eliminate misrepresentations of the imminency of legal action, and to "fence-in" related misrepresentations of the *likelihood* of legal action. In remanding this order provision, the Court of Appeals applied the terms "vagueness and overbreadth" to that portion of the order fencing-in misrepresentations of the likelihood of legal action. Respondents argue that the Court held that a showing of misrepresentations of the imminency of legal action was insufficient to justify any fencing-in order as to the likelihood of legal action. Complaint counsel argue that the Court made clear that the Commission was not powerless to fence-in misrepresentations of the likelihood of legal action, but merely objected to the manner in which the Commission had done so.

From the Court's opinion, we are not entirely sure what is the source of its objection to the breadth of the Commission's order. Both sides have offered plausible interpretations. For the reasons noted below, we believe that it will be sufficient for the purposes of this proceeding if we adopt the order proposed by respondents.[1]

The Fair Debt Collection Practices Act, 15 U.S.C. 1692, prohibits on pain of $10,000 civil penalties per violation, any "false, deceptive, or misleading representation or means in connection with the collection of any debt", 15 U.S.C. 1692e. Among the deceptive practices specifically enumerated are "The threat to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. 1692e(5).

Respondents suggest that their messages are merely "educational" rather than "threatening." The two attributes are not mutually exclusive, however, and coalesce perfectly in the typical debt collection missive. In our experience, debt collectors are not in business to give free correspondence courses in Creditors' Remedies. When a letter is sent to a debtor for the purpose of collecting a debt, and the writer makes the observation that the debtor "will" or "may" be sued if he or she does not pay, that observation is very likely to be perceived by the debtor as a threat. Why else, after all, would the debt collector have spent money to include that information in its letter?

This commonsense proposition finds support in the decision of the Ninth Circuit, as complaint counsel observe. The Court recognized that statements to the effect that legal action "may" be taken if the debtor did not pay within five days were threats of imminent legal action, not merely abstract statements of creditors' legal rights.

In this case, of course, as the Court and respondents observe, there was no proof that respondents misrepresented the *likelihood* of legal action, and no order against such misrepresentations will enter. But respondents would err grievously to assume that they, therefore, are entitled in the future to misrepresent the likelihood of legal action, particularly given the provisions of the Fair Debt Collection Practices Act cited above.

A valid function is performed by advising debtors of the possibility of legal action if legal action *as to the debtor being informed* is, indeed, a realistic possibility. Where form letters are used to communicate the possibility of legal action, however, some care is necessary to avoid deception. If, for example, debtors allegedly owing small amounts are rarely or never sued in the event that they fail to pay, it is plainly deceitful to threaten such debtors with the reasonable possibility of legal action. The deceit as to those debtors not likely to be sued is not obviated merely because the same form letters are sent to other debtors, owing much larger amounts, who are likely to be sued.

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[1] We have, however, retained the term "legal action" rather than "lawsuit". There is no reason why respondents should be allowed to misrepresent the imminency of any form of "legal action" (*e.g.*, referral to an attorney, levying on a judgment). This is clearly permissible fencing-in, and the Court of Appeals expressed no objection to this formulation in the order that was before it.

A debt collector must, therefore, take care that when threatening legal action, the threat be accompanied by an intention to take such legal action as to the debtor being threatened in the event that payment is not made or a defense not raised by the debtor. In the case of form-letter threats, particular care is needed to assure that such threats are not directed at recipients against whom the collector or creditor would be unprepared to take legal action in the event that payment or a defense were not forthcoming. If particular creditors do not take legal action against debtors owing small amounts, then it is simply dishonest to send form letters on behalf of those creditors to those debtors that in any way suggest that legal action may be taken.

With these observations we shall enter the order proposed by respondents, after substitution of the words "legal action" for "lawsuit".

Therefore, *it is ordered*, That the Commission's "Modified Order to Cease and Desist" dated July 25, 1979, be further modified by the insertion of paragraph 3 to read:

3. Misrepresenting directly or by implication, that legal action with respect to an alleged delinquent debt has been or will be initiated, or misrepresenting in any manner the imminency of legal action.

## IN THE MATTER OF

## ATLANTIC RICHFIELD COMPANY

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9089. Complaint, Oct. 13, 1976 — Decision, Oct. 29, 1979*

This consent order, among other things, requires a Los Angeles, Calif. integrated energy company, engaged in various other activities including those related to copper, to timely divest its interest in the Heddleston copper and molybdenum mineral property and Bear copper mineral property located in Lyon County, Nevada; its entire voting stock interest in the Inspiration Consolidated Copper Company; and its joint venture interest in the Anamax Mining Company, a Pima County, Arizona integrated copper company. Each of the divestitures would have to be to an "Eligible Person," and upon company's failure to divest these interests within specified time periods, divestiture authority must be transferred to a trustee who will be charged to attempt diligently to effect divestiture at fair value within three years from the date of his appointment. Should the trustee not have divested the property within such three-year period, he would be required to divest it within one year at the best price he is reasonably able to obtain. The order additionally provides for arbitration should any dispute regarding the terms of the order arise between respondent and the Commission or trustee.

### *Appearances*

For the Commission: *Ernest A. Nagata, Risa D. Sandler, Paul Breitstein* and *Wallace A. Witkowski.*

For the respondents: *Frances X. McCormack* and *Donald A. Bright,* Los Angeles, Calif. and *Jerome Shapiro, Hughes, Hubbard & Reed,* New York City.

### COMPLAINT

The Federal Trade Commission, having reason to believe that the Atlantic Richfield Company, a corporation subject to the jurisdiction of the Commission, has acquired a part and has entered into an agreement to acquire the whole of the stock of The Anaconda Company, a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the

Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

## I. ATLANTIC RICHFIELD COMPANY

1. Respondent, Atlantic Richfield Company (hereinafter "ARCO") is a Pennsylvania corporation with its principal office and place of business located at 515 South Flower St., Los Angeles, California.

2. In 1975, ARCO had sales of $7,307,854,000 and assets of $7,364,787,000. In that year it was the 15th largest publicly held industrial corporation in the nation in total sales and ranked 13th in assets. ARCO ranked eighth in net income and seventh in total assets among petroleum companies in 1975.

3. ARCO is an integrated energy company which is involved in the exploration for and production of crude oil and natural gas, transportation of oil and gas, the manufacturing, refining and marketing of petroleum and gas products, the production and sale of uranium oxide, exploration for copper, and the ownership of coal reserves and sale of coal. In addition, ARCO is a substantial producer of petrochemicals, plastics and plastic products.

4. At all times relevant herein, ARCO was engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce as commerce is defined in the Clayton Act, as amended, and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

## II. The Anaconda Company

5. Respondent, The Anaconda Company (hereinafter "Anaconda"), is a Montana corporation with its principal office and place of business located at 25 Broadway, New York, New York.

6. In 1975, Anaconda had sales of $1,087,778,000 and assets of $2,007,453,000. In that year it ranked 188th in sales and 71st in assets among publicly held industrial corporations in the United States.

7. Anaconda is principally engaged in the business of producing primary copper, brass mill products, wire mill products, primary aluminum, fabricated aluminum products, uranium oxide and industrial valves. In 1975, it had sales of uranium oxide amounting to $24 million; it had sales of primary copper and copper products amounting to $625.1 million; and it had sales of aluminum and aluminum products amounting to $335.8 million.

8. In 1975, Anaconda was the third ranking producer of copper in

the nation, was a leading national producer of primary aluminum, aluminum products and brass mill products, and is believed to have been the second largest producer of uranium oxide in the nation.

9. At all times relevant herein, Anaconda was engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce as commerce is defined in the Clayton Act, as amended, and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

## III. THE PROPOSED ACQUISITION

10. On March 18, 1976, ARCO made a cash tender offer for approximately 6,013,000 shares, or 27 percent, of Anaconda common stock at a price of $27 per share, or a total transaction price of approximately $162 million.

11. On July 1, 1976, ARCO entered into a preliminary merger agreement with Anaconda and purchased $100 million principal amount of Anaconda's 8 percent conditionally convertible subordinated debentures.

12. On July 26, 1976, the parties entered into a plan and agreement of reorganization (the "merger agreement"). Under the terms of the merger agreement, Anaconda will become a wholly-owned subsidiary of ARCO, and each share of Anaconda common stock will be converted into one-half share of ARCO common stock and a right to receive $6 in cash.

13. A special meeting of Anaconda shareholders regarding the merger proposal is to be held on October 20, 1976. The affirmative vote of 66 2/3 percent of the outstanding shares of Anaconda common stock is required for approval of the proposal. Anaconda's management has recommended shareholder approval of the proposal.

## IV. TRADE AND COMMERCE

14. The relevant geographic market is the United States as a whole. The relevant product markets are the following:

(a) Copper mine production.

(b) Production and sale of refined copper.

(c) Production and sale of uranium oxide.

### A. *Copper Mine Production*

15. Copper mine production in the United States in 1975 was approximately 1.41 million short tons.

16. Concentration in domestic copper mine production is high, with the top four firms accounting for 59.0 percent and the top eight firms accounting for 86.6 percent of production in 1975.

17. Anaconda was the third largest company in mine production in 1975 with 11.1 percent.

18. Barriers to entry into copper mine production are high.

19. ARCO is a likely potential entrant into copper mine production. It has demonstrated interest in entering the industry, and is involved in exploration for copper.

20. ARCO is one of the few most likely potential entrants into copper mine production.

### B. *Refined Copper*

21. Production capacity for refined copper in the United States was 3,027,800 tons at the end of 1975.

22. Concentration in the production and sale of refined copper is high, with the top four firms accounting for 72.0 percent and the top eight firms accounting for 93.1 percent of domestic refining capacity in 1975.

23. In 1975, Anaconda was the fourth largest refiner of copper with 10.1 percent of domestic capacity.

24. Barriers to entry in the production and sale of refined copper are high.

25. ARCO is a likely potential entrant into the production and sale of refined copper. It has demonstrated interest in entering the industry, and is involved in exploration for copper.

26. ARCO is one of the few most likely potential entrants into the production and sale of refined copper.

### C. *Uranium Oxide*

27. Production of uranium oxide in the United States for domestic consumption in 1974 totaled 23,756,565 pounds and in 1975 totaled approximately 23,200,000 pounds.

28. Concentration in the production of uranium oxide is high, with the top four firms accounting for 60 percent and the top eight firms accounting for 84 percent of total United States production in 1974.

#### a. Actual Competition

29. In 1974, Anaconda was the second largest producer and seller of uranium oxide in the nation, with 17.8 percent of total United States production. Anaconda is believed to have remained the second

largest producer in 1975 with approximately 15 percent of total United States production. Anaconda's sales of uranium oxide in 1975 totaled $23,994,000.

30. In 1975, ARCO entered into the production of uranium oxide. A joint venture in which ARCO owns a 50 percent interest began operations in April 1975 with a development period running through the month of July 1975. ARCO's share of the joint venture's 1975 production of uranium oxide amounted to 49,000 pounds, or 0.21 percent of total United States production. ARCO's 1975 shipments of uranium oxide amounted to 32,690 pounds, or 0.13 percent of total domestic shipments. ARCO's sales of uranium oxide in 1975 totaled $652,492.

31. Anaconda is believed to be the fifth largest holder of uranium reserves in the United States. ARCO is also a substantial holder of uranium reserves. Substantial portions of the reserves of each are presently uncommitted.

32. Anaconda and ARCO are competitors in the production and sale of uranium oxide in the United States.

### b. Potential Competition

33. Barriers to entry into the production and sale of uranium oxide are substantial.

34. ARCO is a likely potential competitor on a significant scale in the production and sale of uranium oxide by reason of its demonstrated interest, size and financial resources, and technical capabilities, among other factors.

35. ARCO is one of the few most likely potential competitors on a significant scale in the production and sale of uranium oxide.

## V. EFFECTS OF THE ACQUISITION

36. The effects of the acquisition of Anaconda by ARCO may be substantially to lessen competition or to tend to create a monopoly in the production and sale of refined copper and uranium oxide and in copper mine production throughout the United States in violation of Section 7 of the Clayton Act, as amended, and the effects of the acquisition may be unreasonably to restrain trade and to hinder competition unduly in the production and sale of refined copper and uranium oxide and in copper mine production, thereby constituting a restraint of trade and an unfair act and practice and an unfair method of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended, in the following ways among others:

(a) Significant potential competition between ARCO and producers of copper, including Anaconda, both in copper mine production and in the production and sale of refined copper, will be eliminated.

(b) Actual competition between ARCO and Anaconda in the production and sale of uranium oxide will be eliminated.

(c) Significant potential competition between ARCO and producers of uranium oxide, including Anaconda, will be eliminated.

## VI. VIOLATIONS CHARGED

37. The acquisition of Anaconda common stock by ARCO and the merger agreement between ARCO and Anaconda constitute violations of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

Commissioner Dole did not participate for reason of absence.

## DECISION AND ORDER

The Commission having heretofore issued its amended complaint charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed by interested persons pursuant to Section 3.25(f) of its Rules, and having modified the consent agreement, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Atlantic Richfield Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 515 South Flower St., Los Angeles, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

For purposes of this order, the following definitions shall apply:

(a) "Respondent" means Atlantic Richfield Company, a corporation, and its subsidiaries, successors and assigns.

(b) The term "Subsidiary" with respect to any Person named herein means any corporation in which such named Person owns fifty percent (50%) or more of the outstanding securities having ordinary voting power to elect a majority of the Board of Directors of such corporation (whether or not any other class of security has or might have voting powers by reason of the happening of a contingency).

(c) "Person" means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association or organization, or government or agency or political subdivision thereof, or other business or legal entity, other than Respondent.

(d) "Copper Company" means any Person having Operating Copper Properties within the Restricted Area whose combined average annual copper mine production for the five years immediately preceding an acquisition or Joint Venture which may be subject to the provisions of Paragraphs VIII, IX or X of this order exceeded 10,000 short tons of recovered copper, excepting any such Person which has ceased production of copper from all of its Operating Copper Properties within the Restricted Area for more than two years prior to an acquisition or Joint Venture which may be subject to the provisions of Paragraphs VIII, IX or X of this order.

(e) "The Copper Market" shall consist of all primary copper production from mines in the United States, as reported by the American Bureau of Metal Statistics for the most recent applicable calendar year or years for which statistics have been published prior to the date of an acquisition or Joint Venture which may be subject to the provisions of Paragraphs I through V, VIII, IX or X of this order.

(f) "Operating Copper Property" means any deposit which at the time of an acquisition or Joint Venture which may be subject to the provisions of Paragraphs VIII, IX or X of this order is being mined and (i) which is being operated primarily for the purpose of recovering copper contained in the ore being mined. (ii) for which the dollar value of copper recovered exceeds the dollar value of each other mineral recovered except as provided in Paragraph IX, or (iii) which is producing, as a by-product or co-product of other mine production, copper at an average annual rate of 20,000 short tons or more of recovered copper after adjustment in each year for production lost as a result of strikes or other labor interruptions. Operating Copper Properties shall also include:

(1) Any deposit, which would otherwise be an Operating Copper Property, except that its operation has been suspended or discontinued for less than two years prior to an acquisition or Joint Venture which may be subject to the provisions of Paragraphs VIII, IX or X of this order or whose operations were suspended as a consequence of or in connection with the contemplated acquisition of such deposit by Respondent.

(2) Any Non-Operating Copper Property which at the time of an acquisition or Joint Venture which may be subject to the provisions of Paragraphs VIII, IX or X of this order is under active mine development and is scheduled by its owner or owners to enter into production within five years.

(g) "Non-Operating Copper Property" means any deposit for which its owner or owners contemplate at the time of an acquisition or Joint Venture which may be subject to the provisions of Paragraphs VIII, IX or X of this order (i) that any operation would be primarily for the recovery of copper, (ii) that the dollar value of copper recovered would exceed the dollar value of each other mineral to be recovered except as provided in Paragraph IX, or (iii) that any operation would produce, as a by-product or co-product of its mine production, copper at an average annual rate of 20,000 short tons or more of recovered copper.

(h) (1) Subject to the provisions of subparagraph (2) of this definition "h", "Eligible Person" means all Persons other than Noranda Mines Ltd., INCO Ltd., the Anglo American Group, and any of their respective subsidiaries, and any other Person having more than ten percent (10%) of the Copper Market for any of the three calendar years immediately preceding (i) an attempt by such

Person to acquire a property or interest to be divested under the provisions of Paragraphs I through V of this order, or (ii) an attempt by such Person to enter into a Joint Venture with Respondent which may be subject to the provisions of Paragraphs IX and X of this order. The “Anglo American Group” means the Anglo American Corporation of South Africa Limited, Charter Consolidated Ltd., De Beers Consolidated Mines Ltd., Hudson Bay Mining and Smelting Co., Limited, Minerals and Resources Corporation Ltd., Anglo American Corporation of Canada Limited, and Inspiration Consolidated Copper Company and their respective subsidiaries.

(2) Any Person otherwise eligible under subparagraph (1) of this definition “h” having between five percent (5%) and ten percent (10%) of the Copper Market for any of the three calendar years immediately preceding any of the events described in sections (i) and (ii) of subparagraph (1) of this definition “h”, shall be considered to be an “Eligible Person” only upon prior approval of the Commission.

(i) “Ineligible Person” means all Persons other than those classified as “Eligible Persons” in definition “h.”

(j) “Divest” means any act by which Respondent sells, transfers, conveys or relinquishes ownership, possessory interest and control in a property subject to this order.

(k) “Fair Value” means such consideration, taking into account all terms and conditions of transfer and payment therefor, that would be exchanged between a willing buyer and a willing seller for the transfer of a property, where neither buyer nor seller was under any constraints or impediments, including any obligation on the part of the seller to transfer the property within a specified period, whether or not that fact were known to the buyer.

(l) “Joint Venture” means a joint business undertaking by two or more Persons, for the purpose of carrying out a particular objective or objectives, pursuant to an agreement which provides for (i) joint contributions to capital, which may include tangible and intangible assets, (ii) sharing of profits or production in kind, and (iii) a mutual right to control, *provided, however,* that this definition shall not include any venture in which Respondent presently participates, and, *provided further,* that a holder of a right to a Deferred Compensation Interest shall not for that reason be a participant in a Joint Venture.

(m) “Restricted Area” means the United States, including Puerto Rico.

(n) “Deferred Compensation Interest” means any promise of deferred payment, including any royalty, carried interest, production payment or other interest that is not coupled with a right to participate in the operation or management of a property, except to the extent necessary to protect the holder's Deferred Compensation Interest upon default or where actions by the purchaser or operator threatened destruction of, or substantial harm to, the holder's Interest. Payment to the holder of a Deferred Compensation Interest may include cash or production in kind. Payment to Respondent with respect to a Deferred Compensation Interest shall not exceed either (i) ten percent (10%) of production in kind, (ii) ten percent (10%) of gross proceeds, (iii) ten percent (10%) of net profits, or (iv) ten percent (10%) of net smelter returns resulting from the operation of a property subject to such Interest.

(o) "Major Change of Condition" means an involuntary reduction in Respondent's domestic production of copper whereby its total domestic copper mine production in any calendar year fails to exceed 110,000 short tons of recovered copper and it appears that such reduced level of production (absent any act permitted by Paragraph XI) is unlikely to be materially increased above 110,000 short tons of recovered copper, annual production, for a two-year period following such year of initial reduction. Such involuntary reduction means:

(i) acts of God including fire, flood and earthquakes, unexpected variations or changes in the technical characteristics of ore deposits, rebellion, riot, civil unrest or war, whether declared or not;

(ii) changes in operating, raw materials, transportation or other costs beyond the direct control of Respondent; or

(iii) the action or inaction of any federal, state or local government entity, including without limitation actions promulgating, modifying or refusing to modify environmental, health, safety or other regulations

as a result of which, continued operations at previous levels at any copper property or facility, including any concentrator, smelter or refinery of Respondent, would result in net operating losses as measured by the difference between actual or expected operating revenues and actual or expected cash costs of production, along with any actual or expected capital charges directly related to the involuntary reduction, for the affected properties and facilities. Further, Respondent's copper mine production in any year shall be adjusted by the amount of production lost through any strike or other labor interruption (whether legal or illegal, authorized or unauthorized), as measured by the actual production in the previous year for the period corresponding to the period of strike or labor interruption (unless a strike or labor interruption was in effect during such prior period, in which case the measurement shall be based on the next closest year during which there was no strike or labor interruption during the corresponding period), provided that if an involuntary reduction, as defined herein, occurs prior to a strike or labor interruption, the production lost as a result of strike or labor interruption shall be measured by the prior year's production adjusted downward by the effect of the involuntary reduction.

(p) "Catastrophic Change of Condition" means a Major Change of Condition whereby Respondent's total domestic copper mine production in any calendar year fails to exceed 80,000 short tons of recovered copper.

(q) "Limitation Period" means the period commencing at the Effective Date of this order and terminating on the fifth anniversary of such date; *provided, however,* that: (i) should Respondent fail to divest four of the five properties subject to Paragraphs I through V within two calendar years of the Effective Date of this order, the Limitation Period shall be extended day for day by the time in excess of two calendar years from such Effective Date taken by Respondent to divest the fourth property which is ultimately divested, and (ii) the Limitation Period shall be extended day for day by the time in excess of four calendar years from such Effective Date taken by Respondent to divest the fifth property which is ultimately divested (with any additional time resulting from the operation of clauses (i) and (ii) to be calculated concurrently rather than consecutively); and, *provided further,* that in no event shall the Limitation Period extend beyond the tenth anniversary of the Effective Date of this order.

(r) "Anamax" means Anamax Mining Company, a partnership organized under the laws of the State of Arizona between the Anaconda Company and Amax Arizona, Inc., a subsidiary of Amax.

(s) "Effective Date" means the day on which this order becomes final by service upon Respondent by the Commission.

## I

*It is ordered,* That within three years of the Effective Date of this order, Respondent shall divest its entire interest in the Heddleston property which shall include all fee lands, patented mining claims, unpatented mining claims, leases and other interests, including water rights appurtenant thereto, located in the following legal subdivisions situated in Lewis and Clark County, State of Montana, to wit:

Township 14 North, Range 6 West, Montana Principal Meridian

Sections 16 to 22, inclusive; 27 to 29, inclusive; and 31 to 34, inclusive.

Township 15 North, Range 7 West, Montana Principal Meridian

Sections 20 to 22, inclusive; 27 and 28,

to an Eligible Person, *provided, however,* that Respondent may continue to hold a Deferred Compensation Interest. Should Respondent, after diligent efforts, fail to divest the Heddleston property at Fair Value within the specified three-year period, it shall transfer authority to divest the property to a Trustee as provided in Paragraph XII.

## II

*It is further ordered,* That within four years of the Effective Date of this order, Respondent shall divest its entire interest in the Ann Mason property which shall include all fee lands, patented mining claims, unpatented mining claims, leases and other interests, including water rights appurtenant thereto, located in the following legal subdivisions situated in Lyon County, State of Nevada, to wit:

Township 13 North, Range 24 East, Mount Diablo Base and Meridian

Section 10: SE 1/4
Section 11: S 1/2
Section 12: SW 1/4
Section 13: W 1/2
Section 14: All
Section 15: E 1/2
Section 22: NE 1/4
Section 23: N 1/2
Section 24: NW 1/4

to an Eligible Person, *provided, however,* that Respondent may continue to hold a Deferred Compensation Interest. For purposes of this Paragraph II, Amax and its subsidiaries shall be considered Eligible Persons if, with respect to the divestiture of the Respondent's interest in Anamax provided in Paragraph V, Respondent shall have obtained from Amax or its subsidiaries and/or Anamax substantially the entire Helvetia Property, as described in Paragraph V(2), subject to the retention by Anamax or Amax or its subsidiaries of a Deferred Compensation Interest in a magnitude not to exceed that set forth in the last sentence of definition "n." Should Respondent, after diligent efforts, fail to divest the Ann Mason property at a Fair Value within such four year period, it shall transfer authority to divest the property to a Trustee as provided in Paragraph XII.

III

*It is further ordered,* That within four years of the Effective Date of this order, Respondent shall divest its entire interest in the Bear property which shall include all fee lands, patented mining claims, unpatented mining claims, leases and other interests, including water rights appurtenant thereto, located in the following legal subdivisions situated in Lyon County, State of Nevada, to wit:

Township 14. North. Range 25 East. Mount Diablo B.M.

Section 33: E 1/2 SW 1/4, W 1/2 SE 1/4, S 1/2 NE 1/4 SE 1/4

Township 13 North. Range 25 East. Mount Diablo B.M.

Section 3: SW 1/4 NW 1/4, N 1/2 NW 1/4 SW 1/4

Section 4: NE 1/4, E 1/2 E 1/2 NW 1/4, N 1/2 N 1/2, SE 1/4

to an Eligible Person, *provided, however,* that Respondent may continue to hold a Deferred Compensation Interest. For purposes of this Paragraph III, Amax and its subsidiaries shall be considered Eligible Persons if, with respect to the divestiture of the Respondent's interest in Anamax provided in Paragraph V, Respondent shall have obtained from Amax or its subsidiaries and/or Anamax substantially the entire Helvetia Property, as described in Paragraph V(2), subject to the retention by Anamax or Amax or its subsidiaries of a Deferred Compensation Interest in a magnitude not to exceed that set forth in the last sentence of definition "n." Should Respondent, after diligent efforts, be unable to divest the Bear property at Fair Value within such four year period, it shall transfer authority to divest the property to a Trustee as provided in Paragraph XII.

IV

*It is further ordered,* That within one year of the Effective Date of this order, Respondent shall divest its entire voting stock interest (including any common or preferred stock which it may own at the time of disposition) in Inspiration Consolidated Copper Company, or any successor thereto, to an Eligible Person. For purposes of this Paragraph IV, the Anglo-American Group shall be considered to be an Eligible Person. Should Inspiration Consolidated Copper Company, or any successor thereto, fail or refuse to redeem for any reason, including lack of capital or earned surplus sufficient to permit lawful redemption, the common or preferred stock held by Respondent at the time such stock is tendered for redemption, Respondent shall have an additional two years to dispose of its interest. Should Respondent, after diligent efforts, fail to divest its interest in Inspiration Consolidated Copper Company or any successor thereto at Fair Value within the specified additional two year period, Respondent shall transfer authority to divest its interest to a Trustee as provided in Paragraph XII. Fair Value for purposes of this Paragraph IV shall be defined to be any consideration equal to or greater than $33 a share, or the equivalent thereto after adjustment for any stock dividends or stock splits which may occur after March 1, 1979.

## V

*It is further ordered,* That within five years of the Effective Date of this order, Respondent shall Divest its interest in Anamax to an Eligible Person. Anamax is engaged in the mining of copper in Pima County, Arizona, from the Twin Buttes Mine and the Palo Verde Mine, the latter mine operated by the Eisenhower Mining Company, a partnership with Asarco, Inc. Anamax's current annual production capacity from the two mines is 120,000 tons of recovered copper, including 35,000 tons of electrowon refined copper, and Anamax intends to produce uranium from copper ores. For purposes of this Paragraph V Amax and its subsidiaries shall be considered to be Eligible Persons.

*Provided, however,* that notwithstanding the foregoing:

(1) It is intended that the divestiture of Respondent's interest in Anamax is to be accomplished in such a manner as to avoid a termination of the Anamax partnership for federal income tax purposes. It is recognized that under Section 708(b)(1)(B) of the Internal Revenue Code, and the pertinent Treasury Regulations, the partnership will be treated as having terminated for tax purposes in the event that there is a sale or exchange of 50% or more of partnership capital and profits within a twelve month period; such a tax termination would potentially generate severe adverse tax consequences. In order to avoid such a termination, Respondent shall

not be required to divest its entire interest in Anamax on condition that:

(a) Respondent shall, in any event, divest at least so much of its interest in Anamax as to constitute a divestiture of a 45% interest in the capital of Anamax (as the term "capital" is used in Section 708 of the Internal Revenue Code of 1954 in its present form or as hereafter amended or in any corresponding provision of any subsequent federal tax law), provided that notwithstanding any other provision of this order said divestiture shall include, for purposes of the 45% divestiture requirement, divestiture by way of a total or partial liquidation of Respondent's interest in Anamax as provided in subparagraph (2) or a total or partial reallocation of Respondent's interest within Anamax as provided in subparagraphs (3) and (4) and/or a sale, exchange, transfer or other disposition of such interests or any combination of the foregoing;

(b) In complying with its obligations under this subparagraph (1), Respondent shall first propose a divestiture which will reduce its interest in Anamax to an interest which shall not exceed an interest reasonably adequate to prevent a termination of the Anamax partnership for federal tax purposes, provided, for purposes of this subparagraph (1)(b), said divestiture shall include divestiture by way of a total or partial liquidation of Respondent's interest in Anamax as provided in subparagraph (2) or a total or partial reallocation of Respondent's interests within Anamax as provided in subparagraphs (3) and (4) and/or a sale, exchange, transfer or other disposition of such interests or any combination of the foregoing. Respondent may then seek a ruling from the Internal Revenue Service to the effect that the divestiture proposed under this subparagraph (1)(b) will not cause a termination of Anamax for purposes of such Section 708 in its present form or as hereafter amended or under any corresponding provision of any subsequent federal tax law. Should the Internal Revenue Service decline to issue such ruling or fail to issue such ruling within a period of seven months after the ruling is requested, Respondent shall effect a divestiture pursuant to subparagraph (1)(a).

(c) Thirty (30) days prior to filing any request for such ruling as is described under subparagraph (1)(b) above, Respondent shall provide a copy of such request to the Commission, and the Commission thereafter will have twenty (20) days in which to submit the question of Respondent's compliance with subparagraph (1)(b) above to arbitration pursuant to Paragraph XIX or pursuant to such other procedure as the Commission and Respondent may then agree to.

Any arbitration held under this subparagraph (1)(c) shall be solely for the purpose of determining whether Respondent's proposed divestiture, as set forth in the request for ruling, constitutes a reasonable effort to comply with the provisions of subparagraph (1)(b). The arbitrator shall be required to render his decision within seventy-five (75) days of the date the Commission shall submit the proposed divestiture to arbitration; should the arbitrator decide in Respondent's favor or fail to issue a final decision within such seventy-five (75) day period, Respondent shall be entitled to go forward with the proposed divestiture, which shall be deemed to be in compliance with the provisions of subparagraph (1)(b);

(d) If the Commission believes that a ruling requested under subparagraph (1)(b) should be issued, Respondent will not object to the Commission's submission of such views to the Internal Revenue Service; and

(e) Respondent's remaining non-divested interest in Anamax, whether retained pursuant to subparagraph (1)(a) or (1)(b), but excluding any interest retained or received by Respondent as provided in subparagraphs (2), (3) and (4), shall be arranged so that Respondent will receive cash or other monetary consideration, rather than take copper in kind, in connection with Anamax's continued operations, provided that such arrangement shall not be required if Respondent (i) seeks the concurrence of Anamax and any partner or partners therein and fails to receive such concurrence within eight months after such concurrence is requested, or (ii) seeks a ruling from the Internal Revenue Service, and the Service declines or fails to issue a ruling within eight months after such ruling is requested, that such arrangement, combined with any other changes in Respondent's interest in Anamax, will not cause a termination of Anamax for purposes of Section 708 of the Internal Revenue Code of 1954 in its present form or as hereafter amended or in any corresponding provision of any subsequent federal tax law.

(2) Notwithstanding anything in subparagraph (1) or otherwise contained in this order, Respondent may receive from Anamax in total or partial liquidation of or in exchange for Respondent's interest therein (a) all or a portion of Anamax's interest in any one or more of the properties in the following townships situated in Pima County, State of Arizona, including East Helvetia, West Helvetia, Empire Ranch and Cienega Ranch (the "Helvetia Property"), to wit:

Township 18 South, Ranges 15, 16, 17 and 18 East
Township 19 South, Ranges 15, 16, 17 and 18 East,

best copy available

> Township 20 South, Ranges 17 and 18 East, all Gila and Salt River Base and Meridian,

which property is presently owned or controlled by Anamax, and/or (b) current or deferred cash payments from Anamax (any deferred cash payments may be evidenced by Anamax's promissory note or notes).

(3) Nothing in subparagraph (1) or otherwise contained in this Order shall preclude Respondent from effecting the divestiture of its interests in Anamax through a reallocation of partnership interests within Anamax as a result of which Respondent retains or increases an interest in the Helvetia Property, which may be held within, and be owned by, the Anamax partnership, in which Respondent may have an interest, provided that Respondent's interests in other partnership capital (other than that subject to this subparagraph (3)) shall not exceed the amounts permitted by subparagraph (1), and further provided that any management rights which may be held by Respondent in Anamax, attributable to an interest held under this subparagraph (3), shall be limited to the Helvetia Property, and do not permit Respondent to participate in the active management or control of those other portions of Anamax divested pursuant to this Paragraph V.

(4) Notwithstanding anything in subparagraph (1) or otherwise contained in this order, Respondent may retain, as a partner in Anamax or otherwise, the right to take in kind, or the right to sell, any minerals produced by Anamax other than uranium and copper (except that this exclusion shall not apply to uranium and copper produced as a consequence of the operation of the Helvetia Property, as provided under subparagraph (3), or as a consequence of the provisions of subparagraph (1)(e)).

*Provided further,* Respondent shall use its best efforts to maintain in force to the time of divestiture contemplated by this Paragraph V those provisions in the Partnership Agreement, as presently amended, which provide that should Respondent's interest in Anamax be reduced to less than 45%, it shall cease to be entitled to equal participation in the management of the partnership and, further, that should its interest be reduced to less than 20%, such remaining interest may, under certain circumstances, be purchased at the option of Amax.

Provided further, that Respondent shall not make any voluntary contribution to Anamax which would have the effect of increasing its percentage partnership interest in Anamax, provided that Respondent shall remain free to make any contributions necessary to meet its obligations pursuant to the Partnership Agreement, as amended, any production payment agreement in effect on the Effective Date of this order or the mining plan in effect on the Effective Date of this order or any successor mining plan adopted under the Partnership Agreement, as amended, provided that the implementation of any such successor plan shall not increase Respondent's percentage partnership interest in Anamax.

And provided further, that should Respondent, after diligent efforts, be unable to divest its interest in Anamax, as provided by this Paragraph V at Fair Value within such five year period, it shall transfer authority to divest such interest, to the extent required by this Paragraph V, to a Trustee as provided in Paragraph XII.

## VI

*It is further ordered*, That Respondent, as part of its compliance with provisions in Paragraphs I, II, III and V, shall undertake reasonable steps to advertise the availability for acquisition of the properties subject to said respective paragraphs. In discharge of this obligation, Respondent shall advertise each property, so long as it has not been divested, twice yearly in *Engineering and Mining Journal*, *Mining Congress Journal*, *Mining Engineering*, *London Mining Journal*, and *The Wall Street Journal*. Such advertisements shall contain a description of the property offered at least as detailed as the description contained in this order, and shall refer inquiring persons to an employee of Respondent active in Respondent's efforts to sell such property, giving his address and telephone number. In addition, Respondent shall within 30 days of the Effective Date of this order mail a description of each property, including the information set forth above, to no less than 50 Eligible Persons engaged in mining within the United States. Respondent agrees that it will negotiate in good faith with all Persons seeking to acquire any of the properties subject to Paragraphs I, II, III and V who are Eligible Persons, who appear to be genuinely interested in acquiring such property for their use or on behalf of an Eligible Person, and who demonstrate to Respondent their financial ability to accomplish purchase at Fair Value. Respondent shall make available to such *bona fide* prospective purchasers, to the extent it has the legal right to do so, access to factual data, including drill hole locations, logs and assay reports, and will permit escorted on-site inspections of the properties, subject to Respondent having obtained written agreement that such Person will hold confidential any information disclosed, will use such information solely for the purpose of evaluating the property and will not use such information for any business or competitive purpose. With respect to Anamax, Respondent will use its best efforts to obtain the consent of Amax or its subsidiaries to the disclosure of factual data to prospective purchasers consistent with the provisions of the preceding sentence. Respondent shall not be required to deal with Persons purporting to act as agents for certain unknown or unspecified buyers whether or not such Persons state they intend to collect a commission or other consideration from Respondent.

## VII

*It is further ordered*, That with respect to the divestitures required by Paragraphs I, II, III and V, this order shall not be deemed to prohibit Respondent (i) from accepting a Deferred Compensation Interest or (ii) from retaining, accepting and enforcing a promissory note, mortgage, deed of trust, lien or other similar interest, not to exceed 25 years in duration, that is not coupled with a right to participate in the operation or management of the property, except upon default or where actions by the purchaser or operator threaten destruction of, or substantial harm to, such interest or interests of Respondent and then only to the extent necessary to protect such interests, for the purpose of securing to Respondent payment of the price agreed upon by Respondent and the purchaser in connection with each divestiture; *provided, however*, that if Respondent by enforcement or settlement of such interest, or for any other reason, regains direct or indirect ownership or control of any of the divested assets, properties, rights and privileges, tangible and intangible, Respondent shall, consistent with the provisions of this order, redivest such ownership or control as expeditiously as possible, but in no event beyond two years of the time of reacquisition; *provided further*, that should Respondent fail to redivest any such reacquired ownership or control within two years as specified in this Paragraph VII, Respondent shall transfer authority to divest the property to a Trustee as provided in Paragraph XII.

## VIII

*It is further ordered*, That during the Limitation Period Respondent shall not acquire, through purchase, lease or other such transaction which would confer upon Respondent ownership or control or possessory interest, any Operating Copper Property within the Restricted Area from any Copper Company, without the prior approval of the Commission; however, this restriction shall not apply to any acquisition of any ore deposit or deposits in the aggregate of less than 250,000 tons of recoverable copper which (i) is adjacent to or nearby an ore deposit owned or controlled by Respondent prior to such acquisition, (ii) would, in the interests of adopting efficient mining practices, be consolidated with Respondent's deposit for mining purposes and share a common ore concentrator with Respondent's deposit and (iii) does not contain recoverable copper in excess of the amount of recoverable copper in such adjacent or nearby deposits owned or controlled by Respondent immediately prior to the acquisition.

## IX

*It is further ordered*, That during the Limitation Period, Respondent shall not participate in any operating Joint Venture with any Ineligible Person with respect to any Operating Copper Property within the Restricted Area, provided further that no Joint Venture permitted by this Paragraph IX shall engage in the joint marketing or sale of copper, in whatever form, produced by the Joint Venture.

*Provided, however*, that nothing in this Paragraph IX or Paragraph X shall prevent Respondent from participating in the State of Alaska during the Limitation Period in (i) any operating Joint Venture with respect to an Operating Copper Property owned or controlled by Respondent prior to the establishment of such Joint Venture or (ii) any Joint Venture engaged in the development or construction of mine facilities with respect to a Non-Operating Copper Property owned or controlled by Respondent prior to the establishment of such Joint Venture, so long as:

(i) No more than a 40 percent (40%) interest in the capital and profits in any such Joint Venture is held, singly or in the aggregate, by Ineligible Persons;

(ii) Neither Kennecott Copper Corp., Phelps-Dodge Corporation, Newmont Mining Corp. nor Asarco Inc. participates in any such Joint Venture, without prior approval of the Commission; and

(iii) Any such Joint Venture shall not engage in the joint marketing or sale of copper, in whatever form, produced by such Joint Venture.

*Provided further*, that nothing in this Paragraph IX or in Paragraph X shall prevent Respondent from participating in the State of Alaska during the Limitation Period in (i) any operating Joint Venture with respect to an Operating Copper Property owned or controlled by a Person other than Respondent prior to the establishment of such Joint Venture, or (ii) any Joint Venture engaged in the development or construction of mine facilities with respect to a Non-Operating Copper Property owned or controlled by a Person other than Respondent prior to the establishment of such Joint Venture so long as:

(i) Respondent holds no more than a 40 percent (40%) interest in the capital and profits in any such Joint Venture;

(ii) No more than two Ineligible Persons may participate with Respondent in any such Joint Venture; and

(iii) Any such Joint Venture shall not engage in the joint marketing or sale of copper, in whatever form, produced by such Joint Venture.

*And provided further,* that for purposes of this Paragraph IX and Paragraphs VIII and X with respect to ore deposits in the State of Alaska, clause (ii) in definition "f" shall read "(ii) for which the dollar value of copper recovered exceeds the dollar value of all other minerals recovered" and clause (ii) in definition "g" shall read "(ii) that the dollar value of copper recovered would exceed the dollar value of all other minerals to be recovered;" definitions "f" and "g" shall in all other respects remain unchanged.

## X

*It is further ordered,* That during the Limitation Period, Respondent shall not participate in any Joint Venture engaged in the development or construction of mine facilities with any Ineligible Person with respect to any Non-Operating Copper Property within the Restricted Area, provided further that no Joint Venture permitted by this Paragraph X shall engage in the joint marketing or sale of copper, in whatever form, subsequently produced by the Joint Venture.

*Provided further,* that nothing contained in Paragraphs VIII, IX and X shall prevent Respondent, in the interest of adopting efficient mining practices at a specific mining property, from acquiring or receiving, or in turn transferring or delivering, or swapping, copper deposits, ore, or concentrates from, to, or with another Copper Company or Companies owning or operating a copper property adjacent to or overlapping copper properties of Respondent, provided, however, that such transactions shall involve no more of the respective adjacent or overlapping copper properties than is reasonably necessary to such purpose.

## XI

*It is further ordered,* That in the event of a Major Change of Condition, Respondent shall be entitled within the Limitation Period to make one acquisition or to enter into one Joint Venture which would otherwise be prohibited by Paragraphs VIII, IX or X, provided that such acquisition or Respondent's share of such Joint Venture shall not increase Respondent's total domestic copper mine production above 145,000 short tons of recovered copper a year, and further provided that no Joint Venture permitted by this Paragraph XI shall engage in the joint marketing or sale of copper, in whatever form, subsequently produced by the Joint Venture. In the event of a Catastrophic Change of Condition, Respondent shall be entitled to make one such acquisition or enter into one such Joint Venture without limitation as to size.

## XII

*It is further ordered,* That should it be necessary to appoint a Trustee with respect to a property subject to Paragraphs I through V, such Trustee shall be appointed by agreement of Respondent and the Commission, acting through the Director of the Bureau of Competition or such other person as the Commission may designate. If they are unable to agree, then each shall nominate a representative, who, along with a third person appointed under the Commercial Rules of the American Arbitration Association, shall select the Trustee by majority vote. The Trustee shall be charged to attempt diligently to effect divestiture at Fair Value within three years from the date of his appointment. Should the Trustee not have divested the property within such three year period, he shall divest it within one year at the best price he is reasonably able to obtain. The functions and obligations of the Trustee are set forth in Appendix I. Nothing shall prevent Respondent from divesting a property after the appointment of a Trustee.

## XIII

*It is further ordered,* That Respondent may not divest more than two of the properties subject to Paragraphs I through V to any one Eligible Person, including the subsidiaries of such Person, without the prior approval of the Commission, except that Amax and its subsidiaries may purchase the properties subject to Paragraphs II, III and V consistent with the provisions of said Paragraphs.

## XIV

*It is further ordered*, That nothing in this Order shall prohibit:

(1) Acquisition by Respondent of all or part of the securities or assets of its subsidiaries.

(2) Formation of subsidiaries by Respondent and the transfer thereto of assets of Respondent or of other subsidiaries.

## XV

*It is further ordered*, That Respondent may apply for relief to the Commission upon the occurrence of any change subsequent to the Effective Date of this order which substantially alters the competitive situation in the copper industry or which materially affects the copper operations of the Respondent.

## XVI

*It is further ordered*, That jurisdiction is retained by the Commission for the purpose of enabling the parties to this order to apply to i at any time for such future orders and directions as may b necessary or appropriate for the construction or modification of an of the provisions hereof; *provided, however*, that in no event shall th provisions of this order be enlarged or extended to require Respondent to divest properties or interests other than those specified i Paragraphs I, II, III, IV and V or to limit or otherwise restric Respondent's activities other than as set forth in Paragraphs VII IX and X. Any order of the Commission construing or declining construe or modifying or declining to modify any of the provisions this order shall be appealable, to the extent provided by statute, any court of any competent jurisdiction.

## XVII

*It is further ordered*, That pending any divestiture required by th order, Respondent shall not knowingly cause or permit the deterioration of the assets and properties specified in Paragraphs I, II, III a V in any manner that impairs the marketability of any such ass and properties. Respondent may, but shall not be required to, ma capital expenditures for the improvement of any such assets a properties to an extent consistent with other provisions of this ord

## XVIII

*It is further ordered*, That in addition to the requirements

Paragraphs I through V concerning the divestitures ordered therein, none of the stock, assets, properties, rights, privileges or interests of whatever nature, tangible or intangible, ordered to be divested shall be sold or transferred, directly or indirectly, to any Person who is at the time of the divestiture an officer, director, employee or agent of, or under the control or direction of, Respondent, or to any person who owns or controls, directly or indirectly, more than one percent (1%) of the outstanding shares of the capital stock of Respondent.

## XIX

*It is further ordered,* That any dispute between Respondent on the one hand and the Commission or the Trustee on the other hand arising under Paragraphs I through XII shall be resolved at the option of Respondent, the Commission or the Trustee by arbitration undertaken pursuant to the Commercial Rules of the American Arbitration Association.

## XX

*It is further ordered,* That within sixty (60) days from the Effective Date of this order, and three times annually thereafter, until it has fully complied with Paragraphs I through V of this order, Respondent shall submit a verified report in writing to the Commission setting forth in reasonable detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include: (a) a specification of the steps taken by Respondent to make public its desire to divest the properties specified in Paragraphs I through V, (b) a list of all Persons or organizations to whom notice of divestiture has been given, and (c) a summary of all negotiations undertaken, giving the identity and address of all interested persons or organizations and indicating whether the negotiations are concluded or are still underway, provided, however, that Respondent may delete from the report the identity of persons it has negotiated with if, in its business judgment, the disclosure of such information as a consequence of a request or suit by any Person or any committee or subcommittee thereof would hinder its efforts to divest any property subject to Paragraphs I through V at Fair Value. In each case, Respondent will make available for inspection in Washington D.C. a complete copy of its report containing such deleted information which may be reviewed by, but not copied by, personnel from the Commission. Upon request from the Commission, Respondent will make available such additional information relating to any specified negotiation which is reasonably necessary to enable the Commission to review Respondent's efforts to comply with the provisions of Paragraphs I through V of this order; *provided, however,* Respondent may limit disclosure of confidential or proprietary information in accord with the procedures set forth in the preceding sentence.

## XXI

*It is further ordered,* That Respondent shall notify the Commission at least thirty (30) days prior to any change in its corporate structure (such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation) which may affect compliance obligations arising out of this order.

## XXII

*It is further ordered,* that for so long as the Limitation Period is in effect, Respondent shall notify the Commission at least sixty (60) days in advance of (i) any acquisition by it of any Operating Copper Property or Non-Operating Copper Property within the Restricted Area from any Copper Company or (ii) any participation by it in any operating Joint Venture with respect to any Operating Copper Property within the Restricted Area, or (iii) any participation by it in any Joint Venture engaged in the development or construction of mine facilities with respect to any Non-Operating Copper Property within the Restricted Area. If any such acquisition or Joint Venture is to be undertaken pursuant to any Major Change of Condition or Catastrophic Change of Condition, Respondent shall provide at the time of notification above, a description of such Major Change of Condition or Catastrophic Change of Condition.

## XXIII

*It is further ordered,* That Respondent shall, upon written request of the Secretary of the Commission or the Director of the Bureau of Competition of the Commission made to Respondent at its principal office for the purpose of securing compliance with this order, and for no other purpose, permit duly authorized representatives of the Commission, subject to any legally recognized privilege:

(1) Reasonable access during the office hours of Respondent, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda, and other records and documents in Respondent's

possession or control which relate materially and substantially to any matter contained in this Order.

(2) An opportunity, subject to the reasonable convenience of Respondent, to interview officers or employees of Respondent, who may have counsel present, regarding such matters.

The foregoing provision shall not be interpreted to provide any access for the Commission to records relating to any of the business activities of the Respondent other than its copper operations subject to this order.

## XXIV

*It is further ordered*, That no acquisition, Joint Venture or other act or transaction to which Respondent is a party shall be deemed immune or exempt from the provisions of the antitrust laws by reason of anything contained in this order.

IN THE MATTER OF

## KARR PREVENTATIVE MEDICAL PRODUCTS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9109. Complaint, April 26, 1978—Decision, Oct. 29, 1979*

This consent order, among other things, requires a Beverly Hills, Calif. firm and its controlling officer, engaged in the advertising and sale of "Acne-Statin," an acne "treatment," to cease disseminating, or causing the dissemination of advertisements that represent that Acne-Statin, or any other product of similar chemical composition, cures acne, eliminates or reduces the causes of acne blemishes, and is superior to all other acne preparations and soap for the antibacterial treatment of acne. They are required to have a reasonable basis at the time of dissemination for representations relating to product efficacy, performance, characteristics or properties, or the result of the use of any product; and prohibited from misrepresenting the extent to which a product has been tested or the results of such tests. Additionally, the firm and its controlling officer are required to establish an independent, irrevocable trust account containing $175,000 to be used to pay half of all requests for restitution by Acne-Statin purchasers.

### *Appearances*

For the Commission: *Mark A. Heller, Ira Nerken* and *Ross D. Petty.*

For the respondents: *George Miron, Wyman, Bautzer, Rothman & Kuchel,* Washington, D.C.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Karr Preventative Medical Products, Inc. (hereinafter "KPMP"), and Atida H. Karr, M.D., as a corporate officer and an individual, hereinafter at times referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. "KPMP" is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 9615 Brighton Way, Beverly Hills, California.

PAR. 2. Atida H. Karr, M.D. is an individual and a corporate president, treasurer, director and shareholder of "KPMP". She formulates, directs and controls the acts and practices of "KPMP," including the acts and practices described herein.

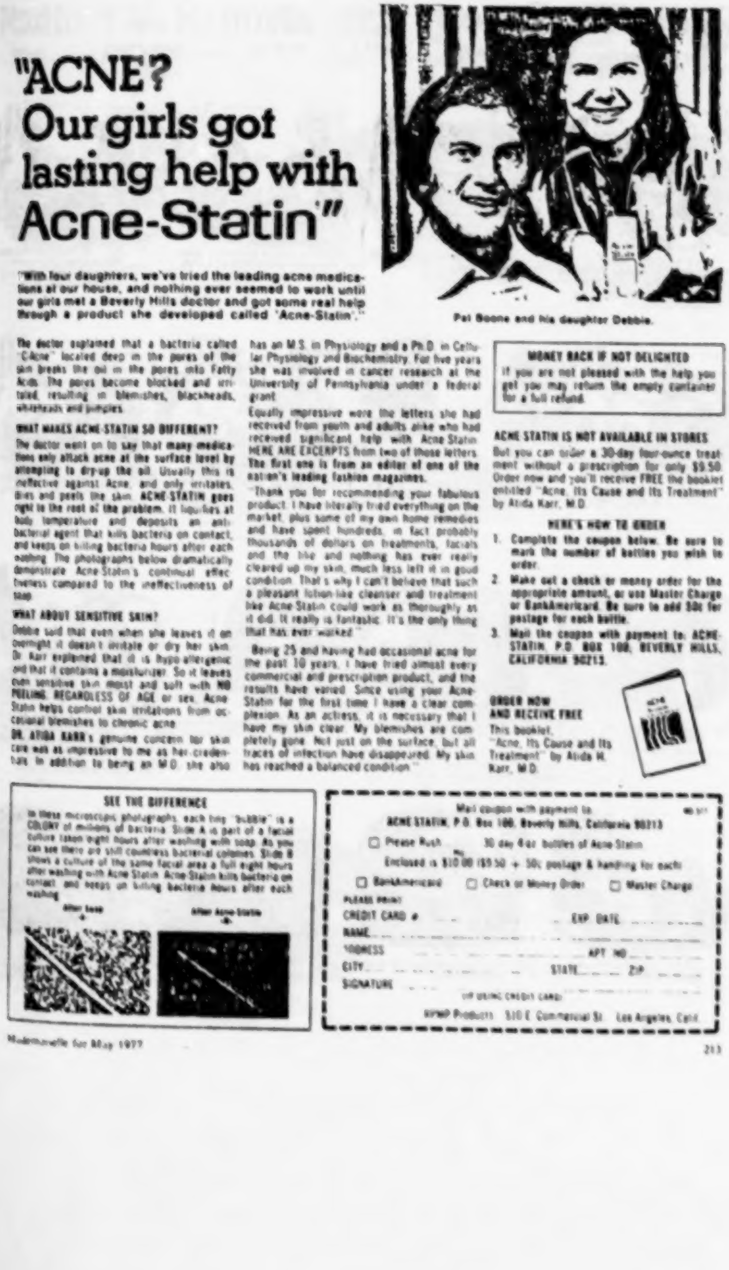
PAR. 3. Respondent "KPMP" is a privately held corporation which was organized and is maintained for the purpose of promoting and advancing the interests of its two shareholders, Dr. Atida H. Karr, M.D., the principal shareholder and beneficiary of the corporation's business, and Devora Silverman, Dr. Atida H. Karr's sister. "KPMP" and Dr. Atida H. Karr have been and now are engaged in the business of marketing and advertising health-related products, including but not limited to the product Acne-Statin, a product advertised for the treatment of acne. The above-named respondents, in connection with the manufacture and marketing of said products, have disseminated, published and distributed, and now disseminate, publish and distribute, advertisements and promotional material for the purpose of promoting the sale of Acne-Statin for human use. This product, as advertised, is a "drug" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. The respondent Atida H. Karr, M.D. and the respondent "KPMP" have joined by contract with Robert J. Marsh, Sr. through The National Media Group, Inc. to form a joint venture whose purpose was and is to profitably exploit the product Acne-Statin "through the mutual expertise and capability of the parties" (Joint Venture Agreement, as amended, September 3, 1976). The National Media Group, Inc. and Robert J. Marsh, Sr. for their part gained the sole rights and interests to the marketing and sale of the product, while the ownership of said product remained with "KPMP" and Atida H. Karr, M.D.

PAR. 5. The National Media Group, Inc. is a Delaware corporation located at 1150 First Ave., Suite 1060, Valley Forge Plaza, King of Prussia, Pennsylvania and is owned and controlled by Robert J. Marsh, Sr.

PAR. 6. In the course and conduct of their said businesses, the respondents have disseminated and caused the dissemination of certain advertisements concerning Acne-Statin through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, the insertion of advertisements in magazines and newspapers with national circulations and the placement of advertisements through television stations with sufficient power to broadcast across state lines and into the District of Columbia and advertisements in the form of a booklet, entitled "Acne: Its Cause and Its Treatment" which was, and is, sent through the United States mail, for the purpose of inducing and which was likely to induce, directly or indirectly, the purchase of the product Acne-Statin; and have disseminated and caused the dissemination of advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said products in commerce.

PAR. 7. Typical of the statements and representations in said advertisements, disseminated as previously described, but not necessarily inclusive thereof, are the following:



# "ACNE? Our girls got lasting help with Acne-Statin"

**"With four daughters, we've tried the leading acne medications at our house, and nothing ever seemed to work until our girls met a Beverly Hills doctor and got some real help through a product she developed called 'Acne-Statin'."**

Pat Boone and his daughter Debbie.

The doctor explained that a bacteria called "C-Acne" located deep in the pores of the skin breaks the oil in the pores into Fatty Acids. The pores become blocked and irritated, resulting in blemishes, blackheads, whiteheads and pimples.

**WHAT MAKES ACNE-STATIN SO DIFFERENT?**

The doctor went on to say that **many medications only attack acne at the surface level by attempting to dry-up the oil.** Usually this is ineffective against Acne, and only irritates, dries and peels the skin. **ACNE-STATIN goes right to the root of the problem.** It liquifies at body temperature and deposits an anti-bacterial agent that kills bacteria on contact, and keeps on killing bacteria hours after each washing. The photographs below dramatically demonstrate Acne-Statin's continual effectiveness compared to the ineffectiveness of soap.

**WHAT ABOUT SENSITIVE SKIN?**

Debbie said that even when she leaves it on overnight it doesn't irritate or dry her skin. Dr. Karr explained that it is hypo-allergenic and that it contains a moisturizer. So it leaves even sensitive skin moist and soft with **NO PEELING. REGARDLESS OF AGE** or sex, Acne-Statin helps control skin irritations from occasional blemishes to chronic acne.

**DR. ATIDA KARR**'s genuine concern for skin care was as impressive to me as her credentials. In addition to being an M.D. she also has an M.S. in Physiology and a Ph.D. in Cellular Physiology and Biochemistry. For five years she was involved in cancer research at the University of Pennsylvania under a federal grant.

Equally impressive were the letters she had received from youth and adults alike who had received significant help with Acne-Statin. HERE ARE EXCERPTS from two of those letters. **The first one is from an editor of one of the nation's leading fashion magazines.**

"Thank you for recommending your fabulous product. I have literally tried everything on the market, plus some of my own home remedies and have spent hundreds, in fact probably thousands of dollars on treatments, facials and the like and nothing has ever really cleared up my skin, much less left it in good condition. That's why I can't believe that such a pleasant lotion-like cleanser and treatment like Acne-Statin could work as thoroughly as it did. It really is fantastic. It's the only thing that has ever worked."

"Being 25 and having had occasional acne for the past 10 years, I have tried almost every commercial and prescription product, and the results have varied. Since using your Acne-Statin for the first time I have a clear complexion. As an actress, it is necessary that I have my skin clear. My blemishes are completely gone. Not just on the surface, but all traces of infection have disappeared. My skin has reached a balanced condition."

**MONEY BACK IF NOT DELIGHTED**

If you are not pleased with the help you got you may return the empty container for a full refund.

**ACNE-STATIN IS NOT AVAILABLE IN STORES**

But you can order **a 30-day four-ounce treatment** without a prescription for only $9.50. Order now and you'll receive FREE the booklet entitled "Acne, Its Cause and Its Treatment" by Atida Karr, M.D.

**HERE'S HOW TO ORDER**

1. **Complete the coupon below. Be sure to mark the number of bottles you wish to order.**
2. **Make out a check or money order for the appropriate amount, or use Master Charge or BankAmericard. Be sure to add 50¢ for postage for each bottle.**
3. **Mail the coupon with payment to: ACNE-STATIN, P.O. BOX 100, BEVERLY HILLS, CALIFORNIA 90213.**

**ORDER NOW AND RECEIVE FREE**

This booklet, "Acne, Its Cause and Its Treatment" by Atida H. Karr, M.D.

**SEE THE DIFFERENCE**

In these microscopic photographs, each tiny "bubble" is a COLONY of millions of bacteria. Slide A is part of a facial culture taken eight hours after washing with soap. As you can see there are still countless bacterial colonies. Slide B shows a culture of the same facial area a full eight hours after washing with Acne-Statin. Acne-Statin kills bacteria on contact, and keeps on killing bacteria hours after each washing.

After Soap A

After Acne-Statin B

Mail coupon with payment to: MD 5/7

**ACNE-STATIN, P.O. Box 100, Beverly Hills, California 90213**

☐ Please Rush ____ 30 day 4 oz. bottles of Acne-Statin

Enclosed is $10.00 ($9.50 + 50¢ postage & handling for each)

☐ BankAmericard ☐ Check or Money Order ☐ Master Charge

PLEASE PRINT

CREDIT CARD # ____ EXP. DATE ____

NAME ____

ADDRESS ____ APT. NO. ____

CITY ____ STATE ____ ZIP ____

SIGNATURE ____ (IF USING CREDIT CARD)

KPMP Products 510 E. Commercial St. Los Angeles, Calif.

Mademoiselle for May 1977

213

**Radio TV Reports**

41 East 42nd Street New York, N.Y. 10017
(212) 697-5100

PRODUCT ACNE STATIN 771087
PROGRAM NEWS 2/15/77 120 SEC.
PAGE 1 WPIX-TV (NEW YORK) 10:19PM

1. PAT BOONE: Acne is painful, both physically and emotionally. I don't care if you're a teenager or an adult.

2. Acne causes embarrassment and anxiety.

3. I'm one of the lucky ones. I never had much of a skin problem,

DEBBY & PAT BOONE

4. but I do have four daughte We've tried a lot of skin cleansers and medication around our house.

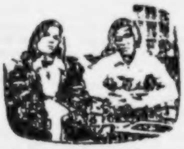
5. And nothing ever really seemed to work, did it, Deb?

6. DEBBIE BOONE: No, not until my sisters and I met a Beverly

7. Hills doctor and got some real help through a product she developed called Acne Statin.

8. PAT: Right. The doctor explained that a bacteria called C-Acne

9. located deep in the pores of the skin, breaks the oil of the pores into fatty acids.



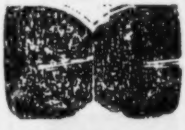
10. The pores become blocked and irritated.

11. This results in blemishes, whiteheads, blackheads, and pimples,

12. DEBBIE: Many medications only attack acne at the surface level by trying to draw out the oil.

13. Usually this doesn't work against acne.

14. It only irritates, dries and peels the skin.



15. PAT: Let me show you a photograph.

16. Here are thousands of bacteria colonies still left on facial skin after washi with soap.

**Radio TV Reports**

41 East 42nd Street New York N.Y. 10017
(212) 697-5100

PRODUCT: ACNE STATIN 771887
PROGRAM: NEWS 2/15/77 120 SEC.
PAGE 2 WPIX-TV (NEW YORK) 10:19PM

1. Now, here are the same areas eight hours after using Acne Statin.

2. See, Acne Statin goes right to the ront of the problem.

3. It liquifies at body temperature so that it can pentrate deep into the pores.

4. And there it deposits an anti-bacterial agen that kills the bacteria responsible for acne,

5. and keeps on killing the bacteria hours after each application.

6. DEBBIE: I like it because it's lotion-like, not greasy, and it goes on clear, leaving my skin moist and soft.

7. PAT: Acne Statin is not available in stores,

8. but you can order a fu 30-day four ounce tre ment without prescrip

9. And if you're not completely satisfied, you just return the empty container for a full refund.

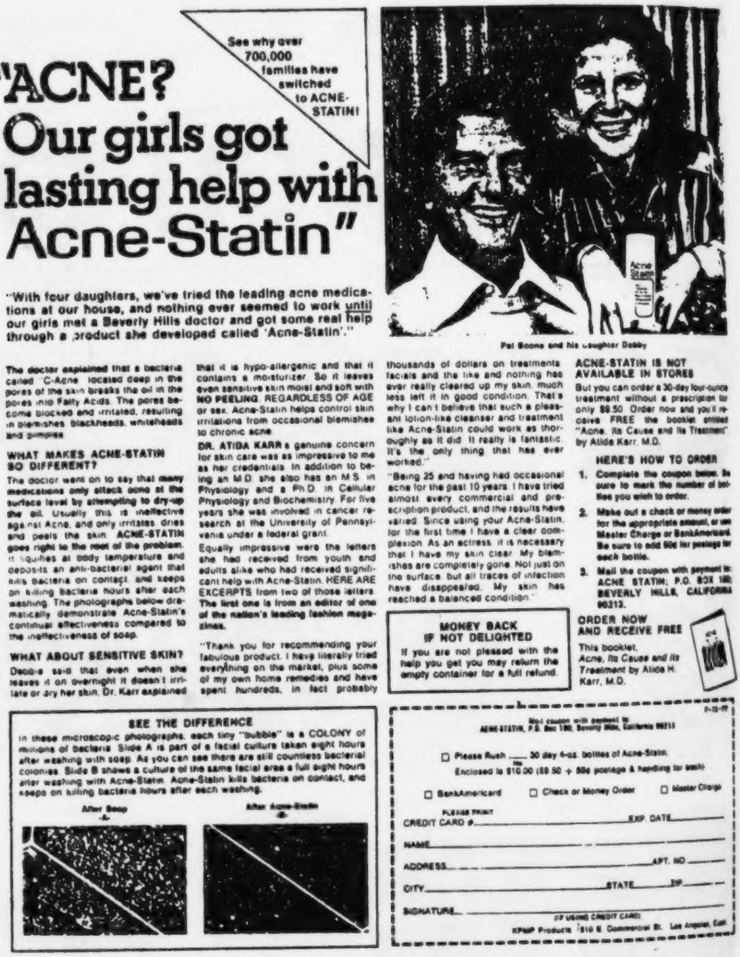
10. Order right away, and you'll also receive a booklet entitled,

11. "Acne: It's Cause And Treatment", by Tina Carr, M.D. Here's how to order.

12. ANNCR: Call toll fre 1-800-228-2200.

1-800-228-2200
13. When your package arrives, pay just $9.50 plus C.O.D. Postage

1-800-228-2200
14. That's 1-800-228-2200. 1-800-228-2200. This is a free call.



See why over 700,000 families have switched to ACNE-STATIN!

# "ACNE? Our girls got lasting help with Acne-Statin"

"With four daughters, we've tried the leading acne medications at our house, and nothing ever seemed to work until our girls met a Beverly Hills doctor and got some real help through a product she developed called 'Acne-Statin'."

Pat Boone and his daughter Debby

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"Thank you for recommending your fabulous product. I have literally tried everything on the market, plus some of my own home remedies and have spent hundreds, in fact probably thousands of dollars on treatments, facials and the like and nothing has ever really cleared up my skin, much less left it in good condition. That's why I can't believe that such a pleasant lotion-like cleanser and treatment like Acne-Statin could work as thoroughly as it did. It really is fantastic. It's the only thing that has ever worked."

"Being 25 and having had occasional acne for the past 10 years, I have tried almost every commercial and prescription product, and the results have varied. Since using your Acne-Statin, for the first time I have a clear complexion. As an actress, it is necessary that I have my skin clear. My blemishes are completely gone. Not just on the surface, but all traces of infection have disappeared. My skin has reached a balanced condition."

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**HERE'S HOW TO ORDER**

1. Complete the coupon below. Be sure to mark the number of bottles you wish to order.
2. Make out a check or money order for the appropriate amount, or use Master Charge or BankAmericard. Be sure to add 50¢ for postage for each bottle.
3. Mail the coupon with payment to: ACNE STATIN; P.O. BOX 180; BEVERLY HILLS, CALIFORNIA 90213.

**ORDER NOW AND RECEIVE FREE**

This booklet, *Acne, Its Cause and Its Treatment* by Atida H. Karr, M.D.

**SEE THE DIFFERENCE**

In these microscopic photographs, each tiny "bubble" is a COLONY of millions of bacteria. Slide A is part of a facial culture taken eight hours after washing with soap. As you can see there are still countless bacterial colonies. Slide B shows a culture of the same facial area a full eight hours after washing with Acne-Statin. Acne-Statin kills bacteria on contact, and keeps on killing bacteria hours after each washing.

After Soap -A-

After Acne-Statin -B-

9-18-77

Mail coupon with payment to:
ACNE-STATIN, P.O. Box 180, Beverly Hills, California 90213

☐ Please Rush ____ 30 day 4-oz. bottles of Acne-Statin.
Enclosed is $10.00 ($9.50 + 50¢ postage & handling for each)

☐ BankAmericard ☐ Check or Money Order ☐ Master Charge

PLEASE PRINT
CREDIT CARD #________________ EXP. DATE________
NAME________________________________
ADDRESS________________________ APT. NO. ______
CITY__________________ STATE______ ZIP______
SIGNATURE____________________________
(IF USING CREDIT CARD)

KP&P Products 910 E. Commercial St. Los Angeles, Cal.

PAR. 8. Through the use of said advertisements referred to in Paragraphs Six and Seven and others, respondents represented, and now represent, directly or by implication that:

a. Use of Acne-Statin will cure acne regardless of the severity of he condition.

b. Acne-Statin can penetrate the pores of the skin to eliminate he bacteria responsible for pimples, blackheads, whiteheads and ther acne blemishes.

c. Acne-Statin can penetrate the pores of the skin to eliminate he fatty acids responsible for pimples, blackheads, whiteheads and ther acne blemishes.

d. Acne-Statin is superior to all other acne preparations in the ntibacterial treatment of acne.

e. Acne-Statin is superior to soap in the anti-bacterial treatment f acne.

f. Competent and reliable medical and scientific tests show that Acne-Statin is an efficacious treatment of acne.

g. If a purchaser of Acne-Statin is not completely satisfied, a full efund is guaranteed without time or quantity limitations.

PAR. 9. In truth and in fact:

a. Use of Acne-Statin will not cure acne.

b. Acne-Statin cannot penetrate the pores of the skin to eliminate the bacteria contributively responsible for pimples, blackheads, whiteheads and other acne blemishes.

c. Acne-Statin cannot penetrate the pores of the skin to eliminate he fatty acids contributively responsible for pimples, blackheads, whiteheads and other acne blemishes.

d. Acne-Statin is not superior to prescription and over-the-counter drug preparations which are efficacious in the antibacterial reatment of acne.

e. Neither Acne-Statin nor soap is an effective antibacterial reatment for acne.

f. There exist no competent and reliable medical and scientific ests which demonstrate the efficacy of Acne-Statin as a treatment or acne.

g. There are time and quantity limitations on the money-back uarantee for Acne-Statin.

Therefore, the advertisements referred to in Paragraphs Six and Seven, were and are misleading in material respects and constituted, nd now constitute, false advertisements, and the statements and representations set forth in Paragraph Eight were, and are false, misleading or deceptive.

PAR. 10. Furthermore, through the use of the advertisements referred to in Paragraphs Six and Seven and others, respondents represented, and now represent, directly or by implication that:

a. Use of Acne-Statin by persons with acne will result in skin free of pimples, blackheads, whiteheads and other acne blemishes.

b. Use of Acne-Statin by persons with acne will help control pimples, blackheads, whiteheads and other acne blemishes, regardless of the severity of the disease.

c. Acne-Statin can penetrate the pores of the skin to eliminate the cause of acne.

d. Acne-Statin is superior to all prescription acne preparations for the treatment of acne.

e. Acne-Statin is superior to all other over-the-counter acne preparations for the treatment of acne.

PAR. 11. There existed at the time of the first dissemination of the representations contained in Paragraphs Eight a, b, c, and f and Ten no reasonable basis for the making of these representations. Therefore, the making and dissemination of said representations as alleged, constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce.

PAR. 12. Through the use of photographs of bacterial colonies, in both the print and television advertisements referred to in Paragraphs Six and Seven, respondents represented, and now represent, to consumers that Acne-Statin effectively kills "C-acne," the bacteria responsible for acne.

PAR. 13. In truth and in fact, the slides in the photographs did not contain "C-acne" (correctly C. acnes, now generally referred to as P. acnes). They contained staph and other resident bacteria on the facial surface, an environment in which "C-acne" (P. acnes) does not survive. Furthermore, these surface bacteria are neither involved nor in any manner related to the cause of acne.

Therefore, the use of the photographs of bacteria in the advertisements referred to above, constituted, and now constitute, false, misleading or deceptive acts or practices.

PAR. 14. In the course and conduct of its aforesaid business, and at all times mentioned herein, the respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals representing or engaged in the over-the-counter and prescription drug industries.

PAR. 15. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 16. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days; and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Karr Preventative Medical Products is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 9615 Brighton Way, Beverly Hills, California.

2. Respondent Atida H. Karr, M.D. is an individual and corporate

officer of Karr Preventative Medical Products, Inc., and maintains an office at 9615 Brighton Way, Beverly Hills, California.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### I

*It is ordered,* That respondents Karr Preventative Medical Products, Inc., a corporation, and Atida H. Karr, M.D., an individual, their successors and assigns, either jointly or individually, and the corporate respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of all products do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of Acne-Statin or any other product of similar chemical composition will cure acne or any skin condition associated with acne.

2. Represents that Acne-Statin or any other product of similar chemical composition will eliminate or reduce the bacteria responsible for pimples, blackheads, whiteheads, other acne blemishes or any skin condition associated with acne.

3. Represents that Acne-Statin or any other product of similar chemical composition will eliminate or reduce the fatty acids responsible for pimples, blackheads, whiteheads, other acne blemishes or any skin condition associated with acne.

4. Represents that Acne-Statin or any other product of similar chemical composition is superior to prescription or over-the-counter acne preparations in the antibacterial treatment of acne.

5. Represents that Acne-Statin or any other product of similar chemical composition is superior to soap in the antibacterial treatment of acne.

6. Represents that the money-back guarantee for Acne-Statin or any other product has no time and quantity limitations unless such statement is true.

7. Misrepresents the extent to which any product has been tested or the results of any such test(s).

8. Represents through a test(s) or demonstration(s) that a product is comparable or superior to another product or other products where the test(s) or demonstration(s) does not accurately depict or present the efficacy or the mode of performance of each product for the advertised use or purpose.

9. Misrepresents the efficacy, use or the mode of performance of any product where the use or misuse of the product may affect the health or safety of the user.

B. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of Acne-Statin or any other acne product by persons with acne will reduce, minimize or eliminate pimples, blackheads, whiteheads or any other blemishes associated with acne;

2. Represents that Acne-Statin or any other acne product can eliminate any factor contributing to acne or any skin condition associated with acne;

3. Represents that Acne-Statin or any other acne product is superior to prescription or over-the-counter acne preparations in the treatment of acne or any skin condition associated with acne;

4. Represents that Acne-Statin or any other product is efficacious for the treatment of acne,

unless, at the time of each dissemination of such representation(s), respondents possess and rely upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). Competent and reliable scientific or medical evidence shall be defined as evidence in the form of at least two well-controlled double-blind clinical studies which are conducted by different persons, independently of each other. Such persons shall be dermatologists who are qualified by scientific training and experience to treat acne and conduct the aforementioned studies.

*Provided, however,* that insofar as representations are covered by Parts IB2 and IA2–IA3, Parts IA2–IA3 shall govern. Additionally, insofar as representations are covered by Parts IB3 and IA4, Part IA4 shall govern.

C. Disseminating and causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly makes representations referring or relating to the performance or efficacy of any product or refers or relates to any characteristic, property or result of the use of any product, unless, at the time of each dissemination of such representation(s) respondents possess and rely upon a reasonable basis for such representation(s).

## II

*It is further ordered,* That:

A. Within thirty (30) days of final acceptance of this order by the Federal Trade Commission (hereinafter the "Commission"), respondents shall establish an interest-bearing trust account for the purpose of paying restitution to Acne-Statin purchasers, which in all respects meets with the approval of the Commission or its designated staff. Said trust account shall provide for at least a six (6) percent annual interest rate, compounded quarterly, and shall be administered, maintained and terminated free of charge. Said account shall be entitled "Acne-Statin Restitution Account-I," and when established shall contain the sum of one hundred thousand dollars ($100,000). Additionally, within sixty (60) days of the final acceptance of this order by the Commission, respondents shall augment said trust account with an additional seventy-five thousand dollars ($75,000). Ten (10) days after each funding of said trust account, respondents shall provide the Commission or its designated staff a verified accounting of the funds within said account, and after the first funding, a copy of the trust agreement which establishes the trust account. The instrument creating said trust account shall expressly contain binding provisions to the following effect:

1. Neither Atida H. Karr, M.D., nor Karr Preventative Medical Products, Inc., shall have any power, either express or implied, to revoke said trust account or deplete the monies therein.

2. The trust account monies shall not be subject to the claims of any creditors of Atida H. Karr, M.D., or Karr Preventative Medical Products, Inc.

3. The beneficiaries of said trust account shall be Acne-Statin purchasers who request refunds and are identified by the Commission or its designated staff as beneficiaries of said trust and/or the respondents named herein. *Provided, however,* that purchasers who make their initial purchase of Acne-Statin after the first dissemination of the restitution notice required in Part III, *infra,* shall be ineligible to be designated as beneficiaries of said trust and, therefore, ineligible to receive restitution under this order.

4. The Commission or its designated staff shall have the exclusive power to determine when and which beneficiaries or other parties

necessary to the execution of the restitution program (which includes the notification of consumers) are to receive monies from said trust account and what amount each is to receive. This power of distribution shall include the power to have up to fifty thousand dollars ($50,000) distributed to pay for the expenses of administering the restitution program.

5. Said trust account shall retain all interest accumulated thereto and such interest shall be available as funds for distribution to the beneficiaries of said trust account.

6. The trustee of said trust account shall be independent of Atida H. Karr, M.D., and Karr Preventative Medical Products, Inc. and shall meet with the approval of the Commission or its designated staff.

7. Upon the direction of the Commission or its designated staff to pay funds to a party identified pursuant to IIA4 *supra*, the trustee shall issue such payment to the said identified party within sixty (60) days of the direction of the Commission or its designated staff.

B. The Commission or its designated staff will determine the terms and conditions under which such purchasers shall receive restitution, provided that:

1. purchasers will be given a specific deadline not more than 120 days after the first publication of the notification before which they must request refunds in writing in order to receive restitution;

2. each purchaser who requests restitution shall receive the total amount paid for Acne-Statin unless there are insufficient funds to pay all such purchasers. If there are not sufficient funds to fully pay all such purchasers, each such purchaser will receive the proportion, equal to the ratio of the total monies available for restitution over the total amount of restitution requested by purchasers, of the amount which he or she spent for Acne-Statin;

3. no purchaser shall receive more in restitution than such purchaser paid for Acne-Statin less the amount of refunds, if any, already received; and

4. funds from the aforementioned trust account shall be used to pay fifty percent (50%) of each restitution payment. *Provided, however,* that if no funds are available from the National Media Group, Inc., and/or Robert J. Marsh, Sr. or if the funds from the trust account established by the National Media Group, Inc., entitled "Acne-Statin Restitution Account-II," are for any reason depleted prior to the depletion of the funds in the trust account established by this order, then monies from the trust account established herein shall alone be used to pay the remaining restitution requests.

C. Within six months after the completion of the restitution program, the Commission or its designated staff shall direct the trustee of the trust account established in IIA, *supra*, to pay all monies remaining in the trust account to Karr Preventative Medical Products, Inc., or Atida H. Karr, M.D., and terminate the trust account.

## III

After the final acceptance of this order by the Commission, the Commission or its designated staff shall provide notice to consumers of an opportunity to obtain refunds for purchases of Acne-Statin. Said notice shall not include the Commission's public announcements of this consent agreement or the publication of this agreement and order in the Federal Register.

Ten (10) days prior to reserving commercial space for the first dissemination of said notice, the Commission or its designated staff shall provide respondents with a copy of the restitution notice. Providing said notice to respondents does not in anyway suggest that respondents shall have any veto power over the content of said notice or any part thereof, and in fact, respondents shall have no such veto power.

Said notice may contain the following concepts and shall not substantively exceed the scope of such concepts:

1. No product cures acne.
2. Notice to Acne-Statin purchasers of the restitution program identified herein. Said notice may contain, among other things, information regarding the eligibility for refunds, means of obtaining refunds and any limitations of the restitution program.
3. The fact that a Federal Trade Commission complaint was issued in this matter, and that the consent agreement and order are the basis for said notice and the restitution program.
4. Any information pertinent to the consent agreement or the Commission's order; *provided, however,* that the disclosure of any such information shall not be inconsistent with paragraph seven of the consent agreement.
5. The total amount of money available for restitution including funds from this and other orders.
6. The picturing of the container or any other promotional material for the product Acne-Statin or the quoting or summarizing of the language contained either on the product container or appearing in any other promotional vehicle.

Upon the first publication of said notice to consumers, persons who desire refunds will have up to, and including, one hundred and twenty (120) days to request the return of monies they spent on the purchase of Acne-Statin.

Respondents shall provide the Commission or its designated staff all consumer letters requesting refunds for Acne-Statin not yet provided to the Commission. All such letters shall be provided to the Commission or its designated staff fifteen (15) days after this order becomes final. Further, any such letters received subsequent to the order becoming final and before the end of the 120 day notification period as described in IIB1, *supra*, shall be provided to the Commission within fifteen (15) days of their receipt by respondents.

Lastly, respondents shall provide complete and updated computer tapes which identify the purchasers of Acne-Statin to the party responsible for verifying refund requests from consumers and dispensing refund checks. Such tapes shall remain with said party until all refund requests have been fully processed (*i.e.*, paid or rejected) to the satisfaction of the Commission or its designated staff. At which time, said computer customer list shall be returned to respondents.

## IV

*It is further ordered*, That the corporate respondent shall forthwith distribute a copy of this order to each of its operating divisions.

*It is further ordered*, That each respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered*, That each respondent shall, within sixty (60) days after this order becomes final, and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

*It is further ordered*, That each respondent shall maintain files and records of all substantiation related to the requirements of Parts IB and IC of this order for a period of three (3) years after the dissemination of any advertisement which relates to either of these portions of the order. Additionally, such material shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a demand for such material.

## IN THE MATTER OF

# THE NATIONAL MEDIA GROUP, INC., ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2995. Complaint, Oct. 29, 1979—Decision, Oct. 29, 1979*

This consent order, among other things, requires a King of Prussia, Pa. firm and a corporate officer, engaged in the advertising and sale of "Acne-Statin," an acne "treatment," to cease disseminating or causing the dissemination of advertisements that represent that Acne-Statin cures acne, eliminates or reduces the bacteria and fatty acids responsible for acne blemishes, and is superior to all other acne preparations and soap for the antibacterial treatment of acne. The firm and its corporate officer are required to have a reasonable basis at the time of dissemination for representations relating to the efficacy, performance, characteristics, properties or the use of any drug, cosmetic, device or food; and prohibited from misrepresenting the extent to which a product has been tested or the results of such tests. Additionally, they are required to establish an independent, irrevocable trust account, containing sixty thousand dollars ($60,000) to be used to pay half of all requests for restitution by Acne-Statin purchasers; and obligated to conduct and be totally responsible for the administration of the restitution program.

### *Appearances*

For the Commission: *Mark A. Heller.*

For the Respondents: *Clinton R. Batterton, Fulbright & Jaworski,* Washington, D.C.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that The National Media Group, Inc. (hereinafter "NMG"), a corporation, and Robert J. Marsh, Sr., as a corporate officer and an individual, hereinafter at times referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. "NMG" is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1150 First Ave., Suite 1060, Valley Forge Plaza, King of Prussia, Pennsylvania.

PAR. 2. Robert J. Marsh, Sr. is an individual and corporate director, chief executive officer, president, treasurer and sole shareholder of "NMG." He formulates, directs and controls the acts and practices of "NMG," including the acts and practices described herein.

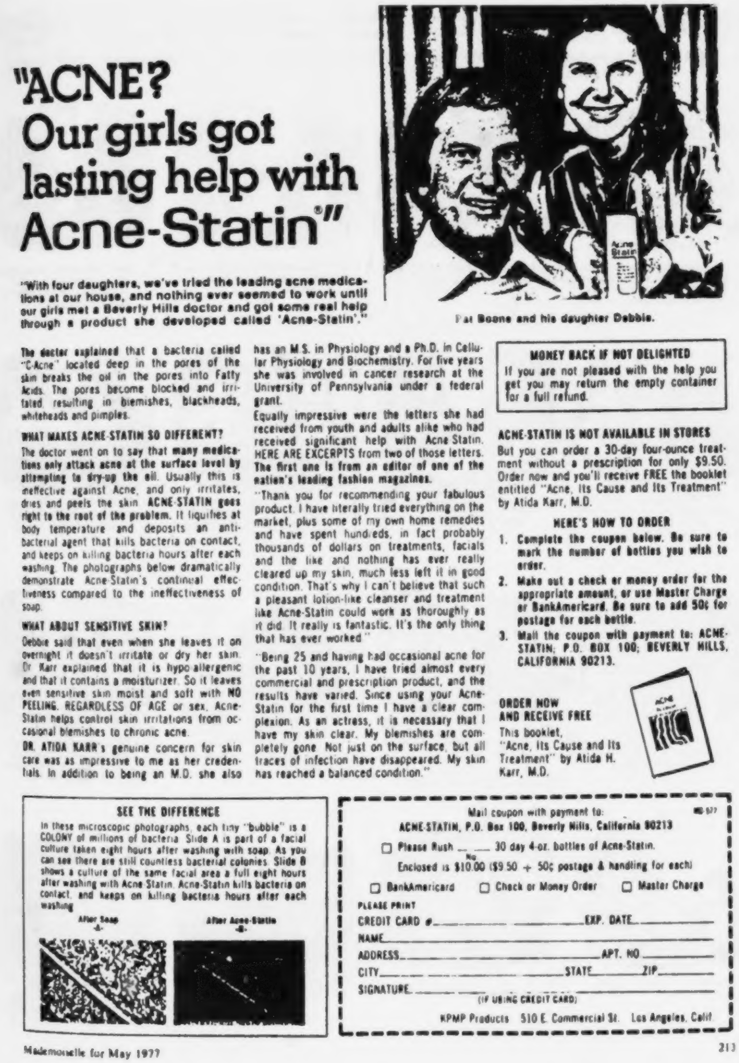
PAR. 3. Respondent "NMG" is a privately held corporation which was organized and is maintained for the purpose of promoting and advancing the interests of Robert J. Marsh, Sr., the sole shareholder of the corporation. "NMG" and Robert J. Marsh, Sr., have been and now are engaged in the business of marketing and preparing advertisements for consumer products, as well as purchasing television time for the placement of advertisements for consumer products. Among the products now marketed by "NMG" and Robert J. Marsh, Sr. is Acne-Statin. The above-named respondents have prepared, disseminated and published and now prepare, disseminate and publish advertisements and promotional material for the purpose of promoting the sale of Acne-Statin for human use. This product, as advertised, is a "drug" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. The respondent Robert J. Marsh, Sr., through the respondent "NMG" has joined by contract with Karr Preventative Medical Products, Inc., and Atida H. Karr, M.D., to form a joint venture whose purpose was and is to profitably exploit the product Acne-Statin "through the mutual expertise and capability of the parties" (Joint Venture Agreement as amended, September 3, 1976). "NMG" and Robert J. Marsh, Sr., for their part gained the sole rights and interests to the marketing and sale of Acne-Statin, while the ownership of said product remained with Karr Preventative Medical Products, Inc. and Atida H. Karr, M.D.

PAR. 5. Karr Preventative Medical Products, Inc. is a California corporation located at 9615 Brighton Way, Beverly Hills, California and directed and controlled by Atida H. Karr, M.D., a major shareholder.

PAR. 6. In the course and conduct of their said businesses, the respondents, along with joint venturers Karr Preventative Medical Products, Inc. and Atida H. Karr, M.D., have disseminated and caused the dissemination of certain advertisements concerning Acne-Statin through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the insertion of advertisements in magazines and newspapers with national circulations and the placement of advertisements through television stations with sufficient power to broadcast across state lines and into the District of Columbia and advertisements in the form of a booklet, entitled "Acne: Its Cause and Its Treatment" which was, and is, sent through the United States mail, for the purpose of inducing and which was likely to induce, directly or indirectly, the purchase of the product Acne-Statin; and have disseminated and caused the dissemination of advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce.

PAR. 7. Typical of the statements and representations in said advertisements, disseminated as previously described, but not necessarily inclusive thereof, are the following:



# "ACNE? Our girls got lasting help with Acne-Statin®"

**"With four daughters, we've tried the leading acne medications at our house, and nothing ever seemed to work until our girls met a Beverly Hills doctor and got some real help through a product she developed called 'Acne-Statin'."**

Pat Boone and his daughter Debbie.

**The doctor explained** that a bacteria called "C-Acne" located deep in the pores of the skin breaks the oil in the pores into Fatty Acids. The pores become blocked and irritated resulting in blemishes, blackheads, whiteheads and pimples.

**WHAT MAKES ACNE-STATIN SO DIFFERENT?**

The doctor went on to say that **many medications only attack acne at the surface level by attempting to dry-up the oil.** Usually this is ineffective against Acne, and only irritates, dries and peels the skin. **ACNE-STATIN goes right to the root of the problem.** It liquifies at body temperature and deposits an antibacterial agent that kills bacteria on contact, and keeps on killing bacteria hours after each washing. The photographs below dramatically demonstrate Acne-Statin's continual effectiveness compared to the ineffectiveness of soap.

**WHAT ABOUT SENSITIVE SKIN?**

Debbie said that even when she leaves it on overnight it doesn't irritate or dry her skin. Dr. Karr explained that it is hypo-allergenic and that it contains a moisturizer. So it leaves even sensitive skin moist and soft with **NO PEELING. REGARDLESS OF AGE** or sex. Acne-Statin helps control skin irritations from occasional blemishes to chronic acne.

**DR. ATIDA KARR**'s genuine concern for skin care was as impressive to me as her credentials. In addition to being an M.D. she also has an M.S. in Physiology and a Ph.D. in Cellular Physiology and Biochemistry. For five years she was involved in cancer research at the University of Pennsylvania under a federal grant.

Equally impressive were the letters she had received from youth and adults alike who had received significant help with Acne-Statin. HERE ARE EXCERPTS from two of those letters. **The first one is from an editor of one of the nation's leading fashion magazines.**

"Thank you for recommending your fabulous product. I have literally tried everything on the market, plus some of my own home remedies and have spent hundreds, in fact probably thousands of dollars on treatments, facials and the like and nothing has ever really cleared up my skin, much less left it in good condition. That's why I can't believe that such a pleasant lotion-like cleanser and treatment like Acne-Statin could work as thoroughly as it did. It really is fantastic. It's the only thing that has ever worked."

"Being 25 and having had occasional acne for the past 10 years, I have tried almost every commercial and prescription product, and the results have varied. Since using your Acne-Statin for the first time I have a clear complexion. As an actress, it is necessary that I have my skin clear. My blemishes are completely gone. Not just on the surface, but all traces of infection have disappeared. My skin has reached a balanced condition."

**MONEY BACK IF NOT DELIGHTED**

If you are not pleased with the help you get you may return the empty container for a full refund.

**ACNE-STATIN IS NOT AVAILABLE IN STORES**

But you can order a 30-day four-ounce treatment without a prescription for only $9.50. Order now and you'll receive FREE the booklet entitled "Acne, Its Cause and Its Treatment" by Atida Karr, M.D.

**HERE'S HOW TO ORDER**

1. **Complete the coupon below. Be sure to mark the number of bottles you wish to order.**
2. **Make out a check or money order for the appropriate amount, or use Master Charge or BankAmericard. Be sure to add 50¢ for postage for each bottle.**
3. **Mail the coupon with payment to: ACNE-STATIN; P.O. BOX 100; BEVERLY HILLS, CALIFORNIA 90213.**

**ORDER NOW**
**AND RECEIVE FREE**
This booklet,
"Acne, Its Cause and Its Treatment" by Atida H. Karr, M.D.

**SEE THE DIFFERENCE**

In these microscopic photographs, each tiny "bubble" is a COLONY of millions of bacteria. Slide A is part of a facial culture taken eight hours after washing with soap. As you can see there are still countless bacterial colonies. Slide B shows a culture of the same facial area a full eight hours after washing with Acne-Statin. Acne-Statin kills bacteria on contact, and keeps on killing bacteria hours after each washing.

After Soap
-A-

After Acne-Statin
-B-

Mail coupon with payment to: MD-577
**ACNE-STATIN, P.O. Box 100, Beverly Hills, California 90213**

☐ Please Rush ___ ___ 30 day 4-oz. bottles of Acne-Statin.
No.
Enclosed is $10.00 ($9.50 + 50¢ postage & handling for each)

☐ BankAmericard ☐ Check or Money Order ☐ Master Charge

PLEASE PRINT
CREDIT CARD #________ ________EXP. DATE________
NAME________________________
ADDRESS________________APT. NO ________
CITY________________STATE________ZIP________
SIGNATURE________________________
(IF USING CREDIT CARD)

KPMP Products 510 E. Commercial St. Los Angeles, Calif.

Mademoiselle for May 1977

213

# Radio TV Reports

41 East 42nd Street New York N.Y. 10017
(212) 697-5100

PRODUCT: ACNE STATIN 771087
PROGRAM: NEWS 2/15/77 130 SEC.
PAGE 1 WPIX-TV (NEW YORK) 10:19PM

1. PAT BOONE: Acne is painful, both physically and emotionally. I don't care if you're a teenager or an adult.

2. Acne causes embarassment and anxiety,

3. I'm one of the lucky ones. I never had much of a skin problem,

DEBBY & PAT BOONE

4. but I do have four daughters We've tried a lot of skin cleansers and medications around our house.

5. And nothing ever really seemed to work, did it, Deb?

6. DEBBIE BOONE: No, not until my sisters and I met a Beverly

7. Hills doctor and got some real help through a product she developed called Acne Statin.

8. PAT: Right. The doctor explained that a bacteria called C-Acne

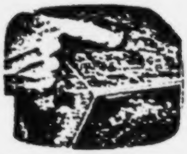
9. located deep in the pores of the skin, breaks the oil of the pores into fatty acids.

10. The pores become blocked and irritated.

11. This results in blemishes, whiteheads, blackheads, and pimples,

12. DEBBIE: Many medications only attack acne at the surface level by trying to draw out the oil.

13. Usually this doesn't work against acne.



14. It only irritates, dries and peels the skin.

15. PAT: Let me show you a photograph.

16. Here are thousands of bacteria colonies still left on facial skin after washing with soap.

**Radio TV Reports**
41 East 42nd Street New York N.Y. 10017
(212) 697-5100

PRODUCT: ACNE STATIN 771887
PROGRAM: NEWS 2/15/77 120 SEC.
PAGE 2 WPIX-TV (NEW YORK) 10:19PM

1. Now, here are the same areas eight hours after using Acne Statin.

2. See, Acne Statin goes right to the root of the problem.

3. It liquifies at body temperature so that it can pentrate deep into the pores.

4. And there it deposits an anti-bacterial agent that kills the bacteria responsible for acne,

5. and keeps on killing the bacteria hours after each application.

6. DEBBIE: I like it because it's lotion-like, not greasy, and it goes on clear, leaving my skin moist and soft.

7. PAT: Acne Statin is not available in stores,

8. but you can order a full 30-day four ounce treatment without prescription .

9. And if you're not completely satisfied, you just return the empty container for a full refund.

10. Order right away, and you'll also receive a booklet entitled,

11." Acne: It's Cause And Treatment"; by Tina Carr, M.D. Here's how to order.

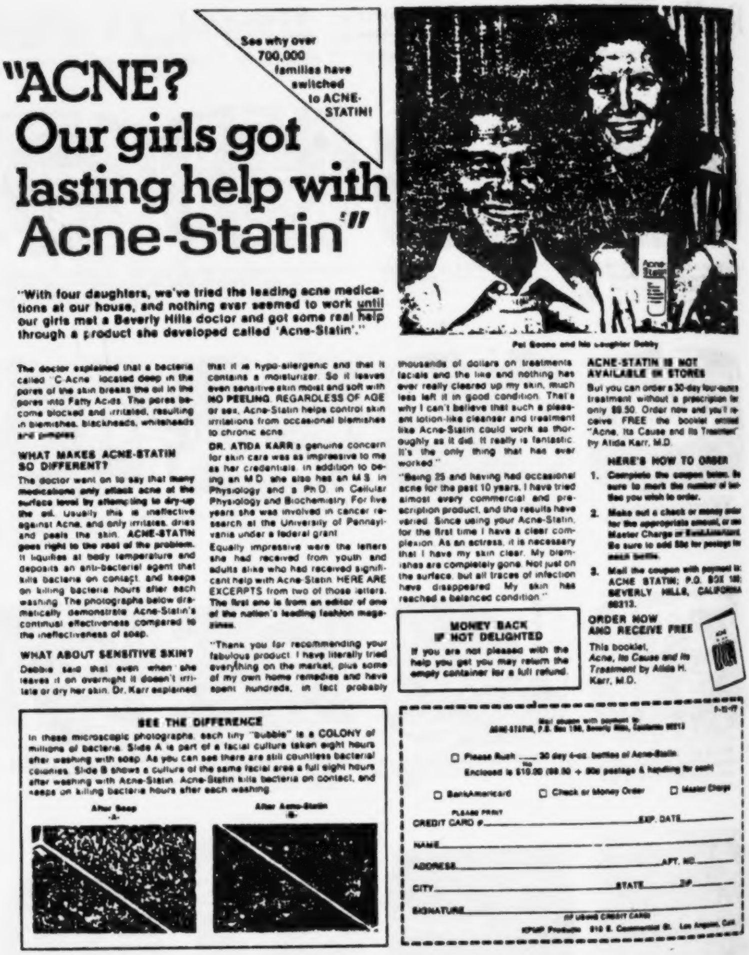
12. ANNCR: Call toll free, 1-800-228-2200.

1-800-228-2200

13. When your package arrives, pay just $9.50 plus C.O.D. Postage

1-800-228-2200

14. That's 1-800-228-2200. 1-800-228-2200. This is a free call.



See why over 700,000 families have switched to ACNE-STATIN!

# "ACNE? Our girls got lasting help with Acne-Statin®"

**"With four daughters, we've tried the leading acne medications at our house, and nothing ever seemed to work until our girls met a Beverly Hills doctor and got some real help through a product she developed called 'Acne-Statin'."**

Pat Boone and his daughter Debby

The doctor explained that a bacteria called "C-Acne" located deep in the pores of the skin breaks the oil in the pores into Fatty Acids. The pores become blocked and irritated, resulting in blemishes, blackheads, whiteheads and pimples.

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"Thank you for recommending your fabulous product. I have literally tried everything on the market, plus some of my own home remedies and have spent hundreds, in fact probably thousands of dollars on treatments, facials and the like and nothing has ever really cleared up my skin, much less left it in good condition. That's why I can't believe that such a pleasant lotion-like cleanser and treatment like Acne-Statin could work as thoroughly as it did. It really is fantastic. It's the only thing that has ever worked."

"Being 25 and having had occasional acne for the past 10 years, I have tried almost every commercial and prescription product, and the results have varied. Since using your Acne-Statin, for the first time I have a clear complexion. As an actress, it is necessary that I have my skin clear. My blemishes are completely gone. Not just on the surface, but all traces of infection have disappeared. My skin has reached a balanced condition."

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**HERE'S HOW TO ORDER**

1. **Complete the coupon below. Be sure to mark the number of bottles you wish to order.**
2. **Make out a check or money order for the appropriate amount, or use Master Charge or BankAmericard. Be sure to add 50c for postage to each bottle.**
3. **Mail the coupon with payment to: ACNE STATIN; P.O. BOX 18[illegible] BEVERLY HILLS, CALIFORNIA 90213.**

**ORDER NOW AND RECEIVE FREE**

This booklet, *Acne, Its Cause and Its Treatment* by Atida H. Karr, M.D.

**SEE THE DIFFERENCE**

In these microscopic photographs, each tiny "bubble" is a COLONY of millions of bacteria. Slide A is part of a facial culture taken eight hours after washing with soap. As you can see there are still countless bacterial colonies. Slide B shows a culture of the same facial area a full eight hours after washing with Acne-Statin. Acne-Statin kills bacteria on contact, and keeps on killing bacteria hours after each washing.

After Soap -A-

After Acne-Statin -B-

[illegible]

Mail coupon with payment to:
ACNE-STATIN, P.O. Box [illegible], Beverly Hills, California 90213

☐ Please Rush ____ 30 day 4-oz. bottles of Acne-Statin
No.
Enclosed is $10.00 ($9.50 + 50c postage & handling for each)

☐ BankAmericard ☐ Check or Money Order ☐ Master Charge

PLEASE PRINT
CREDIT CARD #________________ EXP. DATE________
NAME________________________________
ADDRESS________________________ APT. NO.______
CITY________________ STATE______ ZIP______
SIGNATURE____________________________
(IF USING CREDIT CARD)

[illegible] Products 510 E. Commercial St. Los Angeles, Cal.

PAR. 8. Through the use of said advertisements referred to in Paragraphs Six and Seven and others, respondents represented, and now represent, directly or by implication that:

a. Use of Acne-Statin will cure acne regardless of the severity of the condition.

b. Acne-Statin can penetrate the pores of the skin to eliminate the bacteria responsible for pimples, blackheads, whiteheads and other acne blemishes.

c. Acne-Statin can penetrate the pores of the skin to eliminate the fatty acids responsible for pimples, blackheads, whiteheads and other acne blemishes.

d. Acne-Statin is superior to all other acne preparations in the antibacterial treatment of acne.

e. Acne-Statin is superior to soap in the antibacterial treatment of acne.

f. Competent and reliable medical and scientific tests show that Acne-Statin is an efficacious treatment for acne.

g. If a purchaser of Acne-Statin is not completely satisfied, a full refund is guaranteed without time or quantity limitations.

PAR. 9. In truth and in fact:

a. Use of Acne-Statin will not cure acne.

b. Acne-Statin cannot penetrate the pores of the skin to eliminate the bacteria contributively responsible for pimples, blackheads, whiteheads and other acne blemishes.

c. Acne-Statin cannot penetrate the pores of the skin to eliminate the fatty acids contributively responsible for pimples, blackheads, whiteheads and other acne blemishes.

d. Acne-Statin is not superior to prescription and over-the-counter drug preparations which are efficacious in the antibacterial treatment of acne.

e. Neither Acne-Statin nor soap is an effective antibacterial treatment of acne.

f. There exist no competent and reliable medical or scientific tests which demonstrate the efficacy of Acne-Statin as a treatment for acne.

g. There are time and quantity limitations on the money-back guarantee for Acne-Statin.

Therefore, the advertisements referred to in Paragraphs Six and Seven were and are misleading in material respects and constituted, and now constitute, false advertisements, and the statements and representations set forth in Paragraph Eight were, and are false, misleading or deceptive.

PAR. 10. Furthermore, through the use of the advertisements referred to in Paragraphs Six and Seven and others, respondents represented, and now represent, directly or by implication that:

a. Use of Acne-Statin by persons with acne will result in skin free of pimples, blackheads, whiteheads and other acne blemishes.

b. Use of Acne-Statin by persons with acne will help control pimples, blackheads, whiteheads and other acne blemishes, regardless of the severity of the disease.

c. Acne-Statin can penetrate the pores of the skin to eliminate the cause of acne.

d. Acne-Statin is superior to all prescription acne preparations for the treatment of acne.

e. Acne-Statin is superior to all other over-the-counter acne preparations for the treatment of acne.

PAR. 11. There existed at the time of the first dissemination of the representations contained in Paragraphs Eight a, b, c, and f and Ten no reasonable basis for the making of these representations. Therefore, the making and dissemination of said representations as alleged, constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce.

PAR. 12. Through the use of photographs of bacterial colonies, in both the print and television advertisements referred to in Paragraphs Six and Seven, respondents represented, and now represent, to consumers that Acne-Statin effectively kills "C-acne," the bacteria responsible for acne.

PAR. 13. In truth and in fact, the slides in the photographs did not contain "C-acne" (correctly C. acnes, now generally referred to as P. acnes). They contained staph and other resident bacteria on the facial surface, an environment in which "C-acne" (P. acnes) does not survive. Furthermore, these surface bacteria are neither involved nor in any manner related to the cause of acne.

Therefore, the use of the photographs of bacteria in the advertisements referred to above, constituted, and now constitute, false, misleading or deceptive acts or practices.

PAR. 14. In the course and conduct of their aforesaid businesses and at all times mentioned herein, the respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals representing or engaged in the over-the-counter and prescription drug industries.

In addition to the above, respondents are in substantial competition in or affecting commerce with corporations, firms and individuals representing or engaged in the direct mail order sales and advertising industries.

PAR. 15. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true.

PAR. 16. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The National Media Group, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 1060 Valley Forge Plaza, 1150 First Ave., King of Prussia, Pennsylvania

2. Respondent Robert J. Marsh, Sr. is an individual and corporate officer of The National Media Group, Inc., and maintains an office at 1060 Valley Forge Plaza, 1150 First Ave., King of Prussia, Pennsylvania.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

## ORDER

### I

*It is ordered,* That respondents, The National Media Group, Inc., a corporation, and Robert J. Marsh, Sr., an individual, their successors and assigns, either jointly or individually, and the corporate respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of all products do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. Represents that use of Acne-Statin will cure acne or any skin condition associated with acne.

2. Represents that Acne-Statin will eliminate or reduce the bacteria responsible for pimples, blackheads, whiteheads, other acne blemishes or any skin condition associated with acne.

3. Represents that Acne-Statin will eliminate or reduce the fatty acids responsible for pimples, blackheads, whiteheads, other acne blemishes or any skin condition associated with acne.

4. Represents that Acne-Statin is superior to prescription or over-the-counter antibacterial acne preparations in the treatment of acne.

5. Represents that Acne-Statin is superior to soap in the antibacterial treatment of acne.

6. Represents that the money-back guarantee for Acne-Statin or any other product has no time and quantity limitations unless such statement is true.

7. Misrepresents the extent to which any product has been tested or the results of any such test(s).

8. Represents through a test(s) or, demonstration(s) that a product is comparable or superior to another product or other products where the test(s) or demonstration(s) does not accurately depict or present the efficacy or the mode of performance of each product for the advertised use.

9. Misrepresents the efficacy, use or the mode of performance of any "drug," "cosmetic," "device" or "food" (as these terms are defined by Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55) where the use or reasonably foreseeable misuse of the product may adversely affect the health or safety of the user.

B. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly:

1. represents that use of Acne-Statin or any other acne product by persons with acne will reduce, minimize or eliminate pimples, blackheads, whiteheads or any other blemishes associated with acne;

2. represents that Acne-Statin or any other acne product can eliminate any factor contributing to acne or any skin condition associated with acne;

3. represents that Acne-Statin or any other acne product is superior to prescription or over-the-counter acne preparations in the treatment of acne or any skin condition associated with acne;

4. represents that Acne-Statin or any other product is efficacious for the treatment of acne, unless, at the time of each dissemination of such representation(s) respondent(s) possess and rely upon competent and reliable scientific or medical evidence as a reasonable basis for such representation(s). Competent and reliable scientific or medical evidence shall be defined as evidence in the form of at least two well-controlled double-blind clinical studies conducted by different persons, independently of each other. Such persons shall be dermatologists who are qualified by scientific training and experience to treat acne and conduct the aforementioned studies.

C. Disseminating or causing the dissemination of any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade

Commission Act, which directly or indirectly makes representations referring or relating to the performance or efficacy of any "drug," "cosmetic," "device" or "food," or refers or relates to any characteristic, property or result of the use of any "drug," "cosmetic," "device" or "food," unless, at the time of each dissemination of such representation(s) respondents possess and rely upon a reasonable basis for such representation(s). For purposes of this provision the terms "drug," "cosmetic," "device" or "food" shall be defined by Section 15 of the Federal Trade Commission Act, 15 U.S.C. 55.

## II

With reference to IA 7-9, IB and IC of this order, the respondent(s) shall have an affirmative defense to a compliance suit for violation of these provisions where respondent(s): (1)(a) acted only as an advertising agency; that is only aided in the preparation of copy, marketing strategy and placement of advertisements which are the subject of a compliance suit and had no proprietary interest in the product(s) advertised nor financial interest in the sale thereof; or (b) functioned as a media buyer with a financial interest in the product(s) advertised; that is only purchased media space or time for advertising and had a proprietary interest in the product(s) advertised or a financial interest in the sale thereof; and (2) neither knew nor should have known that the advertisements violated the above-specified order provisions.

## III

Respondents shall be exempt from paragraphs IA 7-9, IB and IC of this order where they acted only as media buyer; that is they only purchased media space or time and were remunerated by the standard and traditional means of compensation for such acts. For the purposes of this part of the order, "standard and traditional means of compensation" shall be defined as a fee based on:

A. a percent of the cost of media space or time;

B. a fixed rate charged for resources expended by the media buyer to locate and/or purchase media space or time; or

C. a combination of A and B, *supra*.

In no event shall a "standard and traditional means of compensation" for purposes of this part of the order include a method of payment based on a percentage of sales of the product(s) or service(s) for which media space or time is purchased.

## IV

*It is further ordered,* That:

A. Within thirty (30) days of final acceptance of this consent order by the Federal Trade Commission (hereinafter the "Commission"), respondent The National Media Group, Inc., shall establish an interest-bearing trust account containing the sum of sixty thousand dollars ($60,000), for the purpose of paying restitution to Acne-Statin purchasers. The instrument creating the trust account shall not become binding until the Commission or its designated staff has reviewed said instrument and determined that it conforms to all obligations outlined in this order. In the event that said instrument does not so conform to the order, respondents shall make all changes identified by the Commission or its designated staff in a timely manner to insure that said trust account is established within the time constraints imposed by this order. Said trust account shall provide for at least a six (6) percent annual interest rate, compounded quarterly, if such rate and terms are reasonably available, and shall be administered, maintained and terminated for a reasonable fee, which fee shall not reduce the principal of the trust account. To the extent respondents pay administration costs of the trust account from funds other than the sixty thousand dollars ($60,000) specified above, they shall be reimbursed from the trust account established by this order pursuant to the provisions in the instrument which creates the said trust account; *provided, however,* that all such payments shall be limited to the interest of said trust account and the principal of said trust account shall not be reduced. Said account shall be entitled "Acne-Statin Restitution Account - II." Furthermore, within forty (40) days of the final acceptance of this order by the Commission, respondents shall provide the Commission or its designated staff a copy of the trust agreement which establishes the trust account, and a verified accounting of the funds within said account. If, for any reason, respondent, The National Media Group, Inc., does not fulfill its obligation to establish the aforementioned trust account, respondent, Robert J. Marsh, Sr., shall then establish the trust account within the time constraints imposed by this order. The instrument creating said trust account shall expressly contain binding provisions to the following effect:

1. Neither Robert J. Marsh, Sr., nor The National Media Group, Inc., shall have any power, either express or implied, to revoke said trust account or deplete the monies therein.
2. The trust account monies shall not be subject to the claims of

any creditors of Robert J. Marsh, Sr., or The National Media Group, Inc.

3. The beneficiaries of said trust account shall be Acne-Statin purchasers who request refunds and are identified by the Commission or its designated staff as beneficiaries of said trust and/or The National Media Group, Inc. *Provided, however,* that purchasers who make their initial purchase of Acne-Statin after the first dissemination of the restitution notice shall be ineligible to be designated as beneficiaries of said trust, and, therefore, ineligible to receive restitution under this order.

4. The Commission or its designated staff shall have the exclusive power to determine when and which beneficiaries, or other parties necessary to the execution of the restitution program, which includes the notification of consumers, are to receive monies from said trus account and what amount each is to receive. This power o distribution shall include the power to have up to ten thousan dollars ($10,000) distributed to pay for expenses of administering th restitution program.

5. Said trust account shall retain all interest accumulate thereto and such interest shall be available as funds for distributio to the beneficiaries of said trust account and may also be available a money for the administration costs of the trust account.

6. The trustee of said trust account shall be independent o Robert J. Marsh, Sr., and The National Media Group, Inc.

7. Upon direction of the Commission or its designated staff to pa funds to a party identified in IIA4, *supra,* the trustee shall issu payment to the said identified party within sixty (60) days of th direction of the Commission or its designated staff.

B. The Commission or its designated staff will determine th means by which Acne-Statin purchasers will be notified and th terms and conditions under which such purchasers shall receiv restitution, provided that:

1. no restitution shall be paid out of the aforementioned tru account to any Acne-Statin purchaser unless Karr Preventati Medical Products, Inc., and/or Atida H. Karr, M.D., is directed by final order of the Commission or a final court decree pursuant Section 19 of the Federal Trade Commission Act, 15 U.S.C. 57b, make restitution to such purchasers;

2. purchasers will be given a specific deadline not more than 1 days after their notification before which they must request restit tion in writing in order to receive restitution;

3. each purchaser who requests restitution shall receive the tot

amount paid for Acne-Statin unless there are insufficient funds to pay all such purchasers. If there are not sufficient funds to fully pay all such purchasers, each such purchaser shall receive the proportion, equal to the ratio of the total monies available for restitution over the total amount of restitution requested by purchasers, of the amount which he or she spent for Acne-Statin;

4. no purchaser shall receive more in restitution than such purchaser paid for Acne-Statin less the amount or refunds, if any, already received and

5. funds from the aforementioned trust account shall be used to pay fifty percent (50%) of each restitution payment. *Provided, however,* that if no funds are available from Karr Preventative Medical Products, Inc., and/or Atida H. Karr, M.D., or if the funds from the trust account established by these parties are for any reason depleted prior to the depletion of the funds in the trust account established by this order, then monies from the trust account established herein shall be used to pay the remaining restitution requests.

C. Within six months after the completion of the restitution program, the Commission or its designated staff shall direct the trustee of the trust account established in IV A, *supra,* to pay all monies remaining in the trust account to The National Media Group, Inc., and to terminate the trust account.

## V

*It is further ordered,* That:

Respondents shall be obligated to the extent set forth below, and as directed by the Commission or its designated staff generally, to take responsibility for the administration of the Acne-Statin restitution program.

Included in the said responsibilities of the respondents herein, are the following:

1. Verification of the fact of purchase and the amount of purchase for each Acne-Statin purchaser who requests his/her money back.

2. Totalling the refund requests and notifying the Commission or its designated staff of the identity of persons who should receive refunds and the amount of money each such person should receive.

3. For each person who requests a refund and said request cannot be verified or for some other reason the said person is allegedly ineligible for the total requested refund, the respondents shall identify each such person and provide an explanation why the

refund is inappropriate. The final determination of eligibility for, and amount of, refunds shall rest with the Commission or its designated staff.

4. The writing and mailing of refund checks to all persons who are eligible for restitution.

5. Certifying under oath that all eligible consumer requests for refunds have been satisfied by the act of mailing refund checks to said persons at the most recent address of such persons known to respondents.

6. Providing the Commission or its designated staff with a full accounting regarding how the respondents expended funds approved by the Commission or its designated staff in the discharge of their duties under Part V of this order.

*Provided, however,* in fulfilling these order obligations, respondents may enter into contracts for the performance of the said obligations. All such contracts shall be approved by the Commission or its designated staff before being made final, and shall be made with parties independent of the respondents, who are bonded to guarantee and insure the honest performance of each such contract. Notwithstanding the fact that certain order obligations may be accomplished through contracting, it shall be the respondents' obligation and responsibility to perform or have performed all order obligations in an expeditious and timely fashion and the responsibility to police all such contracts. Upon approval by the Commission or its designated staff, such contracts shall bind the trustees responsible for Acne-Statin Restitution Accounts I and II. The respondents shall not be financially liable for the aforementioned administrative expenses beyond said ten thousand dollars ($10,000) specified in the account entitled "Acne-Statin Restitution Account - II."

The respondents shall be responsible for the cost of: finding suitable parties for the fulfillment of such contracts; negotiating such contracts; monitoring the compliance with such contracts; and any other similar administrative tasks which are necessary for the administration of the restitution program through its completion. These obligations shall be independent of and in addition to the monies which respondents shall have paid into the trust account to help defray the administrative expenses of the restitution program.

## VI

*It is further ordered,* That the corporate respondent shall forthwith distribute a copy of this order to each of its operating divisions.

*It is further ordered,* That each respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered,* That each respondent, shall, within sixty (60) days after this order becomes final, and annually thereafter for three (3) years, file with the Commission a report, in writing, signed by the respondent, setting forth in detail the manner and form of its compliance with this order.

*It is further ordered,* That each respondent shall maintain files and records of all substantiation related to the requirements of Parts IB and IC of this order for a period of three (3) years after the dissemination of any advertisement which relates to either of these portions of the order. Additionally, such material shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a written request for such material.

## IN THE MATTER OF

## GANT, INC.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2996. Complaint, Nov. 6, 1979—Decision, Nov. 6, 1979*

This consent order, among other things, requires a New Haven, Conn. manufacturer of wearing apparel and related accessories, to cease fixing, maintaining or compelling adherence to suggested resale prices and sale periods for its products. Respondent is prohibited from soliciting the identity of dealers who fail to conform to such prices, and from taking any adverse action against them. Additionally, the firm is prohibited from restricting the use of product trademarks or other identification in the sale or advertising of its products; and barred from suggesting retail prices and sales periods for its products for a period of two years.

### *Appearances*

For the Commission: *Jeffrey Klurfeld.*

For the respondent: *M. Topofsky* and *S. Bosme, Heller, Ehrman, White & McAulife,* San Francisco, Calif.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Gant, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For purposes of this complaint, the following definitions shall apply:

"Product" is defined as any item of wearing apparel or related accessory which is manufactured, offered for sale or sold by respondent.

"Dealer" is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

"Resale Price" is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

"Sale Period" is defined as any time during which any dealer offers to sell any product at resale prices lower than those in effect during the usual and ordinary course of said dealer's business; or any suggested, authorized or customary time for selling or advertising any product at prices lower than the suggested, established or customary resale prices.

PARAGRAPH 1. Respondent Gant, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 40 Sargent Drive, New Haven, Connecticut.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of men's, women's and children's wearing apparel and related accessories. Sales by respondent for fiscal year 1978 exceeded $50 million.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent sells and distributes its products directly to more than 5,000 retail dealers located throughout the United States who in turn resell respondent's products to the general public.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale and distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold and distributed by respondent.

PAR. 6. In the course and conduct of its business as above described, respondent has for some time last past effectuated and pursued a policy throughout the United States, the purpose or effect of which is and has been to fix, control, establish, manipulate and maintain the resale prices at which its dealers advertise, offer for sale and sell its products.

PAR. 7. By various means and methods, respondent has effectuated and enforced the aforesaid practice and policy by which it can and does fix, control, establish, manipulate and maintain the resale prices at which its products are advertised, offered for sale and sold by its dealers. To carry out said practice or policy, respondent adopted and employed, and still employs, the following means and methods among others:

(a) It requires prospective dealers as a condition of becoming dealers, and requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that they will sell products at prices suggested by respondent.

(b) It requires prospective dealers as a condition of becoming dealers, and requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that, in the event they sell any product at less than respondent's suggested retail price, they will not identify such product in any advertisement as having been manufactured by respondent.

(c) It warns, harasses and uses various forms of coercion and discipline against dealers who sell, or are suspected of selling, products at prices other than those respondent has established or suggested.

(d) It prohibits any dealer from being reimbursed pursuant to respondent's cooperative advertising program for any advertisement offering any product at a price other than that which respondent has established or suggested.

PAR. 8. By means of the aforesaid acts and practices and more, respondent, in combination, agreement, understanding and conspiracy with certain of its dealers and with the acquiescence of other of its dealers, has established, maintained and pursued a planned course of action to fix and maintain certain specified uniform prices at which products will be resold.

PAR. 9. The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of respondent's products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Gant, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 40 Sargent Drive, in the City of New Haven, State of Connecticut.

2. Gant Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 400 Pike St., in the City of Cincinnati, State of Ohio.

3. Gant Corporation has recently purchased the business and certain of the assets of respondent Gant, Inc.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, of respondent Gant, Inc., and of Gant Corporation, and the proceeding is in the public interest.

## ORDER

For the purposes of this order, the following definitions shall apply:

"Product" is defined as any item of wearing apparel or related accessory which is manufactured, offered for sale or sold by respondent.

"Dealer" is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

"Resale Price" is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

"Sale Period" is defined as any time during which any dealer offers to sell any product at resale prices lower than those in effect during the usual and ordinary course of said dealer's business; or any suggested, authorized or customary time for selling or advertising any product at prices lower than the suggested, established or customary resale prices.

*It is ordered*, That respondent Gant, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

## I

1. Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product, or the sale period of any dealer.
2. Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price or sale period.
3. Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price or sale period; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer.
4. Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price.
5. Hindering or precluding the lawful use by any dealer of any brand name, trade name or trademark of respondent in connection with the sale or advertising of any product at any resale price.
6. Making any payment or granting any consideration, service or benefit to any dealer because of the resale price at which any other dealer has advertised or sold any product.
7. Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised.
8. Terminating or taking any other action to restrict, prevent or

limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

9. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer, or limiting or restricting the right of any dealer to participate in any cooperative advertising program for which it would otherwise qualify, because of the resale price at which said dealer advertises or sells any product, or proposes to sell or advertise any product.

## II

1. For a period of two (2) years from the date of service of this order, orally suggesting or recommending any resale price or sale period to any dealer.

2. For a period of two (2) years from the date of service of this order, communicating in writing any resale price or sale period to any dealer; *provided, however,* that after said two (2) year period, respondent shall not suggest any resale price or sale period on any list, or in any advertising, book, catalogue or promotional material, unless it is clearly and conspicuously stated on each page where any suggested resale price or sale period appears, the following:

THE [RESALE PRICES OR SALE PERIODS] QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN [RESALE PRICES OR SALE PERIODS].

## III

*It is further ordered,* That respondent shall:

1. Within thirty (30) days after service of this order, mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to each of its present accounts. An affidavit shall be sworn to by an official of the respondent verifying that the attached Exhibit A was so mailed.

2. Mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to any person, partnership, corporation or firm that becomes a new account within three (3) years after service of this order.

## IV

*It is further ordered,* That respondent shall forthwith distribute a copy of this order to all operating divisions of said corporation, and to present or future personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this order, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

## V

*It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

## VI

*It is further ordered,* That respondent shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

## VII

*It is further ordered,* That for purposes of this order, and for no other purpose, Gant Corporation:

(1) Is a successor to respondent Gant, Inc.,

(2) Shall refrain from performing any act which respondent Gant, Inc., is prohibited form performing by said order; and shall perform all acts which respondent Gant, Inc. is required to perform by said order.

(3) Will be required to file one or more compliance reports showing that it has fully complied with said order, and may be liable for civil penalties in the amount provided by law for each violation by it of said order.

## VIII

*It is further ordered,* That a copy of said Order served upon Gant, Inc. shall be mailed by the Federal Trade Commission to Gant Corporation at its above-stated address simultaneously with such service on Gant, Inc.

## EXHIBIT A

Dear Retailer:

Without admitting any violation of the law, Gant, Inc. has agreed to the entry of an Order by the Federal Trade Commission regulating certain distribution practices. In connection therewith, the Company is required to send you this letter describing the Order.

The Order provides, among other things, as follows:

1. You can advertise and sell Gant products at any price you choose.

2. Gant will not take any action aganst you, including termination, because of the price at which you advertise or sell Gant products.

3. Gant will not suggest retail prices for any product until [2 years from the date of service of the Order].

4. The price at which you sell or advertise Gant products will not affect your right to use Gant trademarks or other identification in your sale or advertising of products bearing Gant trademarks or identification.

5. You are free to participate in any cooperative advertising program sponsored by Gant for which you would otherwise qualify, and to receive any advertising credit or allowance allowed thereunder regardless of the price at which you advertise the Gant product.

If you have any questions regarding the Order or this letter, please call ______________________.

______________________

for Gant, Inc.

## IN THE MATTER OF

# IRVING E. MILLER

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 9075. Complaint,* Feb. 26, 1976—Decision, Nov. 7, 1979*

This consent order, among other things, requires an individual party to a complaint issued against Bankers Life and Casualty Company and others, to cease, in connection with the advertising, promotion and sale of land, misrepresenting that land purchase is a safe investment; involves little financial risk; and is a means of achieving financial security. The order requires that all advertising, promotional materials and sales contracts include specified disclosures regarding risks involved in undeveloped land investment; the advisability of consulting with a real estate specialist prior to contracting; the availability and cost of water, sewage disposal and utilities; and the identity of lots in flood plain areas. Respondent is required to provide customers with cooling-off periods and information regarding rights to cancellation and refund; and prohibiting from using certain contractual provisions including one by which defaulting purchasers forfeit all payments made. Additionally, the order requires respondent to release, in favor of consumers who have paid for their lots in full, any security interest he has or obtains in subdivisions.

## *Appearances*

For the Commission: *Gerald H. Jaggers* and *John T. Hankins.*

For the respondent: *Alan H. Bucholtz, Quiat, Bucholtz & Buer,* Denver, Colo.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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* Complaint previously published at 94 F.T.C. 363.

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Irving E. Miller is an individual whose business address is 2601 Biscayne Boulevard, Miami, Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

For purposes of this order, unless otherwise provided, the following definitions shall be applicable:

"Purchaser" shall mean a person to whom one or more lots in a subdivision have been sold or offered for sale; *provided, however,* that a "purchaser" shall not include a person who purchases land in a single transaction for a sum in excess of $25,000.

"Land" or "subdivision" shall mean any real property which is divided or proposed to be divided into 50 or more units, whether contiguous or not, for the purpose of sale or lease to purchasers as part of a common promotional plan.

"Contract" shall mean a written agreement for the sale of land to purchasers.

"Business day" shall mean any calendar day except Saturday, Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day and Christmas Day.

"Property Report" includes documents sometimes referred to as an Offering Statement or Prospectus.

"Company which sold the lot" shall mean the title owner or its sales agent.

"Inconsistent" shall mean mutually repugnant or contradictory one to the other.

For purposes of this order, a requirement to cease and desist from representing or misrepresenting shall include representing or misrepresenting directly or indirectly. For purposes of this order, all required disclosures shall be made in a clear and conspicuous manner.

Except as provided in Sections IV and IX of this order, this order shall not apply to a bulk transfer of land or subdivision. The term "bulk transfer" shall mean the transfer of all or a portion of land or subdivision conveyed in a single transaction for a sum in excess of $25,000.

## I

*It is ordered*, That respondent Irving E. Miller and his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other entity, in connection with the advertising, offering for sale or sale of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing:

1. That land or lots are a good or safe investment, or that the purchase of a lot is a good or safe investment.

2. That there is little or no financial risk involved in the purchase of lots.

3. That the resale of a purchased lot is not difficult.

4. That the value of, or demand for, any land, including lots being offered for sale or previously sold, has increased, or will increase, or that purchasers have made, or will in the future make, a profit by reason of having purchased such land.

5. That the prices of lots periodically rise or that prices of said lots are increasing, have increased or will increase, without disclosing at the same time, and by the same medium by which the price increases are communicated, that the price increases of lots do not in any way relate to the value of said lots.

6. That the purchase of a lot is a way to achieve financial security or prosperity, to deal with inflation or to become wealthy.

7. That the land in any subdivision will soon be unavailable or that prospective purchasers must purchase a lot in a subdivision immediately to ensure that such lot will be available.

8. That subdivision land and the area surrounding it are comparable, similar or analogous either to urban, metropolitan and industrial areas or to mountain resort areas or to recreation areas.

9. That the growth in land values or potential growth in land values at a subdivision corresponds to or will correspond to the growth in land values at any other locality. The word "locality"

includes, but is not limited to, cities, towns, counties, townships, boroughs, states and regions.

*Provided, however,* it shall be a defense that at the time a representation was made, it was true and the maker of the representation possessed data substantiating the representation. Such substantiating data shall be maintained for at least three years from the making of the representation it substantiates and shall be made available to the Commission upon request.

B. Including in any contract for the sale of subdivision land, or in the documents shown or provided to purchasers or prospective purchasers of subdivision land:

1. Language to the effect that no express or implied representations have been made in connection with the sale or offering for sale of such land, other than those set forth in the contract.

2. Language to the effect that upon a failure of the purchaser to pay any installment due under the contract or otherwise to perform any obligation under the contract, the company which sold the lot shall be entitled to retain sums previously paid thereunder by the purchaser.

3. Any waiver, limitation or condition on the right of a purchaser to cancel a transaction or receive a refund under any provision of this order, except as such waiver, limitation or condition is expressly allowed by this order.

C. Misrepresenting the right of a purchaser under any provision of this Order or any applicable statute or regulation to cancel a transaction or receive a refund.

D. Making any representation concerning the rights or obligations of a company or purchaser which differs in any respect from the rights or obligations of the parties as stated in the contract or Property Report.

E. Making any statement or representation concerning the proximity to any subdivision of any existing or future city, place, facility, body of water or road without disclosing, in immediate conjunction therewith and with the same conspicuousness as such statement of representation, the approximate distance to the nearest two (2) miles in road miles from the center of the subdivision to the downtown or geographical center of the city, place or facility referred to, or in the case of a body of water or a road, to the nearest point at which such body of water or road is accessible to entry and use by purchasers.

F. Making any statement or representation concerning any credit, refund or other monetary benefit or remuneration to purchasers or prospective purchasers from the company which sold the lot unless such is a fact and unless any conditions or limitations attached to such credit, refund, benefit or remuneration are disclosed.

II

*It is further ordered,* That respondent Irving E. Miller, his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other entity, in connection with the advertising, offering for sale or sale of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith:

A. Set forth in all sales and promotional material and advertising relating to the sale of land, except billboards, the following statement:

Risk Factor: Since land values are uncertain, you should consult a qualified professional before purchasing.

B. Set forth as the title on the first page of any contract for the sale of land in 12-point boldface type "CONTRACT FOR THE PURCHASE OF LAND."

C. Set forth on the first page of all contracts for the sale of land in 10-point boldface type the following statement:

THIS IS A CONTRACT BY WHICH YOU AGREE TO PURCHASE LAND.

THE FUTURE VALUE OF THIS LAND, AS WELL AS ALL UNDEVELOPED REAL ESTATE, IS UNCERTAIN. YOU SHOULD NOT ASSUME THAT THE VALUE OF LAND WILL INCREASE. DO NOT ASSUME THAT YOU WILL BE ABLE TO RESELL YOUR LAND WITHOUT SIGNIFICANT COMMUNITY DEVELOPMENT AND POPULATION GROWTH.

D. Set forth on the first page of all contracts for the sale of lots such of the following statements as are applicable:

1. For contracts for the sale of lots where the company which sold the lot is not obligated to provide electricity, water, and sewage disposal by central systems, but where all such utilities are available by other means, the following statement:

This undeveloped land has been planned for use as a vacation homesite. Electricity, water, and sewage disposal are available at the purchaser's expense. Electricity is obtainable by generator, water by well, and sewage disposal by septic tank. Access will be by unpaved roads.

*Provided* that, if a central system is provided instead of a generator or well or septic tank, then the above statement may be modified only to the extent necessary to so indicate.

*Provided further* that, if paved roads are provided, then the above statement may be modified only to the extent necessary to so indicate.

*Provided further* that, if roads are county accepted, then the above statement may be modified only to the extent necessary to so indicate.

2. For contracts for the sale of lots where the company which sold the lot is not obligated to provide any utilities and where utilities are not known to be available, the following statement in lieu of the above statement:

> **This completely undeveloped land is being sold "as is." No improvements are planned for this subdivision other than county-approved and maintained roads. No representation is made as to the availability of water or sewer.**

*Provided* that, if the roads are not county-approved and maintained, this statement shall be modified to disclose the status of the roads if any.

E. Set forth the following statement in any contract for land requiring a Property Report; immediately below the statement required by paragraph D. above.

> **Note to Buyer: See page [insert page number] of the Property Report for statements relating to the additional expense for improvements.**

F. Set forth in any contract for the sale of land which does not require a Property Report, immediately below the statements required by paragraph D. above, a statement providing the cost of improvements.

G. Whenever prospective buyers are provided with a contract for the sale of land by any means other than by mailing said contract directly to such purchasers:

1. Furnish each purchaser, at the time the purchaser signs a contract for the sale of land, with two copies of a form, captioned in boldface type "NOTICE OF CANCELLATION," which shall contain in boldface type the following information and statements:

**NOTICE OF CANCELLATION**

______________________________
**Date of Transaction**

______________________________
**Contract Number**

**YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE SHOWN ON THE CONTRACT.**

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT AND ANY NEGOTIABLE INSTRUMENT ISSUED BY YOU WILL BE RETURNED WITHIN TWENTY BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO [name of company which sold the lot], AT [address of said company's place of business] NOT LATER THAN MIDNIGHT OF [date].

I (WE) HEREBY CANCEL THIS TRANSACTION (EACH PURCHASER MUST SIGN THIS NOTICE.)

Signature of Purchaser Date

Signature of Purchaser Date

2. Before furnishing copies of the above "Notice of Cancellation" to the purchaser, complete both of the copies by entering the name of the company which sold the lot, the address of said company's place of business, the date of the transaction, the contract number and the date by which the purchaser may give notice of cancellation, but in no event may such date be earlier than the tenth business day following the date of the transaction.

3. Where a timely notice of cancellation is received and said notice is not properly signed and the company which sold the lot does not intend to honor the notice, immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of his error and stating clearly and conspicuously that a notice signed by the purchaser must be mailed by midnight of the seventh business day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

4. Where the signature of a prospective purchaser is solicited during the course of a sales presentation, inform each person orally, at the time he signs the contract, of his right to cancel as stated in paragraph II.G.5. of this order.

5. Include clearly and conspicuously in each contract for the sale of land the following statement in boldface type:

PURCHASER HAS THE RIGHT TO CANCEL THE CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT. SEE THE ATTACHED "NOTICE OF CANCELLATION" FOR AN EXPLANATION OF THIS RIGHT.

6. Within twenty business days after the receipt of a timely notice of cancellation signed by a purchaser, refund all payments

made under the contract, and cancel and return any monies paid by the purchaser in connection with the contract.

H. Furnish any report required to be furnished to a purchaser at or before the signing of a contract by Federal or State law or by this order (i) with the first written materials furnished to a prospective purchaser in connection with the sale of a lot or (ii) during the first contact which the prospective purchaser has with any agent or employee of the company which is offering the lot for sale, in connection with the sale of a lot.

I. Inform all prospective purchasers that a bank or other lender located near the subdivision should be consulted prior to the purchase of land if the purchaser intends to finance the building of a house on that land.

J. If a refund is offered contingent upon the purchaser taking a company-guided inspection tour or making a registered inspection of the property in which the purchaser's lot is located:

1. Provide the purchaser three business days after taking said tour or making said inspection within which to request a refund.

2. Include in any contract with the original purchaser, in immediate proximity to the provision setting forth the availability of a refund upon the completion of a company-guided tour or registered inspection of the property, the following statements:

> If you take a company-guided tour of the property within [designate time period] months of your purchase and you have not been declared in default, you will have three days after the tour to cancel your purchase and get your money back.
>
> You, the purchaser, pay your own expenses for travel to the property in order to take the tour.

3. Furnish each purchaser at the completion of the tour or inspection a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall contain in boldface type the following statements:

NOTICE OF CANCELLATION

______________________________

Date of Company-Guided Inspection
Tour or Registered Inspection
of Property

______________________________

Contract Number

YOU MAY CANCEL YOUR CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE ABOVE DATE.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TWENTY BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE.

TO CANCEL YOUR CONTRACT, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO [name of company which sold the lot], AT [address of said company's place of business] NOT LATER THAN MIDNIGHT OF [date].

I (WE) HEREBY CANCEL THE CONTRACT. (EACH PURCHASER MUST SIGN THIS NOTICE.)

Signature of Purchaser Date

Signature of Purchaser Date

4. Before furnishing copies of the above "Notice of Cancellation" to purchaser, complete both copies by entering the name of the company which sold the lot and the address of said company's place of business, the date of the company-guided inspection tour or the registered inspection of the property, the contract number and the date by which the purchaser may give notice of cancellation, but in no event may such date be earlier than the third business day following the date of said tour or inspection.

5. Where a timely notice of cancellation is received but said notice is not properly signed and the company which sold the lot does not intend to honor the notice, immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of his error and stating clearly and conspicuously that a notice signed by the purchaser must be mailed by midnight of the seventh day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

K. Disclose in each instance where all or part of any printed article, publication, endorsement or testimonial is used, published or referred to, the date when such article, publication, endorsement or testimonial was originally published or made and the source of such article, publication, endorsement or testimonial.

L. Notify prospective purchasers of any lot offered for sale in a flood plain area that said lot is in a flood plain area.

## III

*It is further ordered*, That respondent Irving E. Miller and his agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other entity, in connection with the advertising, offering for sale or sale of land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing that any land may be used now or in the future:

A. As a homesite, unless the contracts or Property Reports accurately set forth:

1. That water is available to the purchaser by drilling a well or by central water system.

2. That sewage disposal is available to purchasers by installation of a septic tank or by hook-up to a central sewage system.

3. That electricity will be available to the purchaser from a utility company.

B. As a vacation homesite, unless the contracts or Property Reports set forth:

1. That water is available to the purchaser by drilling a well.

2. That percolation on the property purchased is sufficient to support a septic tank.

3. That electricity is available to the purchaser by installing a generator.

## IV

*It is further ordered,* That respondent Irving E. Miller, including his agents, representatives and employees, directly or through any corporation, subsidiary, division or other entity:

A. Regarding each subdivision in which respondent has or obtains a security interest, shall execute and record a covenant providing that, if a purchaser pays the total purchase price pursuant to the terms of a contract for the purchase of land, respondent shall grant to such purchaser a release of said security interest.

1. For each subdivision in which respondent has a security interest as of the effective date of this order, respondent shall execute and record such covenant within 90 days of the effective date of this order.

2. For each subdivision in which respondent obtains a security interest after the effective date of this order, respondent shall execute and record such covenant at the same time said security interest is recorded.

B. Regarding each subdivision in which respondent has or obtains title, for as long as respondent retains title, shall obtain for each purchaser who pays the total purchase price pursuant to the terms of a contract for the purchase of land, a release as to that purchaser of any security interest on such subdivision granted subsequent to the effective date of this order.

## V

*It is further ordered,* That if the Interstate Land Sales Full Disclosure Act, presently codified at 15 U.S.C. 1701-20 (1970), or any regulation that has been or may be promulgated pursuant thereto requires an act or practice that is prohibited by any provision of this order, or prohibits an act or practice that is required by any such provision, or is otherwise inconsistent with any such provision of this order, any such provision of this order shall be without legal force or effect.

## VI

*It is further ordered,* That in the event the Federal Trade Commission promulgates a valid Trade Regulation Rule applicable to respondents' sale of land, then to the extent there are any inconsistencies between this order and such Rule, the Trade Regulation Rule will govern.

## VII

*It is further ordered,* That respondent Irving E. Miller:

1. Deliver, by hand or by certified mail, a copy of Sections I, II, and III of this order to each of his present or future employees and salesmen, and independent brokers, who sell or promote the sale of land to purchasers.
2. Provide each person so described in Paragraph 1 above with a form, returnable to said respondent, clearly stating such person's intention to be bound by and to conform his sales practices to the requirements of this order.
3. Inform each person described in Paragraph 1 above that said respondent shall not use any such person, or the services of any such person, unless such person agrees to and does file notice with said respondent that such person will be bound by the provisions contained in this order.
4. That in the event such person will not agree to so file notice with said respondent and to be bound by the provisions of this order, said respondent shall not use such person, or the services of such person.
5. Inform the persons described in Paragraph 1 above that said respondent is obligated by this order to discontinue dealing with those persons who engage on their own in the acts and practices prohibited by this order.
6. Institute a program of continuing surveillance adequate to reveal whether the sales practices of each of said persons described

in Paragraph 1 above conform to the requirements of Sections I, II, and III of this order.

7. Discontinue dealing with any person described in Paragraph 1 above, revealed by the aforesaid program of surveillance, who repeatedly engages on his own in the acts or practices prohibited by Sections I, II, and III of this order; *provided, however,* that, in the event remedial action is taken, evidence of such dismissal or termination shall not be admissible against said respondent in any proceeding brought to recover penalties for alleged violation of any other paragraph of this order.

## VIII

*It is further ordered,* That respondent Irving E. Miller shall forthwith distribute a copy of this order to each entity which he owns or controls and which is engaged in the sale of land.

## IX

*It is further ordered,* That in the event that respondent Irving E. Miller transfers to any other person or entity all or a substantial part of any subdivision owned by him or by an entity within his control, respondent shall notify the Commission in writing within sixty days of such transfer of the fact of the transfer, identifying the property transferred, the name and address of the transferee, and the date of the transfer.

## X

*It is further ordered,* That respondent Irving E. Miller, for a period of 10 years from the date of service of this order, shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the advertising, offering for sale or sale of subdivision land to the consuming public. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

## XI

*It is further ordered,* That respondent Irving E. Miller shall, within sixty (60) days after service upon him of this order, file with the

Commission a report in writing setting forth in detail the manner and form in which said respondent has complied with this order.

## IN THE MATTER OF

# GEORGE'S RADIO AND TELEVISION COMPANY, INC.

### FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND MAGNUSON-MOSS WARRANTY ACTS

*Docket 9115. Complaint, July 25, 1978—Final Order, Nov. 7, 1979*

This order, among other things, requires a Washington, D.C. retailer of furniture and home appliances to cease failing to properly designate written warranties; clearly identify in written warranties the product, parts, components and properties covered or excluded; the items or services furnished by the warrantor; and a statement advising that the warranty provides purchasers with specific legal rights. Respondent must make the text of written warranties readily available to prospective purchasers prior to sale; and conspicuously post signs advising consumers that all warranties are not the same, and that written warranties are available for their review. Additionally, the firm is required to instruct its employees as to their obligations under the law, and to institute a surveillance program designed to detect violations of the order.

## *Appearances*

For the Commission: *Michael E.K. Mpras* and *Bernard Fensterwald, III.*

For the respondent: *Arnold F. Shaw, Donohue, Kaufmann, Shaw & Kligman,* Washington, D.C.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act ("Warranty Act") and the implementing Rules promulgated under the Warranty Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that George's Radio and Television Co., Inc., a corporation sometimes referred to in this complaint as respondent, has violated the provisions of said Acts and implementing Rules, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent George's Radio and Television Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located at 2850 New York Ave., N.E., Washington, D.C.

Par. 2. Respondent has been, and is now, engaged in the advertising, offering for sale and sale of appliances, furniture and other consumer products to the public.

Par. 3. In the course and conduct of its business, respondent offers for sale and sells consumer products to consumers distributed in commerce as "consumer product", "consumer" and "commerce" are defined by Sections 101(1), 101(3) and 101(13) and (14), respectively, of the Warranty Act. In connection with the offering to sell and sale of consumer products manufactured after July 4, 1975, respondent grants a written warranty, as "written warranty" is defined by Section 101(6) of the Warranty Act, and is therefore a warrantor, as "warrantor" is defined [2] by Section 101(5) of the Warranty Act.

## COUNT I

Alleging violations of the Warranty Act, and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Three are incorporated by reference in Count I as if fully set forth verbatim.

Par. 4. In connection with respondent's offering and granting of written warranties upon consumer products costing the consumer in excess of $10.00, respondent designates each such warranty as "George's extended limited warranty."

Par. 5. Respondent's use of the phrase "George's extended limited warranty" violates Section 103 of the Warranty Act, by failing clearly and conspicuously to exclusively designate each such warranty as either a "full (statement of duration) warranty" or a "limited warranty" and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

## COUNT II

Alleging violations of the Warranty Act and the implementing Rule promulgated under the Warranty Act, and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Three are incorporated by reference in Count II as if fully set forth verbatim.

Par. 6. The Federal Trade Commission, pursuant to Title I, Section 109 of the Warranty Act, (15 U.S.C. 2309), duly promulgated the Rule Concerning the Disclosure of Written Consumer Product Warranty Terms and Conditions on December 31, 1975 (16 CFR 701 (1977)) (effective January 1, 1977) ("Disclosure Rule"). A copy of the Disclosure Rule is marked and attached as Appendix A* and is incorporated in Count II by reference as if fully set forth verbatim.

PAR. 7. Subsequent to January 1, 1977, in connection with its offering and granting of written warranties on consumer products costing the consumer in excess of $15.00 which were manufactured subsequent to January 1, 1977, respondent failed to clearly and conspicuously disclose, in single documents, in simple and readily understood language:

a) a clear description and identification of the products, parts, characteristics, components [3] or properties covered by, and where necessary for clarification excluded from, each written warranty, as required by Section 701.3(a)(2) of the Disclosure Rule;

b) the point in time or event on which the warranty term commences, if different from the purchase date, and the period or other measurement of warranty duration, as required by Section 701.3(a)(4) of the Disclosure Rule; and

c) a statement in the following language: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state", as required by Section 701.3(a)(9) of the Disclosure Rule.

PAR. 8. Respondent's failure to comply with the Disclosure Rule as described in Paragraph Seven of this Complaint is a violation of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

## COUNT III

Alleging violations of the Warranty Act and the implementing Rule promulgated under the Warranty Act, and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Three are incorporated by reference in Count III, as if fully set forth verbatim.

PAR. 9. The Federal Trade Commission, pursuant to Title I, Section 109 of the Warranty Act, (15 U.S.C. 2309) has duly promulgated the Rule Concerning the Pre-Sale Availability of Written Warranty Terms on December 31, 1975 (16 CFR 702 (1977)) (effective January 1, 1977) ("Pre-Sale Rule"). A copy of the Pre-Sale Rule is marked and attached as Appendix B* and is incorporated in Count III by reference as if fully set forth verbatim.

PAR. 10. Subsequent to January 1, 1977, respondent has failed, in the ordinary course and conduct of its business, to make available for prospective buyers' review, prior to sale, the text of its written warranties offered or granted in connection with the offering for sale and sale of consumer products manufactured after January 1, 1977 and costing the consumer [4] in excess of $15.00, as required by Section 702.3(a)(1) of the Pre-Sale Rule.

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* For reasons of economy, not reproduced herein.

PAR. 11. Subsequent to January 1, 1977, respondent, in the course and conduct of its business, has offered for sale and sold consumer products costing the consumer in excess of $15.00, many of which are warranted by the manufacturer. Respondent is therefore a seller as "seller" is defined in Section 702.1(e) of the Pre-Sale Rule.

As a seller, respondent elected, in accordance with Section 702.3(1)(ii) of the Pre-Sale Rule, to implement a binder system to make available for prospective buyers' review, prior to sale, the text of the manufacturer's written warranty terms.

In connection with the above-mentioned binder system, respondent failed, as required by Section 702.3(1)(ii) of the Pre-Sale Rule, to:

a) provide the prospective buyers with ready access to such binder(s);

b) (1) display such binder(s) in a manner reasonably calculated to elicit the prospective buyers' attention; or

(2) (A) make the binder(s) available to the prospective buyers on request; and

(B) place signs reasonably calculated to elicit the prospective buyers' attention in prominent locations within the store, advising such prospective buyers of the availability of the binder(s), including instructions for obtaining access;

c) index such binder(s) according to product or warrantor; and

d) clearly entitle such binder(s) as "Warranties" or other similar title.

PAR. 12. Respondent's failure to comply with the Pre-Sale Rule as described in Paragraphs Ten and Eleven of this complaint is a violation of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

## INITIAL DECISION BY THOMAS F. HOWDER, ADMINISTRATIVE LAW JUDGE

### JULY 16, 1979

## PRELIMINARY STATEMENT

On July 25, 1978, the Commission issued its complaint in this case, charging respondent George's Radio and Television Company, Inc., ("George's") with violating the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Warranty Act"), and two Rules promulgated thereunder: the Rule concerning the Disclosure of Written Consumer Product Warranty Terms and Conditions ("Disclosure Rule"), and the Rule concerning the Pre-Sale Availability of Written Warranty Terms ("Pre-Sale Rule"). Specifically, the complaint alleged that respondent failed to properly designate its warranty as required by Section 103 of the Warranty Act; failed to make certain written disclosures in its warranty in violation of Sections 701.3(a)(2), (4) and (9) of the Disclosure Rule; failed to make its own warranties available for prospective buyers' review, prior to sale, in violation of Section 702.3(a)(1) of the Pre-Sale Rule; and failed to properly [2] implement a binder system making available for prospective buyers' review, prior to sale, the texts of manufacturers' written warranty terms in violation of Section 702.3(1)(ii) of the Pre-Sale Rule. The complaint further alleged that the above conduct of respondent violated Section 5 of the Federal Trade Commission Act, pursuant to Section 110(b) of the Warranty Act.

Respondent answered on September 26, 1978, denying the violations alleged. It admitted, however, its corporate identity and business as described in the complaint (Answer, pars. 1, 2). It further admitted the validity and application of the Warranty Act and the implementing Rules to its business operation (Answer, pars. 3, 6, 9, 11).

A prehearing conference was held in Washington, D. C., on October 30, 1978. Following the completion of discovery, trial of this matter was held in Washington, D. C., in February 1979. The record was closed for the reception of evidence on April 2, 1979, and respondent's motion to dismiss was denied on April 11, 1979. Proposed findings of fact and conclusions of law were filed by the parties on April 20, 1979, and replies thereto on April 30, 1979.

This proceeding is before me upon the complaint, answer, testimony and other evidence, and proposed findings of the parties. These findings have been carefully considered, and those not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial matters not necessary for this decision.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings of the parties, I make the following findings:

## FINDINGS OF FACT

1. Respondent George's is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 2850 New York Ave., N.W., Washington, D.C. (Answer, par. 1).

2. George's is in the business of advertising and selling televisions and other major and small appliances, furniture and other products to the consuming public (Answer, par. 2). [3]

3. At the time of trial, George's maintained thirteen retail sales branches at various locations throughout the Washington, D. C., metropolitan area (CX 1).[1]

4. George's advertises its products regularly in local newspapers, primarily The Washington Post (Filderman 25; CX 5, 6, 7). It also advertises from time-to-time on local television stations (Filderman 27).

5. Respondent purchases its products from approximately 50 manufacturers and suppliers located in numerous states of the United States (CX 2A-B).

6. The warranties associated with retail sales of products by respondent arise from two sources: In addition to the manufacturer's warranty which normally comes with the product, George's often offers its own "extended" warranty (Filderman 84, 39-51; CX 4A-B, 18-87).

7. Accordingly, in view of the above findings and of the admissions contained in respondent's answer, it is found that (in the language of paragraph three of the complaint): In the course and

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[1] As of August 3, 1977, George's maintained 13 retail outlets located at the following places:

1. 2135 Queens Chapel Rd., N.E., Washington, D.C.
2. 816 F St., N.W., Washington, D.C.
3. 6192 Greenbelt Rd., Greenbelt, MD
4. 7700 Richmond Highway, Hybla Valley, VA
5. 3807 Branch Ave., Hillcrest Heights, MD
6. 12125 Rockville Pike, Rockville, MD
7. 3036 Annandale Rd., Falls Church, VA
8. 8837 Leesburg Pike, Tyson's Corner, VA
9. 3509 Connecticut Ave., N.W., Washington, D.C.
10. 8239 Georgia Ave., Silver Spring, MD
11. 6200 Branch Ave., Camp Springs, MD
12. 6400 Commerce St., Springfield, VA
13. 13534 Occoquan Rd., Woodbridge, VA

conduct of its business, respondent offers for sale and sells consumer products to consumers distributed in commerce as "consumer product," "consumer" and "commerce" are defined by Section 101(1), 101(3) and 101(13) and (14), respectively, of the Warranty Act. It is further found that in connection with the offering to sell and sale of consumer products manufactured after July 4, 1975, respondent grants a written warranty, as "written warranty" is defined by Section 101(6) of the Warranty Act, and is therefore a warrantor, as "warrantor" is defined by Section 101(5) of the Warranty Act. [4]

## Count I

8. Respondent entitles its warranty "George's Extended Limited Warranty." This is printed on the reverse side of respondent's retail sales tickets, along with definitions or explanations of what is meant by various terms such as "Carry-In (Shop Service)," "Home Service," "Cost of Parts." Certain disclaimers as to George's warranty undertakings are also set forth (CX 4B).

9. According to the testimony of George's president and chief executive official, Mr. Filderman, the printed warranty information on the reverse of the retail sales invoice is to be taken in conjunction with the information handwritten on the face of the ticket by a salesman at the time of a customer's purchase (Filderman 39-48). This written information indicates the type of warranty service given and the extent of its duration. Examples of this would include language such as "15 Months Free Shop Service, Parts and Labor," "2 Year Free Home Service," "3 Year Picture Tube," "3 Year Free Home Service," etc. (See CX 18-87).

10. Mr. Filderman testified that George's warranty is but an extension of duration of the warranty already given on the product by the manufacturer; that except for extending the time, respondent undertakes no additional obligation (Filderman 53-55). George's employs its warranty as a merchandizing aid, to assist in moving products where there is an excess of inventory. Whether or not to offer a George's warranty on any given product for any given time period is a matter of discretion on the part of respondent's managing officials. The terms of George's warranties can and do vary both as to different products and as to the same product (Filderman 338-43). Sometimes respondent does not offer a George's warranty on a product; in such cases salesmen are instructed to write "Manufacturer's Warranty" on the face of the sales ticket (Filderman 48).

11. It is charged in the complaint that the phrase "George's Extended Limited Warranty" violates Section 103 of the Warranty Act, because such terminology is impermissible when used in

connection with consumer products costing the consumer in excess of $10.00 (Complaint, pars. 4, 5).[3]

12. According to complaint counsel, the only warranty designations allowed under the statute are either "full (statement of duration) warranty" or "limited warranty." [5]

13. Respondent denies that the use of its warranty designation is unlawful (Answer, par. 5). And it does appear to be factually accurate that "George's Extended Limited Warranty" is what it purports to be: an extension of a manufacturer's warranty by respondent (Filderman 53).

14. Nevertheless, the Commission, in interpreting the applicable provision of the Warranty Act, has stated (16 C.F.R. 700.6):

> (a) Section 103 of the Act provides that written warranties on consumer products manufactured after July 4, 1975, and actually costing the consumer more than $10, excluding tax, must be designated either "Full (statement of duration) Warranty" or "Limited Warranty." Warrantors may include a statement of duration in a limited warranty designation. The designation or designations should appear clearly and conspicuously as a caption, or prominent title, clearly separated from the text of the warranty. The full (statement of duration) warranty and limited warranty are the exclusive designations permitted under the Act, unless a specific exception is created by rule.

15. Since no specific exception has been made in this case, the finding must be, and hereby is, made that George's warranty terminology does not comply with the statute.

16. Complaint counsel further argue that the record contains instances where respondent's use of the word "extended" is misleading and deceptive in that George's warranty did not in fact extend the manufacturer's warranty. Compare CX 88A-28 with CX 51, where on a General Electric dryer the manufacturer offered a full one-year warranty while respondent gave its limited one-year warranty. Compare CX 88A-40 with CX 78, where General Electric air conditioners carried a full one-year warranty on the entire unit, a full four-year warranty on the sealed refrigerating system and a full nine-year warranty on the moulded outdoor case, whereas George's limited warranty on a sale to a consumer was "2 yr. Home Service" and "5-year Sealed System." Other instances include a Brothers Stereo purchase where George's extended limited warranty was a one-year parts and shop service (CX 94A; tr. 154), whereas the manufacturer offered a limited five-year warranty on the transistors, a one-year limited warranty on parts and 90 days free labor (CX 94; tr. 160). Another consumer purchased a Tappan microwave [6]

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[3] Average retail prices at George's range anywhere from $25 to over $1,000 (Filderman 24; See CX 18-87).

oven from respondent and received a one-year limited warranty on parts and service (CX 92; tr. 177), whereas the manufacturer offered a full one-year warranty, an additional one-year limited warranty on parts and an additional four-year limited warranty on the magnetron (CX 88A–135; tr. 181–93).

17. However, in view of my above finding of noncompliance it is unnecessary to determine how the terminology "George's Extended Limited Warranty" might otherwise be misleading. In this connection, it should be noted that respondent's president, Mr. Filderman, testified that George's employed from 110 to 120 salesmen, and that from January, 1977, up until the time of trial approximately one-quarter million sales tickets had been written—approximately 1,000 tickets per year per salesman. Mr. Filderman readily acknowledged that mistakes do occur (Filderman 305). Whatever the case, the few instances cited by complaint counsel do not permit the finding that such discrepancies occurred on a systematic basis in respondent's operations.

## COUNT II

18. Paragraph seven of the Commission's complaint charges respondent with three specific violations of the Disclosure Rule, 16 C.F.R. 701, effective January 1, 1977, promulgated under the Warranty Act.

19. It is charged that subsequent to January 1, 1977, in connection with its offering and granting of written warranties on consumer products costing the consumer in excess of $15, which were manufactured subsequent to January 1, 1977, respondent failed to clearly and conspicuously disclose, in single documents, in simple and readily understood language:

(a) a clear description and identification of the products, parts, characteristics, components or properties covered by, and where necessary for clarification excluded from, each written warranty, as required by Section 701.3(a)(2) of the Disclosure Rule.

(b) the point in time or event on which the warranty term commences, if different from the purchase date, and the period or other measurement of warranty duration, as required by Section 701.3(a)(4) of the Disclosure Rule; and

(c) a statement in the following language: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state," as required by Section 701.3(a)(9) of the Disclosure Rule. [7]

20. Respondent has admitted that it offered for sale and sold, on and after April 1, 1977, consumer products which were manufac-

tured after January 1, 1977, as evidenced by CX 10A-B, 13A-C, 15A-D and 18-86.[3] As noted previously, Mr. Filderman testified that George's retail prices charged to consumers generally ranged from $25 to $1000.

21. It cannot be determined from an examination of George's warranties in evidence whether any particular parts of products are excluded from coverage (See CX 18-87, 91-94).

22. However, Mr. Filderman made it clear that it was George's warranty policy not to include "[a]ll items such as glass, knobs, etc., normally excluded by the manufacturer * * *" (tr. 50; CX 8), and that this fact is not disclosed on George's extended limited warranty (tr. 97-98; see also tr. 51-52).

23. The record provides examples of the exclusion from manufacturers' warranties and consequently from George's warranties, of such items as glass, knobs, antennas, light bulbs, accessories and appearance items (CX 88A-97, 88A-115).

24. Nothwithstanding the foregoing, Mr. Filderman testified that in actual practice he had instructed George's service department not to charge customers for the replacement of knobs, glass, etc., unless "willful neglect" were involved, and in the case of knobs "we have replaced thousands of them" (tr. 91-92).

25. Certain consumer testimony was presented by complaint counsel concerning their understanding of what items were or were not covered under a George's warranty. These witnesses were too sparse in view of respondent's many thousands of transactions to permit a finding of violation based on their testimony. And I find reliance upon their testimony unnecessary in view of the documents in evidence and the testimony of Mr. Filderman concerning George's policy and practice in this area.

26. Accordingly, based upon the above findings, I find that, as a technical matter, George's warranties are not in compliance with 701.3(a)(2) of the Disclosure Rule in that there was failure to specify certain excluded items. [8]

27. An examination of respondent's warranties in evidence reveals that they do not disclose the point in time or event on which the warranty term commences. They are simply silent on this matter (See CX 18-87).

28. In this connection Mr. Filderman testified that respondent's warranties take effect on the date of delivery (tr. 68).

29. Although the date of sale may concide with the date the consumer actually takes possession of the product, this is not

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[3] See the third request in complaint counsel's request for admissions, dated November 14, 1978, and respondent's answer thereto, dated November 27, 1978 (p. 1).

necessarily the case at George's. Mr. Filderman testified that date of delivery may sometimes be months following the date of purchase (tr. 68).

30. In view of the above, it must be found that respondent's practice is technically not in compliance with Section 701.3(a)(4) of the Disclosure Rule.

31. An examination of respondent's warranties reveals that they do not contain the necessary statement informing consumers concerning specific rights and additional rights which vary by state, as required by Section 701.3(a)(9) of the Disclosure Rule (CX 18–87).

32. Mr. Filderman acknowledged that this language was lacking in George's warranties, explaining that it was contained on the manufacturers' warranties accompanying the products George's sold to consumers (tr. 52–53, 90).

33. Nevertheless, the finding must be made that the mandatory language does not appear in conjunction with the warranties of respondent. Hence there is violation of Section 701.3(a)(9) of the Disclosure Rule.

## COUNT III

34. Paragraph ten of the complaint charges that subsequent to January 1, 1977, respondent failed, in the ordinary course and conduct of its business, to make available for prospective buyers' review, prior to sale, the text of its written warranties offered or granted in connection with the offering for sale and sale of consumer products manufactured after January 1, 1977 and costing the consumer in excess of $15, as required by Section 702.3(a)(1) of the Pre-Sale Rule.[4] [9]

35. As earlier indicated, respondent's warranty is contained on the front and back of the retail sales invoice. This ticket is not given to the customer prior to the sale of a product. It is given to the customer upon consummation of a sale, where the customer takes the item with him from the store. Where delivery is to be later made, the customer is given only the perforated top of the form as a receipt, with the balance of the ticket, containing George's warranty, being furnished to the customer upon delivery (respondent's answer to complaint counsel's request for admissions, p. 2, par. 2). Thus, the practice with respect to George's warranties is not in compliance with the Rule.

36. The record contains testimony given by Mr. Irvin E. Abrams,

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[4] There is no dispute, and it is hereby found with respect to the Pre-Sale Rule charges that respondent sold after April 1, 1977, consumer products which were manufactured after January 1, 1977. Consumer products sold by respondent generally range from $25 to $1,000 (Filderman tr. 24–25).

a Commission investigative employee. Mr. Abrams testified that he had had the occasion to visit George's F Street store in June, 1977, acting solely in his private capacity as a consumer in search of a washer and dryer for his new home (tr. 102-03).

37. As Mr. Abrams relates the event, he was met at the entrance by one of respondent's salesmen, and was directed to the area where the washers and dryers were located. After examining several machines, Mr. Abrams attempted to open a plastic package in one of the washers which contained the manufacturer's warranty information. He was prevented from doing so by the salesman, who expressed concern that the written materials could become "mixed up", causing "problems" at time of delivery (tr. 104). In response to Mr. Abrams' query as to how he could read the warranty, the salesman responded that they are all the same, and that their duration is for one-year. Mr. Abrams testified that the salesman went on to state that in addition to the manufacturer's warranty, George's offered a separate warranty, which is written on the sales slip at time of purchase (tr. 104). Upon Mr. Abram's persistence in attempting to read a warranty, the salesman procured an assistant manager. This gentleman likewise informed Mr. Abrams that all warranties (on washers) were the same, and that, in the words of the witness, "if I would give him a down payment and tell him when I wanted the machine delivered, he would write the warranty out for me, just like they did for everyone else" (tr. 106).

38. Following this experience in George's F Street Store, and after consultation with a superior in the Commission's Washington, D. C. regional office, Mr. Abrams visited in his official capacity four other retail outlets of respondent, *viz.,* Branch Avenue, Landover Mall, Greenbelt Road and Silver Spring. In each of these stores, the response of respondent's sales personnel was substantially similar; the plastic bag containing [10] the manufacturer's warranty was not to be tampered with; and George's warranty was to be written on the sales slip at the time of sale (tr. 111-14, 117-18, 121-22, 124, 128, 143).

39. The testimony of certain consumer witnesses concerning the Pre-Sale availability of written warranties is not inconsistent with the testimony of Mr. Abrams. However, in view of the factors outlined in the legal discussion, *infra,* p. 17, I do not consider it sufficiently indicative or reliable enough upon which to base findings concerning respondent's warranty practices.

40. For the above reasons it must be found that respondent's practices, with respect to its own warranties at least, are not in compliance with the Pre-Sale Availability Rule.

41. Respondent is admittedly a "seller" within the definition of

that term in Section 702.1(e) of the Pre-Sale Rule (Answer, par. 11). As a seller, respondent elected, in accordance with Section 702.3(1)(ii) of the Pre-Sale Rule, to implement a binder system to make available for prospective buyers' review, prior to sale, the text of the manufacturers' written warranty terms (Answer, par. 11).

42. The warranty binder identified as Commission's Exhibit 88A-88A-203 was used by respondent for this purpose following the effective date of the Rule. This binder was superseded in 1978 by new warranty binders identified as Respondent's Physical Exhibits 1-3 (Filderman tr. 57-58, 78-79, 282-85, 295-99).

43. The complaint charges that, in connection with the above-mentioned binder system, respondent failed, as required by Section 702.3(1)(ii) of the Pre-Sale Rule, to:

(a) provide the prospective buyers with ready access to such binder(s);

(b)(1) display such binder(s) in a manner reasonable calculated to elicit the prospective buyers attention; or

(2)(A) make the binder(s) available to the prospective buyers on request, and

(B) place signs reasonably calculated to elicit the prospective buyers' attention in prominent locations within the store, advising such prospective buyers of the availability of the binder(s), including instructions for obtaining access. [11]

44. In support of this charge, complaint counsel rely upon the testimony of Mr. Abrams and the consumer witnesses who testified in this proceeding. Mr. Abrams related that in his June 1977 visit to F Street he looked around but did not notice any type of warranty information about, nor any signs relating to warranty information, except for an "umbrella" over the TV's promoting George's own warranty (tr. 107-08). He did not remember seeing CX 88, the warranty binder Mr. Filderman identified as then in use in the stores (tr. 109).

45. At Branch Avenue, Mr. Abrams was shown a filled-in sales slip containing George's warranty and a supposedly representative manufacturer's warranty taken from a plastic package previously opened (tr. 113). He saw no other warranty, and no signs pertaining to manufacturers' warranties, nor any binder such as CX 88 or similar thereto (tr. 115-16).[5]

46. At Landover Mall, Mr. Abrams looked around but saw no

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[5] Mr. Abrams did notice, however, a sign advertising George's warranty, but not the terms thereof, in the TV section of the store (tr. 115-16).

signs pertaining to manufacturers' warranties, nor any binder or similar book (tr. 119-20).[6] Upon asking whether there was any one place or book where he could read and compare all warranties, he was told that there was no need (tr. 120).

47. At Greenbelt, Mr. Abrams again inquired whether there was any one place where he could read manufacturers' warranties. In response, the salesman, after going from machine to machine, finally found a washing machine which had an open package, whereupon he read certain warranty terms to Mr. Abrams from a sheet (tr. 121). Other than signs in the TV department pertaining to George's warranty, Mr. Abrams was unsuccessful in discovering information concerning manufacturers' warranties or any book or binder such as CX 88 (tr. 122-23).

48. At Silver Spring, Mr. Abrams had a similar experience, with a salesman searching for and reading to Mr. Abrams from a supposedly representative manufacturer's warranty (tr. 124-26). Other than George's TV warranty signs, Mr. Abrams saw no signs regarding manufacturer's warranties nor any book or binder, although he looked carefully (tr. 126-27).

49. As for consumer testimony on this point, I do not believe it is sufficiently reliable, upon which to base a finding concerning respondent's business practices. See legal discussion, *infra*, p. 17. [12]

50. Turning to respondent's defense, Mr. Filderman testified that he prepared to comply with the provisions of the Rule by compiling pertinent manufacturers' warranty information and instituting a binder system (tr. 203). A meeting was held on December 31, 1976, to advise store managers about the new legal requirements and to distribute the warranty book (CX 88). The store managers were instructed to make the binder available to inquiring customers (tr. 282-84).

51. Mr. Filderman's testimony is supported by a contemporaneous document, dated January 5, 1977, sent by respondent's stores supervisor, Morris Kottler (known in George's operations as Moe Kay) to all store managers (RX 13):

> By this time your warranty books should be in your stores and all sales personnel should be aware of its function.
>
> You are being sent out warranties from different manufacturers as they come into my office. Make sure that they are being put into your book.
>
> At the Managers meeting held on December 31st, 1976, you were told to have your

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[6] Again, Mr. Abrams observed a sign in the TV Section advertising George's warranty (tr. 1A).

cashier put this book in alphabetical order in a loose leaf book, and label it Manufacturers Warranties.

I hope this has been done.

52. Subsequently, in July, 1977, Mr. Filderman received a visit from two staff employees of the Federal Trade Commission, Mr. Abrams and Mr. Fensterwald (the latter being one of the complaint counsel in the instant case) (tr. 286-87). The subject of discussion was the degree of George's compliance with the Warranty Act and Rules promulgated thereunder. One of the areas touched upon was the posting of signs in George's stores (although the visitors declined to specify any exact wording (tr. 287-88)).

53. On July 29, 1977, Mr. Kottler (Moe Kay) sent the following bulletin to the store managers (RX 14):

EACH STORE WILL IMMEDIATELY RECEIVE WARRANTY INFORMATION SIGNS.

THESE SIGNS MUST BE PROMINENTLY DISPLAYED.

IT IS AN ABSOLUTE NECESSITY TO KEEP YOUR WARRANTY INFORMATION BOOKS UP TO DATE.

IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT ME. [13]

54. Mr. Filderman further testified that by August 1, 1977 signs containing the following language had been posted in every store (16):

WRITTEN WARRANTY INFORMATION

Available On Request

*Ask Your Salesman*

At least one of these signs, which measure 14" x 22", were placed in each department in respondent's stores (major appliance, small appliance and furniture). Each store received from three to eight signs. The signs were posted permanently and have been there ever since (tr. 289-90). Mr. Filderman has personally observed their presence (tr. 359).

55. The testimony of Mr. Kottler (Moe Kay) confirms these facts. He personally distributed the signs to the stores and directed that they be posted. In his capacity as stores supervisor Mr. Kottler visits each of the thirteen stores in the chain at least twice a month. He stated categorically that the signs, numbering from five to nine per store, have remained in each George's store continuously since August, 1977 (tr. 406-08).

56. As proof that the signs were in place as of the time of trial, certain photographs taken by Mr. Kottler were received in evidence (RX 23A-E, 24A-G, 25A-F, 26A-E, 27A-E, 28A-E, 29A-E, 30A-C, 31A-D, 32A-E). These photographs show the signs in ten of George's 13 branches.

57. Moreover, the store managers of George's three remaining locations were called as witnesses. Each identified posted sign photographs taken in their respective stores (RX 20A-H, 21A-D, 22A-D). Each testified as to the accuracy of, Mr. Filderman's and Mr. Kottler's testimony concerning the furnishing and continuous posting of the warranty signs (Ogilivie tr. 365-71; Mangum tr. 371-81; Kennedy tr. 390-96).

58. Respondent is also charged with violating the Pre-Sale Rule by failing to index its binder according to product or warrantor as required by Section 702.3(1)(ii). In this connection, Mr. Filderman conceded that George's earlier book of warranties, CX 88, in use during 1977, did not contain an index. This was called to his attention during the July 1977, visit of Messrs. Abrams and Fensterwald (tr. 315-16). [14]

59. In addition, the earlier warranty book was admittedly deficient under the Rule in that it was not labeled with the word "Warranties," or other similar title. This, too, was duly noted by the visiting Commission employees (tr. 130).

60. Following further consultation with the Commission's staff and upon advice of counsel, Mr. Filderman initiated changes in Georges's method of maintaining warranty information. CX 88 was replaced with the three binders (RX 1, 2, 3), entitled "Small Appliance Warranty Book," "Major Appliance Warranty Book," and "Furniture Warranty Book." These new binders were distributed to the store managers at a meeting on December 30, 1977, with the instruction to place them in the appropriate departments (RX 15; Filderman tr. 334).

61. An examination of the new warranty binders discloses that each is indexed separately by each letter of the alphabet. George's own warranties which were not contained in the prior warranty binder (CX 88), are contained in the new binders immediately following the manufacturers' warranties. This appears to be a logical procedure, even though complaint counsel contend that their placement is not in strict alphabetical order (Complaint counsel's proposed findings, p. 28).

62. While violations of the Rule appear to have occurred with respect to respondent's earlier attempts to implement a binder

system, respondent's present practices are in substantial accord with Section 702.3(1)(ii).

## LEGAL DISCUSSION

George's contends throughout its proposed findings that the complaint in this case should never have brought; that it has made a greater effort to comply with the Warranty Act and the Rules than most of the retailers in the United States; that it had been dealing with the Commission staff on a voluntary compliance basis for several years; that it had every reason to expect the same treatment following its contacts with Commission staff a few months after the new regulations became effective; that it proceeded earnestly to implement the staff's suggestions regarding compliance; and then, suddenly that it was hit with a formal complaint alleging numerous violations of the sort it was seeking guidance in correcting. Using terms such as "singled out," "scapegoat," "harsh" and "punitive,"[7] George's argues for dismissal of the case, "[e]ven assuming, *arguendo,* that there were violations" of the Act and Rules (respondent's proposed findings, p. 8). "To enforce the strict [15] letter of the law against this respondent would amount to arbitrary and capricious conduct, condemned by 5 U.S.C. Section 706, and by the 'due process' clause contained in the Fifth Amendment of the United States Constitution" *(ibid).*

Complaint counsel respond in their answering findings, *inter alia,* that respondent's voluntary compliance contacts over the years were with the Commission's staff, not the Commission itself, which issued this complaint; that the Commission has in the past issued formal complaints against George's, resulting in the issuance of cease-and-desist orders;[8] that this is evidence of respondent's proclivity to violate the laws administered by the Commission; that respondent appears to be unable to comply with such laws without prodding, formal or informal, on the part of the Commission or its staff; that the Commission's formal assurance of voluntary compliance procedures (AVC) were rescinded prior to the completion of the investigation in this case; and that respondent was afforded the chance to have this matter voluntarily disposed of through a consent order, but chose not to exercise that option. Complaint counsel further point to the legal principle that it is the Commission alone which is empowered to develop an enforcement policy best calculated to achieve the ends contemplated by Congress, and to allocate its available funds and personnel in such a way to execute its policy efficiently and economically, citing *Moog Industries, Inc.*, v. *FTC*, 355 U.S. 411 (1958); *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244 (1960).

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[7] Mr. Filderman testified that the issuance of the complaint left him feeling "shocked," "betrayed," "duped" (tr. 304-05).

[8] 60 F.T.C. 179 (1962); 52 F.T.C. 599 (1955); 50 F.T.C. 580 (1943). There was also a civil penalty action, 1962 Trade Cases ¶ 70,281. I have given no weight to any of these prior cases in making my decision on the merits of the present case.

I believe that respondent is entitled to argue the points which it raises, and I therefore permitted respondent to make a record concerning them (See, *e.g.*, RX 4-11; tr. 272-82).[9] However, it is clear that I am not the proper party to decide such matters. As noted above, it is the Commission alone who is empowered to make the determination as to how and when to proceed in administering the laws it is charged with enforcing. As an [16] administrative law judge of this Commission, I am not entitled to second guess as to whether the agency has properly exercised its prosecutorial discretion, or as to whether this proceeding was improvidently brought. Respondent, of course, is free to bring its contentions to the Commission's attention on appeal or, if necessary, to the attention of a federal court.

As to whether the law was violated in the present case, it must be observed that the Warranty Act and the applicable Rules are very specific and admit of little or no leeway. Although the company was not required to offer consumers a written warranty, having elected to do so, it was bound by the law's requirements. According to the Commission's interpretation of Section 103 of the Warranty Act, the title "George's Extended Limited Warranty" is not permitted. Thus the Act was violated, even though George's was doing exactly what its title said: extending the duration of the manufacturer's warranty.[10]

As to the Disclosure Rule, there is no question that the George's Warranty failed to set forth a disclosure concerning coverage of ancillary items, even though Mr. Filderman testified that George's policy was to replace them free of charge (except for "willful" damage). Consumers were likewise not informed by George's warranty that commencement of coverage occurs upon delivery, not date of purchase, even though the former affords a longer coverage period. And there is no question that George's Warranties failed to carry the mandatory language concerning consumers' specific legal and other rights. Thus the Rule was violated.

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[9] During the trial, respondent's counsel raised some question as to whether the proximity of George's operations to the Commission's headquarters in Washington, D.C. had any bearing upon the bringing of this action (tr. 138, 292). On this point it can be said that, historically, George's certainly has not gone unnoticed by this agency (see previous footnote). However, George's has never been alone among local firms in receiving the Commission's scrutiny. See *F.T.C.* v. *Army and Navy Trading Co.*, 88 F.2d 776, 777 (D.C. Cir. 1937); *In the Matter of Leon A. Tashof, trading as New York Jewelry Company*, 74 *F.T.C.* 1361, 1366, *aff'd*, 437 F.2d 707 (D.C. Cir. 1970), located a short distance north of the Commission on Seventh St., N.W., and *In the Matter of S. Kann Sons Co.*, 56 *F.T.C.* 212, 213 (1959), located virtually on the Commission's doorstep. Many other examples of Commission proceedings involving local businesses can be cited.

[10] Although this point is not in issue in this case, and not heretofore mentioned, Mr. Filderman testified that for the duration of the manufacturer's warranty George's acts as the manufacturer's agent in rendering performance thereunder. Under the arrangement, George's has recourse to the manufacturer for reimbursement for parts and services utilized in redressing consumer problems (tr. 328-29).

As to the Pre-Sale Rule, the record is clear that it was George's regular business practice to make its written warranties available to consumers at the time of sale (or delivery), not prior to sale, as the Rule requires. Hence a violation. As for George's efforts to implement a binder system under the Rule, the record discloses — especially in the testimony of Mr. Abrams — that this was imperfectly done in the first few months following the effective date of the Rule. Since that time, however, respondent has moved impressively and efficiently to bring its pre-sale availability practices in compliance with the Rule, albeit not to complaint counsel's total satisfaction. While I am mindful of the case law respecting "abandonment," I believe, that an exception should be made in this instance. I simply do not see how the public interest would be served by the issuance of an order in that respect. [17]

I have indicated earlier in the findings that I have chosen not to place reliance upon the consumer testimony in this case (findings 17, 25, 39, 49). My reasons for this are as follows: only eight consumers appeared in this proceeding, attesting to respondent's practices in but four of its 13 branches.[11] Mr. Filderman testified that, since the effective date of the Rules (January 1, 1977), George's has engaged in an estimated one-quarter million consumer transactions (tr. 305). While not attempting to determine how many consumer witnesses need be called to establish a pattern of business conduct at George's, I believe that the number called in this case is far too few. In addition, the majority of the consumer witnesses testified that they saw no warranty information signs in the George's stores they visited at a date which the record shows was subsequent to the placement of these signs (tr. 157, 167, 171, 179, 212, 236, 253, 263; CX 97). In view of findings 53–57, I must conclude that the signs were definitely in the store, and that the witnesses simply did not observe them. Thus, I am left in doubt as to the reliability of their reporting. And since I do not believe that their testimony is critical to any material point in this case, I believe it is appropriate not to place reliance upon it.

## CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the

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[11] F Street (Magruder and Easton); Greenbelt (Hoffman); Branch Avenue (Moore, Houston and the two Edsels); and Rockville (Butler).

subject matter of this proceeding and over respondent George's Radio and Television Company, Inc.

2. This proceeding is in the public interest.

3. The aforesaid acts and practices of the respondent, as herein found, constitute violations of the indicated Sections of the Warranty Act and the Disclosure and Pre-Sale Rules duly promulgated thereunder. Accordingly, pursuant to Section 110(b) of the Warranty Act, they constitute violations of Section 5 of the Federal Trade Commission Act.

4. The order entered in this proceeding is responsive to the violations found. [18]

## ORDER

### I.

### *Definitions*

For the purposes of this order the definitions of the terms "consumer product" and "written warranty" as defined in Section 101 of the Warranty Act shall apply.

### II.

*It is ordered*, That respondent George's Radio and Television Co., Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or indirectly, through any corporation, subsidiary, division or any other device in connection with the advertising, offering for sale and sale of appliances, furniture and any other merchandise and services, do forthwith cease and desist from:

1. Offering or granting a written warranty upon consumer products actually costing the consumer in excess of $10.00 which is not clearly and conspicuously designated exclusively as either a "full (statement of duration) warranty" or a "limited warranty."

2. Offering or granting a written warranty upon consumer products actually costing the consumer in excess of $15.00, which fails to clearly and conspicuously disclose, in a single document, in simple and readily understood language, the following items of information: [19]

(a) A clear description and identification of products, parts, characteristics, components or properties covered by, and where necessary for clarification excluded from, the warranty;

(b) A statement of what the warrantor will do in the event of a defect, malfunction or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and, where necessary for clarification, those which the warrantor will not pay for or provide;

(c) The point in time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration;

(d) A statement in the following language:

> This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

3. Failing to make available for prospective buyers' review, prior to sale, the text of any written warranty offered or granted by the respondent.

### III.

*It is further ordered*, That respondent:

1. Deliver a copy of this order to cease and desist to all present and future employees, salesmen, agents, independent [20] contractors and other representatives engaged in the sale of consumer products on behalf of respondent and secure a signed statement acknowledging receipt of the order from each such person.

2. Instruct all present and future employees, salesmen, agents, independent contractors and other representatives engaged in the sale of consumer products on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act (15 U.S.C. 2301, *et seq.*), all present and future implementing Rules promulgated under the Act and the order.

3. Institute a program of continuing surveillance to reveal whether respondent's employees, salesmen, agents, independent contractors and other representatives are engaged in practices which violate this order.

4. Notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

5. Shall within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

## FINAL ORDER

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon complaint counsel's brief in support of its appeal. The parties submitted a joint motion to waive oral argument, which was granted. Complaint counsel have argued only for certain modifications in the order recommended by the administrative law judge, and respondent's counsel has stated in writing that respondent agrees to the proposed order and does not oppose complaint counsel's appeal.

The Commission has granted complaint counsel's appeal, because we believe the violations established in the record warrant the modifications in the order that complaint counsel have proposed. These include specific requirements for the manner of implementing a binder system and affirmative disclosures about warranties, both on signs to be posted in the stores and in the warranties themselves. These requirements, and the others hereby imposed, are necessary to ensure compliance with the Magnuson-Moss Warranty Act ("Warranty Act") (15 U.S.C. 2301, *et seq.*), as implemented by the Commission's Rule on the Disclosure of Written Consumer Product Warranty Terms and Conditions ("Disclosure Rule") (16 C.F.R. 701), and the Commission's Rule on Pre-Sale Availability of Written Warranty Terms ("Pre-Sale Rule") (16 C.F.R. 702), and with Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45). Therefore,

*It is ordered*, That the initial decision of the administrative law judge be adopted as Findings of Fact and Conclusions of Law of the Commission, except for the last two sentences on page 16, the first paragraph on page 17, and the last sentence of each of the following findings: 39, 49. [2]

*It is further ordered*, That the following order to cease and desist be entered:

## ORDER

### *I.*

### *Definitions*

For the purpose of this order the definitions of the terms "consumer product" and "written warranty" as defined in Section 101 of the Warranty Act shall apply. The definition of the term "binder" as defined in Section 702.1(g) of the Pre-Sale Rule shall apply.

## II.

*It is ordered*, That respondent George's Radio and Television Co., Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or indirectly, through any corporation, subsidiary, division or any other device in connection with the advertising, offering for sale and sale of appliances, furniture and any other merchandise and services, do forthwith cease and desist from:

1. Offering or granting a written warranty upon consumer products actually costing the consumer in excess of $10.00 which is not clearly and conspicuously designated exclusively as either a "full (statement of duration) warranty" or a "limited warranty."

2. Offering or granting a written warranty upon consumer products actually costing the consumer in excess of $15.00, which fails to clearly and conspicuously disclose, in a single document, in simple and readily understood language, the following items of information:

(a) A clear description and identification of products, parts, characteristics, components or properties covered by, and where necessary for clarification excluded from, the warranty. For purposes of this paragraph, identification of products shall be by brand name, except, if respondent offers the identical warranty on all brands of a particular product it sells, then a statement to that effect will be sufficient identification of the products covered;

(b) A statement of what the warrantor will do in the event of a defect, malfunction or failure to comply with the written warranty, including the items or services the warrantor will pay for or provide, and where necessary for clarification, those which the warrantor will not pay for or provide; [3]

(c) The point in time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration. If the warranty runs concurrently with the warranty offered by the manufacturer, then that fact shall be disclosed in simple and readily understood language on the face of the warranty document;

(d) A statement in the following language:

> This warranty is offered by [name of respondent]. Compare this with the warranty offered by the manufacturer.

This statement shall be the first paragraph of any warranty offered by respondent and shall be printed in boldface type;

(e) A statement in the following language:

> This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

3. Failing to make available for the prospective buyer's review, prior to sale, the text of any written warranty offered or granted by the respondent.

4. Failing to make available for the prospective buyer's review, prior to sale, the text of any written warranties offered or granted by the manufacturers of consumer products sold by respondent.

5. Choosing to implement a binder system to satisfy the requirements of Paragraphs 3 and 4 above unless the binder system includes, at a minimum, one binder located in each department of the retail outlet, and such binder includes at least one copy of each written warranty applicable to consumer products sold in that particular department.

6. Choosing to implement a binder system to satisfy the requirements of Paragraphs 3 and 4 above unless, in implementing a binder system, respondent:

(a) provides the prospective buyer with ready access to such binder system;

(b) (1) displays the binders in a manner reasonably calculated to elicit the prospective buyer's attention or [4]

(2) (A) makes such binder available to prospective buyers upon request, and

(B) places signs reasonably calculated to elicit the prospective buyer's attention in prominent locations within each store, advising such prospective buyers of the availability of binders, including instructions for obtaining access;

(c) indexes such binders according to product; and

(d) clearly entitles such binders as "Warranties" or other similar title.

*It is further ordered*, That respondent:

A. Post a sign, with approximate minimum dimensions of two feet (length) by two feet (width), with the following information printed in black against a solid white background:

> *IMPORTANT!*
>
> Not all warranties are the same. You can see manufacturers' warranties and store warranties before you buy. Please ask.

B. Post the sign described in Paragraph A. above:

(1) In a manner reasonably calculated to elicit the prospective buyer's attention;

(2) For a period of not less than two years from the effective date of the order;

(3) In each department of its retail outlets that sells consumer products costing over $15.00 and carrying a written warranty;

(4) In a uniform manner; and

(5) Printed as follows:

(i) The word "Important" shall serve as the title of the notice and shall be printed in capital letters in 42 point boldface type followed by an exclamation mark. [5]

(ii) The next phrase shall be printed on a separate line in capital letters and in 42 point boldface type.

(iii) The next two phrases shall be printed on a separate line and in 24 point medium face type.

C. Deliver a copy of this order to cease and desist to all present and future salesperson, store managers and other representatives engaged in the direct sale of consumer products to consumers on behalf of respondent and secure a signed statement acknowledging receipt of this order from each such person.

D. Instruct, in writing, all present and future salesperson, store managers and other representatives engaged in the direct sale of consumer products to consumers on behalf of respondent as to their specific obligations and duties under the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act (15 U.S.C. 2301, *et seq.*), all present and future implementing Rules promulgated under the Act and the order, and secure a signed statement acknowledging receipt of the written instructions from each such person.

E. Institute a program of continuing surveillance to reveal whether respondent's salesmen, store managers, and other representatives engaged in the direct sale of consumer products to consumers are engaged in practices which violate this order.

F. Maintain, for a period of not less than three (3) years from the effective date of the order, complete business records, including but not limited to, records described in Paragraphs C. and D. above, to be furnished upon request to the staff of the Federal Trade Commission, relating to the manner and form of its continuing compliance with the terms and provisions of this order.

G. Notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

H. File with the Commission, within sixty (60) days after service upon it of this order, a report in writing, setting forth in detail the manner and form in which it has complied with this order.

Commissioner Bailey did not participate.

## SYNOPSIS OF DETERMINATIONS FOR 15 U.S.C. 45 (m)(1)(B), GEORGE'S RADIO AND TELEVISION COMPANY, INC., DOCKET NO. 9115

1. It is an unfair or deceptive act or practice and a violation of Section 103 of the Magnuson-Moss Warranty Act (15 U.S.C. 2303), and Section 5 of the Federal Trade Commission Act (15 USC 45) to offer or grant a written warranty on consumer products which cost the consumer more than $10.00, if such warranty is not clearly and conspicuously designated exclusively as either a "full (statement of duration) warranty" or a "limited warranty".

2. It is an unfair or deceptive act or practice and a violation of the Rule on Disclosure of Written Consumer Product Warranty Terms and Conditions ("Warranty Disclosure Rule") (16 CFR 701) and Section 5 of the Federal Trade Commission Act to offer or grant a written warranty on consumer products which cost the consumer more than $15.00 if such warranty fails to disclose, in a single document, in simple and readily understood language, the following items of information:

(a) A clear description and identification of products, parts, characteristics, components or properties covered by, and, where necessary for clarification, those excluded from, the warranty, as set forth in Section 701.3(a)(2) of the Warranty Disclosure Rule;

(b) A statement of what the warrantor will do in the event of a defect, malfunction or failure to comply with the written warranty, including the items or services the warrantor will pay for or provide, and where necessary for clarification, those which the warrantor will not pay for or provide, as set forth in Section 701.3(a)(3) of the Warranty Disclosure Rule;

(c) The point in time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration, as set forth in Section 701.3(a)(4) of the Warranty Disclosure Rule;

(d) A statement in the following language:

"This warranty gives you specific legal rights, and you may also have other rights which vary from state to state," as set forth in Section 701.3(a)(9) of the Warranty Disclosure Rule.

3. It is an unfair or deceptive act or practice and a violation of Section 702.3(a)(1) of the Rule on Pre-Sale Availability of Written Warranty Terms ("Pre-Sale Rule") (16 CFR 702.3(a)(1)) and Section 5 of the Federal Trade Commission Act to fail to make available for the prospective buyer's review, prior to sale, the text of any written warranty offered on consumer products which cost the consumer more than $15.00.

4. It is an unfair or deceptive act or practice and a violation of Section 702.3(a)(1)(ii) of the Pre-Sale Rule (16 CFR 702.3(a)(1)(ii)) and Section 5 of the FTC Act to implement a binder system, in satisfying the obligation to make available for the prospective buyer's review, prior to sale, the text of the manufacturer's written warranty terms, unless the binder system includes, at a minimum, one binder located in each department of the retail outlet, and such binder includes at least one copy of

each written warranty applicable to consumer products sold in that particular department.

5. It is an unfair or deceptive act or practice and a violation of Section 702.3(a)(1)(ii) of the Pre-Sale Rule (16 CFR 702.3(a)(1)(ii)) and section 5 of the FTC Act to implement a binder system, in satisfying the obligation to make available for the prospective buyer's review, prior to sale, the text of the manufacturer's written warranty terms, unless the seller:

(a) provides prospective buyers with ready access to such binder(s);

(b) (1) displays such binder(s) in a manner reasonably calculated to elicit the prospective buyer's attention; or

(2) (A) makes the binder(s) available to the prospective buyers on request; and

(B) places signs reasonably calculated to elicit the prospective buyer's attention in prominent locations within the store, advising such prospective buyers of the availability of the binder(s), including instructions for obtaining access;

(c) indexes such binder(s) according to product or warrantor; and

(d) clearly entitles such binder(s) as "Warranties" or other similar title.

# IN THE MATTER OF

# JAYMAR-RUBY, INC.

## CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2997. Complaint, Nov. 8, 1979—Decision, Nov. 8, 1979*

This consent order, among other things, requires a Michigan City, Ind. manufacturer of wearing apparel and related accessories, to cease fixing, maintaining or compelling adherence to suggested resale prices and sale periods for its products. Respondent is prohibited from soliciting the identity of dealers who fail to conform to suggested prices; and from taking any adverse action against them. Additionally, respondent is prohibited from restricting the use of product trademarks or other identification in the advertising and sale of its products; and barred from suggesting retail prices and sales periods for its products for a period of two years.

## *Appearances*

For the Commission: *Jeffrey Klurfeld* and *Karen E. Chandler.*

For the respondent: *Lee N. Abrams, Mayer, Brown & Platt,* Chicago, Ill.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Jaymar-Ruby, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For purposes of this complaint, the following definitions shall apply:

"Product" is defined as any item of wearing apparel or related accessory which is manufactured, offered for sale or sold by respondent.

"Dealer" is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

"Resale Price" is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any retail price suggested or established by respondent, any customary resale price or the retail price in effect at any dealer.

"Sale Period" is defined as any time during which any dealer offers to sell any product at resale prices lower than those in effect during the usual and ordinary course of said dealer's business; or any suggested, authorized or customary time for selling or advertising any product at prices lower than the suggested, established or customary resale prices.

PARAGRAPH 1. Respondent Jaymar-Ruby, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 5000 South Ohio St., Michigan City, Indiana.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of wearing apparel and related accessories. Sales by respondent for fiscal year 1978 exceeded $63 million.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent sells and distributes its products directly to more than 5,600 retail dealers located throughout the United States who in turn resell respondent's products to the general public.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale and distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold and distributed by respondent.

PAR. 6. In the course and conduct of its business as above described, respondent has for some time last past effectuated and pursued a policy throughout the United States, the purpose or effect of which is and has been to fix, control, establish, manipulate and maintain the resale prices at which its dealers advertise, offer for sale and sell its products.

PAR. 7. By various means and methods, respondent has effectuated and enforced the aforesaid practice and policy by which it can and does fix, control, establish, manipulate and maintain the resale prices at which its products are advertised, offered for sale and sold by its dealers.

PAR. 8. By means of the aforesaid acts and practices and more, respondent, in combination, agreement, understanding and conspiracy with certain of its dealers and with the acquiescence of other of its dealers, has established, maintained and pursued a planned course of action to fix and maintain certain specified uniform prices at which products will be resold.

PAR. 9. The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of respondent's products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent as herein alleged, are continuing and will continue in the absence of the relief herein requested.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Jaymar-Ruby, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 5000 South Ohio St., in the City of Michigan City, State of Indiana.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding, of respondent Jaymar-Ruby, Inc., and the proceeding is in the public interest.

## ORDER

For the purposes of this Order, the following definitions shall apply:

"Product" is defined as any item of wearing apparel or related accessory which is manufactured, offered for sale or sold by respondent Jaymar-Ruby, Inc.

"Dealer" is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

"Resale Price" is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any retail price suggested or established by respondent, any customary resale price or the retail price in effect at any dealer.

"Sale Period" is defined as any time during which any dealer offers to sell any product at resale prices lower than those in effect during the usual and ordinary course of said dealer's business; or any suggested, authorized or customary time for selling or advertising any product at prices lower than the suggested, established or customary resale prices.

*It is ordered,* That respondent Jaymar-Ruby, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

### I

1. Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product, or the sale period of any dealer.

2. Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price or sale period.

3. Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price or sale period; or acting on any reports or information so

obtained by threatening, intimidating, coercing or terminating said dealer.

4. Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price.

5. Hindering or precluding the lawful use by any dealer of any brand name, trade name or trademark of respondent in connection with the sale or advertising of any product at any resale price.

6. Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised.

7. Terminating or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

8. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer, or limiting or restricting the right of any dealer to participate in any cooperative advertising program for which it would otherwise qualify, because of the resale price at which said dealer advertises or sells any product, or proposes to sell or advertise any product.

9. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer, or limiting or restricting the right of any dealer to participate in any cooperative advertising program for which it would otherwise qualify, because said dealer has advertised or sold, or proposes to advertise or sell, any product using or featuring any resale price comparison.

## II

1. For a period of three (3) years from the date of service of this order, orally suggesting or recommending any resale price or sale period to any dealer.

2. For a period of three (3) years from the date of service of this order, communicating in writing any resale price or sale period to any dealer; *provided, however,* that after said three (3) year period, respondent shall not suggest any resale price or sale period on any list, or in any advertising, book, catalogue or promotional material, unless it is clearly and conspicuously stated on each page where any suggested resale price or sale period appears, the following:

THE [RESALE PRICES OR SALE PERIODS] QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN [RESALE PRICES OR SALE PERIODS].

## III

*It is further ordered,* That respondent shall:

1. Within thirty (30) days after service of this order, mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to each of its present accounts. An affidavit shall be sworn to by an official of the respondent verifying that the attached Exhibit A was so mailed.

2. Mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to any person, partnership, corporation or firm that becomes a new account within three (3) years after service of this order.

## IV

*It is further ordered,* That respondent shall forthwith distribute a copy of this order to all operating divisions of said corporation, and to present or future personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this order, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

## V

*It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

## VI

*It is further ordered,* That respondent shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

### EXHIBIT A

Dear Customer:

Jaymar-Ruby, Inc. has agreed with the Federal Trade Commission to the entry of an order concerning certain distribution practices. Our agreement was solely for the purpose of settling a dispute with the Commission, and does not constitute any admission on our part that we have violated any law. The agreed-to order provides, among other things, as follows:

1. You are free to charge whatever retail prices you deem appropriate for Jaymar-Ruby products, including Sansabelt, and you may advertise those prices as you see fit.

best copy available

2. You can be assured that Jaymar-Ruby will not take any action against you for any prices which you may charge or advertise.

3. Jaymar-Ruby will continue not to suggest retail prices for any product until [3 years from the date of service of the Order].

4. You may continue to use our trademarks or tradenames in any legal and lawful manner in your sale or advertising of our products.

5. You continue to be free to participate in our cooperative advertising programs regardless of the prices at which you advertise Jaymar-Ruby products.

If you wish a copy of the full text of the agreed-to order, or if you have any questions concerning it, please call ________________. As always, we appreciate your business and we will continue providing you with the finest merchandise available.

____________________________

for Jaymar-Ruby, Inc.

## IN THE MATTER OF

# ROOFING CONTRACTORS ASSOCIATION

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-2998. Complaint, Nov. 8, 1979—Decision, Nov. 8, 1979*

This consent order, among other things, requires a Seattle, Wash. roofing association to cease entering into agreements with others to establish and maintain terms of guarantees, prices, or other conditions of sale in connection with the sale of roofs and related services; suggesting or urging adherence to particular prices, guarantees, or other conditions of sale; or restricing by any means a member's right to give any guarantee, price or other condition of sale to its customers. The order additionally bars the association from investigating and/or policing its members with regard to prices charged or guarantees imposed in the sale of their products and services.

## *Appearances*

For the Commission: *Stevan D. Phillips.*

For the respondent: *James M. Martin,* Seattle, Washington.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Roofing Contractors Association, a non-profit corporation hereinafter sometimes referred to as proposed respondent, has violated the provisions of the Federal Trade Commission Act, as amended, as more particularly set forth herein, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Roofing Contractors Association is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1000 Aurora Ave. North, Seattle, Washington. It consisted of approximately sixteen (16) roofing contractors at the time the events referred to herein occurred.

PAR. 2. The respondent is a trade association established for the benefit of its members. It acts as the bargaining agent for and negotiates labor contracts on behalf of its members with certain labor unions. The Association handles grievances and other administrative problems under the terms and conditions of any collective bargaining contract entered into on behalf of its members. The Association has gathered and disseminated information to its respective members concerning the guarantees which are available in the roofing contracting business for new and replacement roofs and which are available and used in regard to waterproofing and dampproofing contracts. As a result of the conduct and activities of respondent and its members as described above, the acts and practices herein complained of are in or affect "commerce" within the meaning of the Federal Trade Commission Act, as amended, and respondent is subject to the jurisdiction of the Federal Trade Commission.

PAR. 3. On or about December 17, 1970 the members of the respondent, at respondent's regularly scheduled meeting, decided to limit the length of guarantees offered by said members to two (2) years. At various times thereafter, said members, at regularly scheduled meetings of respondent, discussed and reemphasized the two (2) year limitation on the length of guarantees to be offered by said members for new and replacement roofs. At certain regularly scheduled meetings of respondent, specific members were reprimanded by the membership for offering guarantees which were longer than two (2) years in length. On or about June 14, 1973 members of respondent, at respondent's regularly scheduled meetings discussed the maximum guarantee to be offered in regard to wind velocity and determined that 60 miles per hour would be appropriate. On or about April 11, 1974 members of respondent, at respondent's regularly scheduled meeting of its Board of Directors, discussed the terms of guarantees offered by respondent's members with representatives of the Inland Empire Roofing Contractors Association. Respondent agreed to provide a copy of its guarantee form to the Inland Empire Roofing Contractors Association.

PAR. 4. The effects, among others, of the acts and practices alleged in Paragraph Three are as follows:

A. Terms of guarantees for new and replacement roofs have been fixed, stabilized or otherwise interfered with;

B. Competition among member roofing contractors in the providing of roofing services has been restrained, hindered, frustrated and/or foreclosed;

C. Customers of roofing services have been deprived of information, options and services pertinent to the selection of a roofer and the benefits of competition; and

D. Member roofers have been restrained in their ability to compete and to make alternative guarantee terms available to customers.

PAR. 5. The aforesaid acts, practices, and methods of competition of respondent constitute unfair methods of competition and unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Chairman Pertschuk did not participate.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Roofing Contractors Association is a nonprofit corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1000 Aurora Ave. North, in the City of Seattle, State of Washington.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

### I

A. Definitions established for the purpose of the following order provisions are:

1. "Other related services" includes but is not limited to, repairing of roofs, inspecting of roofs, waterproofing and dampproofing of roofs, and estimating costs of repair or installation of roofs.

2. "Others not party hereto" means any individual, individual proprietorship, partnership, firm, corporation, association or any other form of legal or business entity.

### II

A. *It is ordered*, That respondent Roofing Contractors Association, a non-profit corporation, its successors and assigns, and its agents, representatives, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale and installation of new or replacement roofs or other related services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Entering into any contract, agreement, course of conduct, or understanding between itself and others not party hereto to fix, establish, stabilize, or maintain, the length or other term of any guarantee;

2. Entering into any contract, agreement, course of conduct, or understanding between itself and others not party hereto to fix, establish, stabilize or maintain any price or other term or condition of sale in connection with the sale and installation of new or replacement roofs or for performing other related services.

### III

A. *It is further ordered*, That respondent Roofing Contractors Association, a non-profit corporation, its successors and assigns, and its agents, representatives, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale and installation of new or replacement roofs or other related services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Urging, recommending, or suggesting that any of its members

or any other person adopt or adhere to any particular guarantee or to any price or other term or condition of sale in connection with the sale and installation of new or replacement roofs or for performing other related services;

2. Adopting, adhering to, maintaining, enforcing or claiming any rights under any bylaw, rule, regulation, plan or program which limits in any way a member's right to give or offer, a guarantee or any price or other term or condition of sale to any customer or prospective customer in connection with the sale or installation of a new or replacement roof or for performing other related services;

3. Investigating and/or policing a price or guarantee term charged or imposed by any member of the association or any other person in connection with the installation of new or replacement roofs.

## IV

A. *It is further ordered,* That respondent Roofing Contractors Association shall within sixty (60) days after the date of service of this order, mail a copy to each of its existing members and to each person who was a member at any time from June 30, 1973 to date of service of this order, and furnish a copy of this order to each prospective member for a period of five (5) years after the date of service of this order.

B. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation or association, the creation or dissolution of subsidiaries or any other change in the association which may affect compliance obligations arising out of the order.

C. *It is further ordered,* That the respondent herein shall within sixty (60) days after service on it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Chairman Pertschuk did not participate.

## IN THE MATTER OF

# BRUNSWICK CORPORATION, ET AL.

### ORDER ON REMAND, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

*Docket 9028. Complaint* April 15, 1975—Order, Nov. 9, 1979*

**This order remands the matter to the administrative law judge for additional evidence on the question of formulating an appropriate remedy in the case.**

### *Appearances*

For the Commission: *Hugh F. Bangasser, Jeffrey F. Shaw* and *Geoffrey S. Walker.*

For the respondents: *Patrick W. O'Brien* and *Kenneth J. Jureck, Mayer, Brown & Platt,* Chicago, Ill., *Arthur S. Katayama, Mori & Katayama,* Los Angeles, Calif. and *James H. Wehrenberg,* Skokie, Ill.

## COMPLAINT

The Federal Trade Commission, having reason to believe that Brunswick Corporation, Yamaha Motor Co., Ltd., and Mariner Corp., corporations subject to the jurisdiction of the Commission, have violated and are violating the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint and states its charges as follows:

## I

## RESPONDENTS

### A. Brunswick Corporation

1. Respondent, Brunswick Corporation ("Brunswick"), is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at Brunswick Center, One Brunswick Plaza, Skokie, Illinois.

2. Respondent is a diversified manufacturer and marketer of medical products and numerous recreational items, including outboard and stern drive motors, snowmobiles and bowling equipment. For fiscal

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* Complaint reported as amended by Commission orders dated March 19 and May 6, 1976.

year 1973, Brunswick's net sales exceeded $683 million. Net income was $39 million, and assets totaled $550 million in that year. [2]

3. In 1961, Brunswick acquired Kiekhaefer Corporation, now the Mercury Marine Division ("Mercury"), which was and is principally engaged in the production and marketing of marine engines, including the "Mercury" line of outboard motors. Mercury's dollar and unit volume of outboard motor sales in 1973 exceeded 130,000 units and $80 million, respectively. Mercury is the second largest outboard motor manufacturer in the United States.

4. Mercury manufactures and sells in the United States and sells throughout the world outboard motors ranging from 4 to 150 horsepower.

5. At all times relevant herein, Brunswick, through Mercury, has sold and shipped outboard motors in interstate commerce and engaged in "commerce" within the meaning of the Clayton Act, as amended, and has been a corporation whose business has been in or has affected "commerce" within the meaning of the Federal Trade Commission Act, as amended.

B. Yamaha Motor Co., Ltd.

6. Yamaha Motor Co., Ltd. ("Yamaha") is a corporation duly organized and existing under the laws of Japan, having its principal place of business in Japan. Yamaha is a substantial marketer of recreational equipment throughout the world. Yamaha's sales in 1972 were $660 million. At least 64% of Yamaha's output is exported.

7. Yamaha produced outboard motors at Yamaha facilities until 1970, when it acquired a controlling interest in Sanshin Kogyo Co. ("Sanshin"), a Japanese company. At that time it transferred the Yamaha outboard motor manufacturing facilities to Sanshin, which currently produces all outboard motors for sale under the "Yamaha" label. Just prior to the joint venture with Brunswick, Sanshin had developed 8 horsepower models up to 25 horsepower and had announced a new 50 horsepower engine. In the year ending June 1971, Sanshin produced approximately 75,000 outboard motors for Yamaha, of which 25,000 were exported.

8. Between 1967 and 1969, through the Yamaha International Corporation, a corporation organized, existing and doing business under the laws of the United States, and a subsidiary of Nippon Gakki Co., Ltd., the parent company of Yamaha, Yamaha exported a small number of low horsepower outboard motors into the United States. In 1971-72, Yamaha sold a limited number of low horsepower outboard motors to Sears, Roebuck and Co. under the "Sears" label. [3]

9. Yamaha distributes motorcycles and snowmobiles in the United

States through the Yamaha International Corporation. Both products were introduced to the United States market with only a small number of low horsepower rated models. Subsequent to entry, Yamaha has expanded the number of available models and has developed a network of motorcycles and snowmobile dealers to carry these products. The dealership service personnel are capable of servicing the basic power units of the Yamaha motorcycle, snowmobile and outboard motor.

10. Yamaha competes with Mercury for the sale of outboard motors in several geographic markets other than the United States, including Japan and Europe. In 1972, Yamaha accounted for 80% of all outboard motors sold in Japan. It also claims to be the second largest marketer of low horsepower outboard motors in Europe.

11. Yamaha was one of the most likely potential entrants into the United States market for outboard motors prior to entering into the joint venture agreement.

12. At all times relevant herein, Yamaha has been engaged in commerce as "commerce" is defined in the Clayton Act, as amended, and has been a corporation whose business has been in or has affected "commerce" within the meaning of the Federal Trade Commission Act, as amended, by virtue of, among other things, (a) shipping and selling outboard motors, motorcycles and snowmobiles to and within the United States through the affiliate corporation; (b) negotiating terms of the joint venture agreement within the United States; and (c) receiving partial fulfillment of the terms of the agreement within the United States.

C. Mariner Corp.

13. Respondent Mariner Corp. ("Mariner") is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at 1939 Pioneer Road, Fond du Lac, Wisconsin. Between 1972 and 1974, Mariner operated under the corporate name of Mercury Marine International Co.

14. At all times relevant herein, Mariner Corp. has been engaged in commerce as "commerce" is defined in the Clayton Act, as amended, and has been a corporation whose business has been in or has affected "commerce" within the meaning of the Federal Trade Commission Act, as amended. [4]

## II

## THE TRANSACTION

15. On November 21, 1972, Brunswick entered into an agreement to

purchase, for approximately $1.4 million, 62,000 shares, amounting to 38%, of newly issued stock of Sanshin. The 62,000 shares were transferred to Mariner which was formed for this purpose.

16. Pursuant to the agreement, Sanshin would continue to manufacture outboard motors for sale to Yamaha for exclusive distribution in Japan; to export and sell to Mariner for exclusive distribution in North America and Australia; and to sell the balance to a proposed equally-owned joint venture sales company for distribution in the rest of the world under the "Mariner" trademark and in those countries mutually agreed upon, under the "Yamaha" trademark. Yamaha and Mercury intended eventually to increase the number of models Sanshin offered to include an outboard motor in excess of 140 horsepower.

17. The agreement provided that Yamaha would not manufacture any marine engines the same as those manufactured by Mercury.

18. Mercury and Yamaha, by means of licensing arrangements, also agreed to exchange patents and technological information relating to marine engines, other two-cycle engines and diecasting and low pressure casting techniques.

19. The licensing arrangements include, among others, the following provisions:

> 2.1 (a) Mercury hereby grants to Yamaha a non-exclusive, world-wide license to use the Mercury Technical Information to make, use and sell goods of all kinds and descriptions except those which are competitive to the goods manufactured by Mercury as of the date of the execution of this Agreement.
>
> (b) Yamaha hereby grants to Mercury a non-exclusive, world-wide license to use the Yamaha Technical Information to make, use and sell goods of all kinds and descriptions except those which are competitive to the goods manufactured by Yamaha as of the date of the execution of this Agreement. [5]

* * * * * * *

> 6.7 Because of the difficulty of identifying when a product incorporates part of the Yamaha Technical Information, in order to induce Yamaha to enter into this Agreement in its capacity as licensor, and because it presently has no intention of producing such goods, Mercury agrees not to manufacture any product competitive to those manufactured by Yamaha at the date of the execution of this agreement, notwithstanding the foregoing, Mercury may manufacture snowmobiles.

20. The agreement further provided that it would be in effect for a period of ten years unless notice of termination was given by either party to the other three years prior to the expiration of the initial term or any extension thereof.

## III

## TRADE AND COMMERCE

21. The relevant geographic market involved in this complaint is the United States as a whole.

22. Outboard motors is the relevant product market. Outboard motors over and under 20 horsepower are the relevant submarkets.

23. The United States outboard motor industry is significant. In 1973, 585,000 outboard motors were sold to consumers with a retail value of approximately $501.3 million.

24. The outboard motor industry is highly concentrated, with the top two firms accounting for approximately 71% of the total shipments in 1971, 1972 and 1973, by units sold. The low and high horsepower submarkets account for 62% and 38% of the total unit sales respectively. Concentration within both submarkets is excessive. The top two firms account for approximately 63% of the low horsepower submarket and 89% of the high horsepower submarket.

25. Mercury is the second largest manufacturer of outboard motors in the United States. In 1972, it accounted for approximately 21% of total unit sales in the United States, 16% of the low horsepower submarket, and 30% of the high horsepower submarket. [6]

26. Historically, the outboard motor industry has been marked by a lack of significant entry and a declining number of firms. Since 1950, three different firms have occupied the third-ranked position in the industry. Two of these firms have ceased production of outboard motors. The barriers to entry into this industry are significant and have remained so over time.

## IV

## EFFECTS OF JOINT VENTURE

27. The effects of the joint venture agreement may be substantially to lessen competition or to tend to create a monopoly in the manufacture and/or marketing of outboard motors, components, parts and accessories to consumers throughout the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways among others:

(a) Substantial potential competition between Brunswick, Yamaha, and Mariner has been, or may be eliminated;

(b) The combination of Yamaha with Brunswick and Mariner may tend to:

i. increase barriers to entry of new and effective competition in the relevant market within the United States;

ii. increase previously existing high levels of concentration in the United States; and

iii. precipitate additional acquisitions or mergers in the United States between other outboard marine engine manufacturers and marketers which effect may be to eliminate actual and potential competition; [7]

(c) Manufacturers and marketers of outboard marine engines may have been denied the benefits of free and open competition to their detriment and to the detriment of the general purchasing public and ultimate consumer.

## V

## VIOLATION

28. The joint venture agreement, by eliminating Yamaha as one of a few likely entrants into the United States outboard motor market, constitutes a violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

29. The joint venture agreement constitutes an unreasonable agreement in restraint of trade in violation of Section 5 of the Federal Trade Commission Act.

## INITIAL DECISION BY JAMES P. TIMONY, ADMINISTRATIVE LAW JUDGE

## MAY 2, 1977

## PRELIMINARY STATEMENT

By a Federal Trade Commission complaint issued on April 15, 1975, respondents Brunswick Corporation ("Brunswick"), Yamaha Motor Co., Ltd. ("Yamaha"), (a Japanese company), and Brunswick's wholly-owned subsidiary Mariner Corp. ("Mariner") [2] are charged with violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by a transaction involving a joint venture agreement.

The complaint alleges that, pursuant to the agreement, Brunswick and Yamaha divided controlling interest in another Japanese company, Sanshin Kogyo Co., Ltd. ("Sanshin"), which would manufacture outboard motors in Japan under the "Mariner" trademark for distribution in the United States, among other places, by Mariner; and Yamaha agreed not to sell "Yamaha" trademark outboard motors in those places reserved for Mariner. The complaint further alleges that the agreement provides, among other things, that Yamaha would not manufacture any marine engine the same as those manufactured by Mercury and that licensing arrangements pursuant to the joint venture agreement provide that Mercury agrees not to manufacture any product competitive with those manufactured by Yamaha except snowmobiles.

The complaint alleges that the relevant product market is outboard motors, and relevant submarkets are outboard motors over and under 20 horsepower.

The complaint alleges that the effects of the joint venture may be substantially to lessen competition or to tend to create a monopoly in the manufacturing and/or marketing of outboard motors in the United States in the following ways:

(a) Substantial potential competition between Brunswick, Yamaha and Mariner may be eliminated;

(b) The combination of Yamaha with Brunswick and Mariner may tend to:

i. increase barriers to entry of new effective competition in the relevant market in the United States;

ii. increase previously existing high levels of concentration in the United States; and

iii. precipitate additional acquisitions or mergers in the United States between other outboard marine engine manufacturers and marketers, which effect may be to eliminate actual and potential competition;

(c) Manufacturers and marketers of outboard marine engines may have been denied the benefits of free and open competition to their detriment and to the detriment of the general purchasing public and ultimate consumer. [3]

By answers filed on June 10, 1975, and July 22, 1975, respondents Brunswick and Mariner and respondent Yamaha admitted in part and denied in part the various allegations of the complaint; Yamaha also denied personal jurisdiction and moved for a determination of the jurisdictional issue.

By order dated March 19, 1976, the complaint was amended to substitute Mariner Corp. as a respondent in the place of Mariner International Co. By an order dated April 9, 1976, the Commission remanded to the administrative law judge a certified motion to amend the complaint by adding "affecting" commerce language to the jurisdictional allegations of the complaint. By order dated April 12, 1976, I was substituted as administrative law judge because of the heavy workload of the former administrative law judge. By order dated May 6, 1976, the complaint was amended to include "affecting" commerce language in the jurisdictional allegations. Respondent Yamaha thereafter withdrew its motion to dismiss based on jurisdictional issues. Numerous discovery pleadings were filed, the record showing 49 orders entered in this docket.

Hearings started on October 5, 1976, in Washington, D.C., and were resumed in Honolulu, Hawaii, upon the unopposed motion by respondent Yamaha for the testimony of officers of Yamaha who came from Japan for the hearings. The defense case started in Honolulu and concluded on December 21, 1976, in Washington, D.C., where the record was closed. The record consists of 866 pages of testimony and 165 exhibits, many multi-paged. On February 7, 1977, the parties filed proposed findings and *in camera* proposed findings. On February 22, 1977, the parties filed reply briefs.

This proceeding is before me upon the amended complaint, answers, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by complaint counsel and counsel for respondents. These submissions by the parties have been given careful consideration and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and upon a consideration of the demeanor of the witnesses who gave testimony in this proceeding. [4]

The findings of fact include reference to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

CX — Commission's Exhibit, followed by number of exhibit being referenced.
BX — Respondents Brunswick and Mariner's Exhibit, followed by number of exhibit being referenced.
YX — Respondent Yamaha's Exhibit, followed by letter of exhibit being referenced.
Tr. — Transcript, preceded by the name of the witness, followed by the page number.
Brunswick Admissions - Answer of Brunswick Corporation to Complaint Counsel's Initial Request for Admissions - 9/18/75.

**Yamaha Admissions** - **Yamaha Answers to Request for Admissions 9/10/75.**

Stipulation No. 2 - Dated 11/3/76.

## Findings of Fact

### I. Identity and Business of Respondents

### A. Brunswick Corporation

1. Brunswick Corporation ("Brunswick") is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at Brunswick Center, One Brunswick Plaza, Skokie, Illinois. (Complaint, ¶ 1; Brunswick Amended Ans., ¶ 1.) [5]

2. Brunswick is a diversified manufacturer and marketer of medical products and numerous recreational items, including outboard and stern drive motors, snowmobiles, and bowling equipment. For fiscal year 1973, Brunswick's net sales exceeded $683 million. Net income was $39 million, and assets totalled $550 million in that year. (Complaint, ¶ 2; Brunswick Amended Ans., ¶ 2.)

3. In 1961, Brunswick acquired Kiekhaefer Corporation, now the Mercury Marine Division ("Mercury"),[1] which was and is principally engaged in the production and marketing of marine engines, including the "Mercury" line of outboard motors. Mercury manufactures and sells outboard motors, stern drives and inboard marine engines and snowmobiles. (Complaint, ¶ 3; Brunswick Amended Ans., ¶ 3; Anderegg, Tr. 186.)

4. In 1972, Brunswick, through its Mercury division sold approximately 114,000 outboard motors in the United States. (Brunswick Amended Ans., ¶ 25.) Mercury's dollar value and unit volume of outboard motor sales in 1973 exceeded $80 million and 130,000 units respectively. Mercury is the second largest outboard motor manufacturer in the United States. (Complaint, ¶ 3; Brunswick Amended Ans., ¶¶ 3 and 25.)

5. Mercury manufactures and sells in the United States and sells throughout the world outboard motors ranging from 4 to 175 horsepower. (Complaint, ¶ 4; Brunswick Amended Ans., ¶ 4; BX 26.) At least from 1971 to date, Mercury has sold outboard motors in Canada, Australia, Europe and Japan. (CX 97D–I, 101A–B.)

6. In the course and conduct of its business, Brunswick, at all times relevent to the complaint, has sold and shipped outboard motors in

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[1] "Mercury" as used hereinafter in this decision means respondent Brunswick.

interstate commerce, has engaged in interstate commerce and has been a corporation whose business has been in or has affected interstate commerce. (Complaint, ¶ 5; Brunswick Amended Ans., ¶ 5.)

B. Mariner Corporation

7. Respondent Mariner Corporation ("Mariner") is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at 1939 Pioneer Road, Fond du Lac, Wisconsin. (Complaint, ¶ 13; Brunswick Amended Ans., ¶ 13; Anderegg, Tr. 190.) [6]

8. Mariner is a wholly-owned subsidiary of Brunswick. (Brunswick Amended Ans., ¶ 15; Anderegg, Tr. 192.) Mariner was formed to become a joint venture partner with Yamaha Motor Company, Ltd. and a world-wide distribution organization for marketing the joint venture products known as "Mariner" outboard motors. (Brunswick Response to Complaint Counsel's Discovery Request, 12/8/75, ¶ 4(c); Anderegg, Tr. 191.) Mariner was formed on December 27, 1972. *(Ibid.)*

9. Between December 27, 1972, and May 15, 1974, Mariner operated under the corporate name of Mercury Marine International Company. (Brunswick Amended Ans., ¶ 13.) From May 15, 1974, to June 17, 1974, Mariner operated under the name Mariner International Corporation, and on that date, its name was changed to Mariner Corporation and it became a holding company. A new firm was formed to handle distribution. (Response of Brunswick to Complaint Counsel's Discovery Request, 12/8/75, ¶ 4(a); Anderegg, Tr. 184–85, 210.)

10. Mariner International Co. is a wholly-owned subsidiary of Mariner, organized in 1974 to handle the world-wide marketing of "Mariner" brand outboard motors. (Anderegg, Tr. 184–85.) The President of both Mariner and Mariner International Co. is Mr. Robert Anderegg. (Anderegg, Tr. 185.)

11. In 1973, the principal assets of Mariner were 62,000 shares of stock of Sanshin Kogyo Co., Ltd. (Brunswick Amended Ans., ¶ 15; Anderegg, Tr. 185, 191.) Acquisition of these shares was the result of the joint venture between Brunswick and Yamaha Motor Company, Ltd. (See *infra*, Finding 37.)

12. From 1973 through 1976, officers of Mariner have been members of the Board of Directors of Sanshin Kogyo Co., Ltd. As Board members, these officers attended meetings in Japan in 1973 and 1974 regarding the business of Mariner. (Anderegg, Tr. 184, 194, 196–97.)

13. During 1973, Mariner communicated, on the average, weekly with Japan (*i.e.*, Yamaha Motor Co., Ltd. and/or Sanshin Kogyo Co., Ltd.) by telex, telephone and mail communications regarding the joint

venture and marketing of "Mariner" brand outboard motors. In mid-1974, the frequency of these communications increased to a daily basis. (Anderegg, Tr. 198-99.)

14. Mariner filed annual reports for 1973 and 1974 with the Japanese Government. A law firm located in Japan was utilized to assist Mariner in the preparation of these reports. (Anderegg, Tr. 204.) [7]

15. In the course and conduct of its business during 1974 and 1975, Mariner sold outboard motors in Asia, Europe, Latin America, North America, the South Pacific, the Middle East, New Zealand and Australia. (CX 99A and C; BX 25A-B, W, Z, Z-4, Z-7; Anderegg, Tr. 208-09, 774-75.)

16. In mid-1975, Mariner began promoting the "Mariner" brand of outboard motors in the United States. (Brunswick Amended Ans., ¶ 14.) In late 1976, Mariner commenced importing Mariner outboard motors for sale in the continental United States. (BX 25Z-2, Z-4, Z-7.)

17. Mariner has been and is engaged in interstate commerce and has been and is affecting interstate commerce. (Brunswick Amended Ans., ¶ 14.)

C. Yamaha Motor Co., Ltd.

18. Respondent Yamaha Motor Co., Ltd ("Yamaha") is a corporation organized and existing under the laws of Japan and has its principal place of business in Japan. (Complaint, ¶ 6; Yamaha Amended Ans., ¶ 1.)

19. Yamaha was incorporated in Japan in 1955; its main investor was Nippon Gakki Co., Ltd., a Japanese corporation which manufactures musical products and sporting goods. Prior to Yamaha's incorporation, Nippon Gakki had started a trial production of motorcycles. When Nippon Gakki decided to go into real production, Yamaha was incorporated separately for that purpose. (Eguchi, Tr. 684, 648-49.) In October 1972, Nippon Gakki was the largest individual stockholder of Yamaha stock with 39.11%. The second largest stockholder held 5.03%. (CX 105, 116P.)

20. Since 1961, Yamaha has manufactured and/or sold snowmobiles, motorcycles and spare parts to Yamaha International Corporation, which in turn distributes said products in the United States. (Complaint, ¶ 9; Yamaha Amended Ans., ¶ 4, Hudson, Tr. 732.) In 1972, Yamaha manufactured and/or sold for export motorcycles, snowmobiles, outboard motors and fiberglass boats. (Eguchi, Tr. 644, 646-47.)

21. In 1972, Yamaha's total sales in dollar value were approximately $405 million (Yamaha Amended Ans., ¶ 1; Eguchi, Tr. 647.) Approximately 70% of these sales were accounted for by export sales

and approximately 40% of Yamaha's total sales were made for export to the United States. (Eguchi, Tr. 647.)

22. As stated in a 1972 Business Report to Stockholders, Yamaha's export sales in yen for the fiscal year amounted to about 70% of the total sales. Of Yamaha's export sales, about 78% was in motorcycles, 3% in boats and outboard motors, and 18% in snowmobiles, parts and other items. (CX 114D.) [8]

23. In 1974, Yamaha's total sales were approximately $500 million. (Eguchi, Tr. 647–48.) The present total sales volume of Yamaha-brand products is approximately $650 million annually. (Yamaha Admissions, ¶ 1.)

24. At all times relevant herein, Yamaha has been engaged in commerce as "commerce" is defined in the Clayton Act, as amended, and has been a corporation whose business has been in or has affected "commerce" within the meaning of the Federal Trade Commission Act, as amended. (Complaint, ¶ 12; Yamaha Amended Ans., ¶ 7.)

### D. Sanshin Kogyo Co., Ltd.

25. Sanshin Kogyo Co., Ltd. ("Sanshin"), a Japanese corporation, was established on February 22, 1960, and its principal office is in Hamamatsu City, Japan. (Yamaha Motion to Dismiss, 10/20/75, ¶ 2.)

26. Yamaha produced outboard motors at Yamaha facilities until May 1969 when it purchased control of Sanshin by acquiring 60% of the stock of Sanshin. After the stock acquisition, Yamaha transferred all of its tools for making outboards to Sashin and continued distributing "Yamaha" brand outboards made thereafter by Sanshin. (Yamaha Motion to Dismiss, ¶ 2; Yamaha Admission, ¶ 51; Yamaha Amended Ans., ¶ 2; CX 1A, 9D, 9I, 13B; Eguchi, Tr. 645–46, 666.)

27. Since 1969, Sanshin has produced all "Yamaha" brand outboard motors. (Yamaha, Amended Ans., ¶ 2; Eguchi, Tr. 665–67; Anderegg, Tr. 772; CX 1A.) In the year ending June 1971, Sanshin produced approximately 75,000 outboard motors for Yamaha, of which 25,000 were exported. (Complaint, ¶ 7; Yamaha Amended Ans., ¶ 2.) In 1973, Sanshin produced approximately 80,000 outboard motor units. (Eguchi, Tr. 669.)

### E. Yamaha International Corporation

28. Yamaha International Corporation ("YIC") is a California corporation with its principal place of business in Buena Park, California. (Yamaha Amended Ans., ¶ 3.) [9]

29. YIC was incorporated in 1960 as a wholly-owned subsidiary of Nippon Gakki. (Complaint, ¶ 8; Yamaha Amended Ans., ¶ 3; Hudson,

Tr. 729.) YIC was incorporated to distribute musical instruments manufactured by Nippon Gakki, and motorized products manufactured by Yamaha in the United States. (Yamaha Admissions, ¶ 13; Eguchi, Tr. 653-54.)

30. Before YIC was incorporated in 1960, exports of Yamaha-manufactured products were handled by the International Department of Nippon Gakki. (Stipulation No. 2, #16.) From 1960 to November 1973, YIC was the exclusive distributor for Nippon Gakki in the United States. (Hudson, Tr. 743-44.) From 1961 to date, YIC has been the exclusive distributor of Yamaha products in the continental United States (YX A; Callaway, Tr. 257; Eguchi, Tr. 660; Hudson, Tr. 732-33, 739-40, 744.)

31. In 1972 and 1976, approximately 90% of YIC's sales consisted of Nippon Gakki and Yamaha products. In both 1972 and 1976, two-thirds of that 90% consisted of products manufactured by Yamaha. (Hudson, Tr. 742-44.)

32. YIC is the only corporation licensed by Nippon Gakki, who own the "Yamaha" brand trademark, to use such trademark in the United States. (YX B2; YX B10.) YIC is also authorized to relicense or sublicense others, such as independent dealers, to use the trademark in connection with the sale of Yamaha products. (Hudson, Tr. 738.)

33. From 1961 to date, Yamaha and YIC have, by telephone, telex, mail and other means, communicated with each other in excess of 500 times each year. Such communications have included, but are not limited to, marketing studies, engineering reports, suggestions by either party for improvements to Yamaha-manufactured products, sales reports, warranty and service information. (Stipulation No. 2, #5.)

34. From 1964 to date, Yamaha has sent personnel to various points in the United States to assist YIC in the inspection and testing of Yamaha-manufactured products distributed by YIC in the United States. (Stipulation No. 2, #7.) **[10]**

35. From 1964 to date, Yamaha has sent service technicians and engineering personnel to YIC to assist with technical design and mechanical problems relating to Yamaha-manufactured products. (Stipulation No. 2, # 8.)

## II. The Transaction

36. From late 1971 to March 1972, Mercury and Yamaha conducted negotiations regarding a possible joint venture for the production and marketing of outboard motors. A memorandum of understanding was concluded March 9, 1972. (CX 10A - 10E.) The parties agreed to create "a new manufacturing joint venture to be established in Japan

between Yamaha Co. . . . . through its subsidiary Sanshin Industries Co., Ltd. . . . and Mercury Marine Division of Brunswick Corporation. . . . through a subsidiary to be formed and to be named Mercury Marine International Co. [Mariner]." (CX 10B.)

37. On November 21, 1972, Brunswick entered into a joint venture agreement with Yamaha wherein it was provided that Mariner would purchase 62,000 shares of newly issued shares of Sanshin stock for approximately $1.4 million. (Brunswick Amended Ans., ¶ 15; Yamaha Amended Ans. ¶ 9.)

38. With the purchase of Sanshin stock, Mariner and Yamaha each owned 38% of the total outstanding stock of Sanshin: the remaining 24% of the Sanshin stock is held by individual Japanese shareholders. (Brunswick Amended Ans., ¶ 15; Yamaha Amended Ans., ¶ 9.)

39. The joint venture agreement provided that the corporate name of Sanshin would be changed in due course to Mercury-Yamaha Mfg. Co., Ltd., or some other corporate name as agreed upon by the parties which would contain reference to both Yamaha and Mercury. (CX 1 0.)

40. The joint venture agreement gives Yamaha the right to appoint six of Sanshin's eleven directors, the remaining directors to be appointed by Mariner. The President of Sanshin is appointed by Yamaha from among the directors it nominates. (CX 1H.) Passage of corporate resolutions in specific areas requires an affirmative vote of seven directors; all other corporate resolutions can be adopted by a majority vote provided a quorum of seven directors is present at a Sanshin Board meeting. (CX 1H - 1J.) [11]

41. An operating committee composed of two Yamaha appointed directors or their representatives and two Mariner appointed directors was provided for in the joint venture agreement. The operating committee was to meet regularly to review major operating and policy matters. Matters on which no agreement could be reached were to be referred to the Board of Directors of Sanshin for resolution. (CX 1J.)

42. The joint venture agreement will remain in effect for a period of 10 years after the Sanshin stock purchase. Unless notice of termination is given by either party three years prior to the expiration of the initial term, or any extended term, the agreement is automatically extended for three year periods, subject to any necessary Japanese Government approvals. (CX 1R; Brunswick Amended Ans., ¶ 20; Yamaha Amended Ans., ¶ 13.)

43. Article 8.4 of the joint venture agreement provided that Sanshin would continue to manufacture outboard motors under the "Yamaha" label for sale to Yamaha for exclusive distribution in Japan. Outboard motors produced by Sanshin bearing the "Mariner" label would be sold to Mariner for exclusive distribution in North America

and Australia. The balance of the Sanshin-produced outboard motors would be sold to a proposed equally-owned joint venture sales company for distribution in the rest of the world under the "Mariner" trademark and, in those countries mutually agreed upon, under the "Yamaha" trademark. (CX 1K - 1L.)

44. In October 1973, Yamaha and Mariner amended certain provisions of the joint venture agreement. They agreed that it was inappropriate to attempt to form a joint venture sales company for marketing Sanshin products in certain areas of the world and that, therefore, both partners would be free to conduct their own independent marketing programs in those territories which the joint venture agreement contemplated would be served by a joint venture sales company. (CX 78A.) The term "North America" as used in the joint venture agreement was clarified to include Canada, the United States of America, and the United States of Mexico. (CX 78C.) The parties further agreed that Mariner would have the exclusive right to sell in North America the products of Sanshin and/or marine engines purchased from Mercury. In the case of Mexico, however, Yamaha could continue to sell the existing outboard motors selected by the Mexican Government for their fishing program. The parties also agreed that New Zealand would be included in the exclusive territory of Mariner. (CX 78C.) [12]

45. Under Article 8.1 of the joint venture agreement, Yamaha and Mariner have been and are the only purchasers of products which Sanshin manufactures. (CX 1K.) Yamaha sells Sanshin-made products under the trademark "Yamaha" and/or other agreed upon trademarks; Mariner sells Sanshin-made products under the trademark "Mariner" and/or other agreed upon trademarks. (CX 1L.) Pursuant to the joint venture agreement, export procedures and shipments of Sanshin products are executed exclusively through Yamaha. (CX 1K.)

46. In May 1973, Mercury and Yamaha agreed that Sanshin would produce the jointly developed small horsepower outboard motors such as the 6 and 9.8 h.p. for sale by Mercury using the "Mercury" trademark. (CX 75B.) No such sales occurred. (Resp.'s Reply, p. 29.)

47. Mercury and Yamaha incorporated in the joint venture agreement licensing arrangements whereby they agreed to exchange between themselves, and provide to Sanshin, patents and technical information relating to marine engines, other two-cycle engines and die cast and low pressure die casting techniques. (CX 1M - 1N; Brunswick Amended Ans., ¶ 18; Yamaha Amended Ans., ¶ 12.)

48. Pursuant to the joint venture agreement, the parties entered into a technical assistance agreement between Yamaha and Mercury which included, among others, the following provisions:

2.1 (a) Mercury hereby grants to Yamaha a non-exclusive, world-wide license to use the Mercury Technical Information to make, use and sell goods of all kinds and descriptions except those which are competitive to the goods manufactured by Mercury as of the date of the execution of this Agreement.

(b) Yamaha hereby grants to Mercury a non-exclusive, world-wide license to use the Yamaha Technical Information to make, use and sell goods of all kinds and descriptions except those which are competitive to the goods manufactured by Yamaha as of the date of the execution of this Agreement.

(CX 1Z-30)

* * * * * * *

[13] 6.7 Because of the difficulty of identifying when a product of Mercury incorporates part of the Yamaha Technical Information, in order to induce Yamaha to enter into this Agreement in its capacity as licensor, and because it presently has no intention of producing such goods, Mercury agrees not to manufacture any product competitive to those manufactured by Yamaha at the date of the execution of this Agreement, notwithstanding the foregoing, Mercury may manufacture snowmobiles.

(CX 1Z-39) 5C

(See also, Brunswick Amended Ans., ¶ 19; Yamaha Amended Ans., ¶ 12.)

49. Yamaha and Mercury also agreed to provide technical assistance by assisting, advising and cooperating via technical experts with each other's technical personnel in "the development, designing, research, manufacture, experimenting, quality control, and servicing of the licensee's products and in plant layout, and the selection of the machinery, tools and equipment necessary or desirable for the manufacture of said products." (CX 1Z-31.)

50. Mercury and Yamaha also agreed to permit each other's technical personnel to inspect their plants and agreed to provide instruction to such personnel concerning the processes, procedures, operating manuals and methods used by the licensor in the manufacture of its products falling within the scope of the licenses granted. (CX 1Z-32.)

51. The parties agreed that the technology exchanged would have no assigned value. (CX 9E; but see Finding 194.) Under Article 5 of Exhibit D to the joint venture agreement, Mercury and Yamaha agreed to pay an annual royalty of $25,000 to each other for the licenses granted in Section 2.1 of the technical assistance agreement. (CX 1Z-33.)

52. Technical assistance agreements were also executed between Yamaha and Sanshin and between Mercury and Sanshin in accord with provisions of the joint venture agreement. These agreements provided that Mercury and Yamaha would disclose and license to Sanshin any and all Mercury or Yamaha patents, utility models, designs (and all

applications for such patents, utility models and designs), technical knowledge, specifications, standards, data, operating manuals and experience applicable to the development, designing, research, manufacture, experimenting, quality control and servicing of marine engines, whether Mercury or Yamaha owned or possessed the information at the time the technical assistance agreements became effective or later developed or acquired it during the term of the agreements. (CX 1Z-5 - 1Z-7, 1Z-18 - 1Z-19.) [14]

53. The parties agreed in Article 10.1 of the joint venture agreement that Yamaha may not "directly or indirectly manufacture marine engines the same as or substantially the same as those which are or will be manufactured by Sanshin," and may not "purchase for resale such marine engines from any third party." Provision was made, however, for Yamaha's continued purchase for resale in Japan of marine engines which Yamaha purchased and sold as of the date of the agreement and any other marine engines subsequently agreed upon by the parties. (CX 1M.)

54. Yamaha and Mercury agreed that an engineering group was to be established at Sanshin with responsibility for the design and development of all Sanshin products. (CX 1M.) Yamaha further agreed to assist Sanshin in securing personnel for the outboard motor engineering group. (CX 1 O.)

55. Prior to the joint venture with Brunswick, neither Yamaha nor Sanshin attempted to buy outboard motor technology from any other outboard motor manufacturers. (Eguchi, Tr. 63.) When McCulloch stopped producing outboards in April 1969, they offered to transfer their complete engineering technology, plant and equipment to Yamaha. After consideration, this offer was declined. (CX 79C, 90L; see Finding 77.)

56. Between 1970 and 1972, Yamaha conducted product development on outboard motors for Sanshin which did not have a research and development department. Such research and development included the improvement of existing outboard motors in performance, primarily, and also the development of new motors to be added to the Yamaha line of outboard motors. (Eguchi, Tr. 671.)

57. In 1974, the Research and Development Department of Sanshin was created pursuant to the joint venture. Most of the personnel of this department were transferred from Yamaha. (Eguchi, Tr. 673.)

58. All technical assistance agreements entered pursuant to the joint venture, unless sooner terminated or extended by the joint venture agreement, remain in effect for ten years. Absent notification six months prior to the expiration of the initial term or any renewal period, the agreements are automatically renewed for three year

periods, subject to necessary approvals by the Japanese Government. (CX 1Z–13, 1Z–25, 1Z–41.) [15]

59. Absent a breach of the joint venture agreement or insolvency of one of the parties, upon termination of the technical assistance agreements, "the rights and licenses granted to each licensee pertaining to Patents etc., shall in principle be revoked . . . ." (CX 1Z–36, 1Z–10, 1Z–21.) Upon termination, rights and licenses granted between Yamaha and Mercury will be renewed, at reasonable cost, upon written request of the licensee. (CX 1Z–36.) Licenses between Yamaha and Sanshin and between Mercury and Sanshin may be renewed after deliberation between the parties to the license regarding the terms and conditions of such renewals. (CX 1Z–10, 1Z–21.)

60. Absent a breach of the joint venture agreement or insolvency of one of the parties, the ownership of technical information other than patents, etc., exchanged pursuant to the technical assistance agreements becomes the joint property of the parties to the agreement and thereafter may be used for any purpose whatever without obtaining the consent of the licensor. (CX 1Z–36, 1Z–10, 1Z–21.)

## III. Relevant Geographic Market

61. The relevant geographic market is the United States. (Complaint, ¶ 21; Brunswick Amended Ans., ¶ 21; Yamaha Amended Ans., ¶ 14.)

## IV. The Outboard Motor Industry

62. The manufacture of an outboard motor[2] is a highly complex process. (BX 12R.) Fundamentally, an outboard motor is composed of three basic parts: (1) an electrical system which gives ignition and in some instances provides recharging capability for the battery; (2) a basic powerhead which is comprised of a cylinder block and associated crank-shaft, connecting rods and reciprocating parts for housing components; and (3) a lower unit or leg which is principally comprised of a gear train and propeller, some method of attachment to the transom, a fuel supply, and remote electrical, shift and throttle controls in some models. (Dillon, Tr. 292–93.) [16]

63. Outboard motors are used for a wide range of water-related activities including fishing, hunting, water skiing, cruising and commercial purposes. (CX 90G, 90Z–46, 90Z–52; Strang, Tr. 386.)

64. Between 1963 and 1972, sales of outboards in the U.S. rose by 10.9% compounded annually. During the same period, the compounded

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[2] The relevant product in this proceeding does not include electric outboard motors, inboard/outboard motors or stern drive motors. (Stipulation, Tr. 169.)

annual growth rate for consumer durable spending was 9.3% and for leisure durable expenditures 9.8%. (BX 12H.)

65. Sales, both domestic and foreign, by United States outboard motor manufacturers have increased annually. In 1965, 393,000 United States-made outboard motors, with a dollar value of $183 million, were sold. (BX 12I.) By 1971, the industry had grown to the point of 514,375 units sold, with a total dollar value of $231,443,271. (CX 92 - 96.) In 1972, 554,019 outboard motors were sold by United States manufacturers, with factory sales of $271,320,036. (CX 92 - 96.) In 1973, 585,000 outboard motor units were sold by the United States outboard motor industry, with a retail value of approximately $501,300,000. (Yamaha Amended Ans., ¶ 16.)

66. The United States outboard motor market is and, at all times relevant herein, has been the largest market for outboard motors in the world. (Stipulation No. 2, ¶ 21; Yamaha Admissions, ¶ 45; BX 12T.)

67. In 1973, imports were insignificant in the United States market and were expected to remain so. (BX 12F.) Foreign manufacturers have not been a factor in the United States outboard motor market. (Anderegg, Tr. 797.)

68. Europe, Canada, Australia, and the Far East, principally Japan, are the most important foreign markets. (BX 12T.) Foreign sales accounted for approximately 35% of the world-wide total in 1972 and were expected to increase as foreign demand grew. The "Andresen Report," a securities research report prepared for Outboard Marine Corporation (OMC) entitled "The Marine Industry and Outboard Marine Corporation" dated January 1973 (BX 12A - 12SS), stated that the foreign outboard motor market was growing as fast as the U.S. market and predicted that, for 1973, foreign unit sales would increase by 6% and dollar value sales by 12%. (BX 12E, 12 O.) [17]

69. The average horsepower of outboard motors sold in foreign markets is significantly lower than the domestic average because "foreign market development is about seven to eight years behind that of the United States." (BX 12T.)

70. The "Andresen Report" concluded that the "United States Outboard Motor Industry" was believed to offer long-term revenues and earnings growth as well as rising return on investment with revenues of the industry growing by at least 12% during 1973. (BX 12E.) The report predicted that there would be an increase in sales of outboard motors between 1972 and 1974 at 16.1% compound annual rate of growth. (BX 12K.) The report estimated that in 1973, domestic outboard motor unit sales would increase by 7.5% and dollar value sales by 18.3%. (BX 12 O.)

71. In 1971, Mercury was expanding its outboard motor production

to meet the demands for outboard motors in the United States. (Anderegg, Tr. 799.) Despite this activity, in February 1973, a Mercury study stated "Mercury Marine has, for the past several years, been plagued by a general inability to supply market demands for our marine products." (CX 71D.) Mariner's present promotional literature states that: "[O]ver the past several years demand had exceeded supply in the industry." (BX 25Z–73.)

72. Beginning with the early 50's, the outboard motor industry in the United States has witnessed a transition from low horsepower motors to larger, more sophisticated engines capable of powering larger and heavier boats. (BX 12A, 12E, 12M, 26; Dillon, Tr. 284–87.) The top horsepower for outboards sold in this country went from 25 h.p. in 1953 to 200 h.p. in 1976. (BX 26.) This trend enhances long-term industry growth potential in that high horsepower engines are more profitable than smaller outboards and wear out faster. (BX 12A, 12E.) In 1972, approximately 75% of outboard motor unit sales were for replacement purposes. (BX 12M.)

73. The manufacture and sale of outboard motors has been highly profitable. (BX 12; CX 71D.) For example, in 1973 the "Andresen Report" estimated OMC's total non-marine sales at about $114 million, with a pre-tax profit of $3.9 million. On total marine sales of $330 million, the report estimated OMC's profit at $58.2 million. (BX 12GG.) About one-third of OMC's outboard sales and 40% of the profit from these sales came from foreign sales. (BX 12 O.) [18]

74. Mercury's sales have increased from $21,749,000 in 1961 to $82,737,000 in 1973. (CX 100E.) Mercury's 1973 division earnings totalled $9,888,000 on net sales of $82,737,000. For 1972, division earnings totalled $8,650,000 on net sales of $65,686,000. (CX 100E.)

75. The "Andresen Report" estimated OMC's marine products division profitability as follows: for 1971, sales were $259.5 million with a pre-tax profit of $45.7 million, resulting in a margin of 17.6%. For 1972, OMC sales were estimated at $290.6 million with a pre-tax profit of $53.7 million, for a margin of 18.4%. For 1973, the report estimated OMC sales at $330.0 million with a pre-tax profit of $58.2 million, resulting in a margin of 17.6%. (BX 12GG.)

76. OMC's return on average investment from 1970 through 1972, as reflected in the following chart, also attests to the profitability of outboard motor sales (CX 123C - 123E):

*Return on Average Investment*

| | 1970 | 1971 | 1972 |
|---|---|---|---|
| Johnson Division | 26.0% | 35.3% | 43.3% |
| Evinrude Division | 19.0% | 36.3% | 38.5% |

77. "Historically, the outboard motor industry has been marked by a lack of significant entry and a declining number of firms." (Yamaha Amended Ans., ¶ 19.) During the period 1955–1965, competitors in the United States outboard motor industry included OMC, Mercury, Scott-Atwater, McCulloch, West Bend, Eska, Clinton and Martin. . Dillon, Tr. 283–85, 291; Anderegg, Tr. 766, 806.) During this period, Martin and Scott-Atwater exited the outboard motor industry. (Dillon, Tr. 285, 291.) In 1969, McCulloch also exited the outboard motor industry. (CX 90L; Dillon, Tr. 291; Anderegg, Tr. 766.) In 1965, Chrysler acquired all of the assets of West Bend's outboard motor operations (Dillon, Tr. 282.) [19]

78. Between 1965 and 1970, there were only minor fluctuations in Mercury's market share in the outboard motor industry. (Anderegg, Tr. 784.) Market shares of the principal domestic competitors, as evidenced by the following charts, remained relatively stable from 1971 to 1973 (CX 92 - 96):

*Market Shares By Units Sold*

| | 1971 | 1972 | 1973 |
|---|---|---|---|
| OMC | 49.1% | 50.3% | 50.3% |
| Mercury | 20.0% | 19.8% | 22.6% |
| Chrysler | 8.6% | 8.6% | 7.8% |
| Eska | 18.4% | 15.6% | 14.2% |
| Clinton | 3.9% | 5.65% | 5.1% |

[20] *Market Shares by Dollar Volume*

| | 1971 | 1972 | 1973 |
|---|---|---|---|
| OMC | 58.3% | 59.3% | 59.0% |
| Mercury | 25.1% | 24.2% | 26.0% |
| Chrysler | 11.6% | 11.6% | 10.2% |
| Eska | 4.0% | 3.4% | 3.4% |
| Clinton | 0.9% | 1.5% | 1.4% |

79. The top two outboard motor manufacturing companies account for in excess of 70% of outboard motor units sold. (Yamaha Amended Ans., ¶ 17.) In 1972, Mercury accounted for approximately 21% of the total unit sales of outboard motors in the United States. (Yamaha Amended Ans., ¶ 18.)

80. Barriers to entry into the outboard motor industry are significant and have remained so over time. (Yamaha Amended Ans., ¶ 19.) "[B]arriers to effective entry into the United States market for outboard motors on a competitive basis are presently significant." (Brunswick Amended Ans., ¶ 26.)

81. Barriers to entry into the United States outboard motor market include capital costs, technology and know-how, and, in addition, for the market in which high horsepower outboard motors are sold, the need to produce and sell a broad line of horsepower engines and the need to develop a sales and service network. (Findings 99, 105; CX 79F; BX 12F, 12Q - 12R, 12V; Strang, Tr. 457.) [21]

82. A market study of the United States outboard motor industry prepared for American Honda in 1969 concluded that:

> [t]he outboard motor industry is composed of two distinctly separate, but overlapping market segments; one for lower horsepower motors, usually under 20 hp, and one for higher horsepower motors, usually over 20 hp. (CX 90G.)

## V. Relevant Product Markets

### A. Low Horsepower[3] Gasoline Outboard Motors

83. A definite market for low horsepower motors, usually 20 h.p. and under, exists in the United States outboard motor industry. (CX 90G; Stipulation No. 2, #22.)

84. In 1972, OMC, Mercury, Chrysler, Clinton and Eska[4] sold low horsepower outboard motors in the United States Although OMC, Mercury and Chrysler also produced outboards in the high horsepower range, Eska and Clinton did not. (CX 92B, 96B; Dillon, Tr. 308; Strang, Tr. 336; Kascel, Tr. 623–24.)

85. OMC, Mercury and Eska considered OMC, Mercury, Eska, Chrysler and Clinton as competitors in 1972. (CX 72A, 73E, 109E - 109F; Strang, Tr. 336; Kascel, Tr. 610.)

86. The 20 h.p. and under market shares of the principal United States competitors were (CX 92 - 96):[5]

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[3] This deliniation is not clear-cut since "overlapping" exists between the low and high horsepower segments of the industry. (CX 90G.) The President of OMC feels the low market is 25 h.p. and below. (Strang, Tr. 386, 438.) In an internal Yamaha memorandum, the low horsepower market was described as "less than 25 horsepower." (CX 15B.) In January 1972, Mercury looked at motors 25 h.p. and under as the "low horsepower offerings." (CX 8A, 8D.) There appears to be a trend to polarization of the two categories. (CX 90G.)

[4] Eska does not manufacture outboard motors, but merely assembles them from components purchased from various manufacturers. (Kascel, Tr. 609.) [22]

[5] These figures reflect all 20 h.p. and under outboard motor sales by United States manufacturers. No figures are available in the record which show how much of the total sales were foreign sales.

*Market Share by Unit Volume*

| | 1971 | 1972 | 1973 |
|---|---|---|---|
| OMC | 39.1% | 40.2% | 39.7% |
| Mercury | 16.9% | 15.5% | 19.3% |
| Chrysler | 6.1% | 5.8% | 4.9% |
| Eska | 31.2% | 28.2% | 29.6% |
| Clinton | 6.6% | 10.2% | 9.5% |

[23] *Market Share by Dollar Volume*

| | 1972 | 1973 5 |
|---|---|---|
| OMC | 50.5% | 49.0% |
| Mercury | 20.6% | 24.6% |
| Chrysler | 9.3% | 6.8% |
| Eska | 13.5% | 14.0% |
| Clinton | 6.1% | 5.6% |

87. In the early 70's, Honda commenced selling a low horsepower motor in the United States. (Strang, Tr. 471.) Two to three years ago, Volvo also entered this market. (Strang, Tr. 470.) Suzuki/Arctic Cat now sells outboards in the low horsepower United States market. (Strang, Tr. 459.) Despite these foreign entries, no foreign manufacturer is considered a factor in the United States to date. (Anderegg, Tr. 797.)

88. A Mariner marketing outline presentation for 1977 describes a United States outboard motor market which includes the "Big 3" (OMC, Mercury and Chrysler) and also Eska, Spirit, British Seagull, Honda, and Volvo Penta. (BX 25Z–70.)

89. The primary use for outboard motors 20 h.p. and under is for fishing, hunting, and moving sailboats in or out of marinas. (CX 90J, 90Z–46, 90Z–52; BX 3A; BX 12Q; Dillon, Tr. 304; Strang, Tr. 386; Kascel, Tr. 611.)

90. Small outboard motors up to 20 or 25 h.p. are used on boats of up to roughly 14 feet. (Strang, Tr. 386.) Such low horsepower engines are generally portable, weighing somewhat less than 80 or 90 pounds and are clamped rather than permanently affixed to the transom of a boat. (BX 24, [Bradley] pp. 51–53; Dillon, Tr. 305; Strang, Tr. 387–88; Kascel, Tr. 612.) [24]

91. Low horsepower outboard motors generally have manual rewind starters and a steering handle. These features do not appear in high horsepower outboard motors. (Dillon, Tr. 306; Strang, Tr. 387.)

92. Chrysler and OMC use a number of production lines in manufacturing low horsepower outboard motors. (Dillon, Tr. 301–02; Strang, Tr. 389–91.) Mr. Strang, the President and General Manager of OMC, testified, however, that, in 1972, a manufacturer could have assembled outboard motors from 2 h.p. to either 25 or 40 h.p. on one assembly line. Low horsepower outboard assembly lines utilize clamp screws rather than bolts to hold the engines in place and require less vertical space on the conveyors than high horsepower assembly lines. Small engines, due to their portability, can also be moved by hand within the factory, whereas equipment is necessary to move larger outboard engines. (Strang, Tr. 392–94.)

93. Prices on low horsepower outboard motors are substantially lower than prices for high horsepower outboard motors. (CX 97; BX 25X.) For example, the 1977 model Mariner 20 h.p. outboard has a listed retail price of $875, while the 60 h.p. was listed at $1,670. (BX 25X.)

94. Prior to the initiation of price controls in late 1971, OMC low horsepower outboard motor prices were not affected by the prices of high horsepower outboard motors. (Strang, Tr. 397.)

95. Eska, during the last 5–6 years, has reduced OMC's share of the low horsepower outboard market. (Strang, Tr. 337, 476, 540–41.) As a result of the inroads being made by Eska in this market, "OMC has initiated . . . a program for the design and development of a low-cost engine to be competitive with the ESKA in price range." (Strang, Tr. 550.)

96. In 1967, Yamaha requested YIC to prepare a report on the possibility of marketing Yamaha-manufactured outboard motors by YIC in the United States, which report was prepared and sent by YIC to Yamaha. (Stipulation No. 2, #9.) This report noted that "generally speaking price competition is quite severe in the market of smaller outboard motors." (BX 3D.) [25]

97. United States manufacturers sell low horsepower outboard motors to mass merchandisers under private labels, and to marine dealers[6] under brand labels. OMC and Mercury sell all outboard motors manufactured by them exclusively to marine dealers. (Strang, Tr. 421; Kascel, Tr. 611.) Prior to 1965, OMC sold private label outboards to mass merchandisers, as well as its "Evinrude" and "Johnson" brands to marine dealers. (Strang, Tr. 422.) Chrysler sells outboard motors to both marine dealers and mass merchandisers. (CX 94E; Dillon, Tr. 290–91, 308, 310.) Chrysler's private label outboards contain essentially the

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[6] The term "marine dealer" refers to a dealer selling a full horsepower range of outboard motors as well as boats, trailers, and accessories. In addition, many sporting goods or hardware stores may stock part of a line of outboard motors for resale. (CX 90Z–19; Strang, Tr. 424.)

same powerhead and major components as its "Chrysler" label outboard motors. (Dillon, Tr. 312.) Eska and Clinton sell all outboard motors manufactured or assembled by them exclusively through mass merchandisers such as Sears, Penneys, Western Auto and other large chains and dealers. (BX 24, [Bradley] p. 28; Dillon, Tr. 311; Strang, Tr. 337, 423; Kascel, Tr. 608–10, 619.)

98. Low horsepower outboard motors sold through mass merchandisers compete with outboard motors of comparable horsepower sold through marine dealers. (BX 24, [Bradley] p. 33; Brunswick Admissions, pp. 20–21.)

## B. High Horsepower Gasoline Outboard Motors

99. A recognized market exists for high horsepower motors, usually over 20 h.p. (CX 90G.) Existence of this separate market was explicitly noted in the "Andresen Report" which stated (BX 12R):

> Market entry appears to be further restricted when the large horsepower market is examined. Only OM, Brunswick, and Chrysler Corporation are producing high quality, larger horsepower motors in quantity. OM produces over half of these engines and the Mercury division of Brunswick produces 30%. Chrysler has been able to make only narrow inroads into this market. Furthermore, the need for the broad distribution and highly skilled service should serve to protect the domestic higher horsepower market from foreign competition. [26]

100. In 1972, OMC, Mercury and Chrysler were the only United States manufacturers selling high horsepower outboard motors up to 150 h.p. in the United States. (CX 90Z-4; BX 26; Dillon, Tr. 308; Strang, Tr. 336.)

101. The above 20 h.p. market shares of the principal United States competitors were (CX 92 - 94):[7]

*Market Share by Unit Volume*

| | 1971 | 1972 | 1973 |
|---|---|---|---|
| OMC | 63.4% | 62.8% | 62.4% |
| Mercury | 24.5% | 25.1% | 26.4% |
| Chrysler | 12.1% | 12.1% | 11.2% |

*Market Share by Dollar Volume*

| | 1972 | 1973 |
|---|---|---|
| OMC | 61.9% | 62.0% |
| Mercury | 25.8% | 26.8% |
| Chrysler | 12.3% | 11.2% 5 |

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[7] These figures reflect both domestic and foreign sales of high horsepower outboards by United States manufacturers.

[27] 102. High horsepower outboard motors are used for sport and recreation, such as for water skiing or cruising. (CX 90Z–46, 90Z–52; Dillon, Tr. 304–05; Strang, Tr. 386.)

103. Outboard motors ranging from 30 to approximately 65 h.p. are used on boats up to 16 or 17 feet. Outboard motors of 70 h.p. and above are used on boats from 17 to 18 feet and up. (Strang, Tr. 386–87.) High horsepower outboards are bolted onto the boats rather than clamped to the boat transom. (Strang, Tr. 392–93.) Outboard motors of 35 h.p. and above are generally not portable. (Dillon, Tr. 305–06.) For example, Mariner's 85 h.p. outboard motor weighs approximately 254 pounds. (BX 25Z–30.) Generally, moving heavier, high horsepower outboard motors requires two people and may require special equipment, such as a forklift truck. (Dillon, Tr. 323–24.)

104. Outboard motors in the 35–65 h.p. range generally come equipped with electric starters, as opposed to manual (or rope recoil) starters, commonly found in the 20 h.p. and below category. (Dillon, Tr. 306–07.) Optional front controls rather than steering handles are also normal equipment on high horsepower outboard motors. (Dillon, Tr. 306.)

105. Advanced technology and know-how are required in the manufacture of high horsepower outboard motors. (Strang, Tr. 457.) Efficiency in fuel consumption, increased weight of larger engines and manufacturing techniques such as die casting, require greater technical innovation and development in manufacturing high horsepower outboard motors. (Alexander, Tr. 848–50.) Features such as jet prop exhaust and capacitor discharge ignition, which are important on larger outboards, were developed and adopted by Mercury, OMC and Chrysler to make their products more saleable. (Strang, Tr. 431; Alexander, Tr. 836–38, 840.) OMC, Mercury and Chrysler have competed intensely in offering such product features. (Strang, Tr. 432–33, 450.)[8] [28]

106. Many of the component parts of an outboard motor are die cast. (CX 112 [Alexander] Z–18.) Yamaha motorcycles have been die cast. However, since motorcycles do not use propellers or gear cases, Mercury's know-how in die casting these, could benefit Yamaha. (Alexander, Tr. 841.)

107. Aluminum castings used in outboard motors are frequently made through high pressure die casting, the main system used in the

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[8] The record does not contain figures as to the amount spent by OMC, Mercury or Chrysler on research and development of their respective outboard motor lines. From 1966 to 1975, OMC's research and development budget increased from $8.3 million to an estimated $20.7 million. These figures, however, reflect research and development expenditures for OMC's entire line of products, which includes lawn mowers, snowmobiles and other durable goods. (BX 12FF, 12 OO, 12PP.)

United States. A high pressure die casting machine contains a metal mold into which molten aluminum is injected at a pressure of 3,000 to 4,000 pounds per square inch. It is chilled in the water-cooled die, the die is then opened and the casting removed. (CX 112 [Alexander] Z-18; Strang, Tr. 413.) High pressure die casting techniques and processes have been well known in the United States for many years. (Strang, Tr. 414.) In 1972, there were many high pressure die casting vendors in the United States. (Strang, Tr. 414–15.)

108. In low pressure die casting, molten aluminum is inhaled into a die by a ceramic straw. After a few seconds to solidify, the vacuum creating the inhalation is turned off and the die is opened. Although low pressure die casting is a slower process, it produces a high quality casting which can be heat treated for high strengths during the casting process. (CX 112 [Alexander] Z-19, 112Z-20; Strang, Tr. 413–14.)

109. Jet prop exhaust, or "through-the-hub" exhaust, refers to the piping of the exhaust from the engine out through the center of the propeller hub, instead of breaking the exhaust down through a snout behind and above the propeller, which is the conventional way to put exhaust into the water. Jet prop results in better silencing and reducing the drag of the lower unit through the water by not forcing the water to close in behind the propeller hub, but rather by filling what would otherwise be a low pressure area downstream of the propeller exhaust. This results in slightly higher top speed and improved fuel economy because of the slight drag reduction. (CX 112 [Anderegg] Z-2, 112Z-3.)

110. The real advantage of the through-the-hub exhaust system appears on outboards that are capable of running a boat at higher speeds. (Strang, Tr. 404.) Where speed is important, it is desirable to eliminate the drag caused by propeller hub vortex. On small engines which run more slowly, it is not as important, and since it is more costly, there is a trade-off between a selling feature and the cost of the selling feature. (Strang, Tr. 523–24.) [29]

111. Jet prop exhaust tends to be used in high horsepower outboard motors because it is more advantageous on higher speed boats, those that run 25 and 30 miles an hour. It is perhaps less of an advantage on low speed boats. (CX 112 [Alexander] Z-6.)

112. The fundamentals of the whole jet prop exhaust system were explained in a now expired 1921 patent. (Strang, Tr. 401.) Mercury has incorporated this feature in all its outboard motors. (CX 112 [Alexander] Z-3 - 112Z-4.) OMC has incorporated jet prop exhaust on newly developed or retooled models. OMC does not believe the added cost of this feature is warranted on some of its smaller engines. (Strang, Tr. 403–04; CX 112 [Alexander] Z-3, 112Z-4.) Neither Chrysler nor Eska

have incorporated jet prop exhaust on their outboards. (Dillon, Tr. 316; Kascel, Tr. 614.) The Yamaha 50 h.p. outboard displayed at the 1972 Tokyo Boat Show did not have jet prop exhaust. (CX 107 O.)

113. Capacitor discharge ignition ("CDI") is a form of electronic ignition system wherein an electrical capacitor is charged and subsequently discharged through a pulse transformer to produce a very rapid voltage rise in the spark plug. CDI allows use of surface gap spark plugs which eliminates oil fouling or lead fouling of the spark plugs and prevents misfiring of the spark plugs. (CX 112 [Alexander] R.) CDI can be used in any internal combustion engine. (Strang, Tr. 408.)

114. CDI is important in the larger size outboard motor over 25 h.p. This is because the high horsepower engines work harder to produce power, the breaking effect of pressure is higher, and the danger of preignition is higher. (CX 112 [Alexander] Y.)

115. In 1972, there were many companies offering CDI systems for sale. (Dillon, Tr. 318; Strang, Tr. 408.) Some CDI systems were displayed at the 1972 Tokyo Boat Show. (Strang, Tr. 408.)

116. In 1972, all OMC larger outboard motors (50 h.p. and above) had CDI. (Strang, Tr. 407.) OMC outboard motors below 50 h.p. did not have CDI for several reasons: (1) some were older models which had not been updated, in part because CDI is not as critical to a small engine as it is to a large one; the small engines are not as prone to preignition damage as large engines; (2) the cost of CDI ignition is higher than inductive ignition; therefore, on the small engines, where cost is a greater factor, OMC chose to remain with the inductive style ignition system. (Strang, Tr. 407–08.) **[30]**

117. Prior to the joint venture, Yamaha did not have CDI in its outboard motors. In upgrading the quality of the outboards to be produced by Sanshin, Mercury and Yamaha agreed that Yamaha would procure a CDI system from Japanese ignition system makers who could provide the CDI system in Japan. Mercury's first approach was to test, evaluate and qualify the Japanese ignition systems provided by Yamaha. As a second approach, Mercury and Yamaha discussed the possibility of Mercury supplying its own CDI system to Yamaha both for Sanshin-produced outboard motors as well as Yamaha motorcycles. (CX 112 [Alexander] W; CX 18D.)

118. In 1972, there were no significant patents relating to lower units of outboard motors. (Strang, Tr. 411.) A great deal of information relating to lower unit technology is available free of charge from United States Government sources as well as private institutes. (Strang, Tr. 411, 520–21.)

119. High horsepower outboards must be produced on a separate

assembly line from low h.p. outboards. Since outboard motors over 25 or 40 h.p. are bolted onto the boat, the assembly lines for these motors must be able to handle an engine which is bolted in place. Large outboard motors also require more vertical space on the conveyors, larger test tanks and hoists or other equipment to move these heavier engines within the factory. (Strang, Tr. 392–94.)

120. OMC prices of high horsepower outboard motors are not affected by prices set for low horsepower motors. (Strang, Tr. 397.) The President of OMC testified on this subject (Strang, Tr. 537):

> Q. What competitors' prices have you seen, Mr. Strang?
>
> A. We normally look at Chrysler's Mercury's, and this year, unfortunately, Mariner's prices came too late for us to compare.

121. Since at least 1968, the majority of dollar growth in the outboard motor industry has been in the high horsepower market. (BX 12P; Alexander, Tr. 838.) Although fewer high horsepower units are sold, the profit per unit increases with high horsepower outboards. (Strang, Tr. 425–26; Anderegg, Tr. 795.) Outboards of 45 h.p. and higher wear out much faster than lower horsepower engines, since they are often used in salt water, and at full throttle. (BX 12Q.) They therefore have to be replaced more often. [31]

122. In 1972, outboard motors 20 h.p. and over accounted for $126,766,453 or over 78% of OMC's $160,967,371 total domestic outboard "factory value." (CX 93D, 93E.) In 1972, $26,149,000 or over 83% of Chrysler's $31,407,000 total sales were attributable to 20 h.p. and over outboard motors. (CX 94B.) During the same year, $52,840,000 or over 80% of Mercury's $65,686,000 total sales were attributable to 20 h.p. and over outboard motors. (CX 92B.)

123. OMC and Mercury sell all outboard motors manufactured by them exclusively through marine dealers. (Strang, Tr. 423; Kascel, Tr. 611.) With the exception of a comparatively few 35 to 55 h.p. private label outboards, Chrysler sells the high horsepower outboards manufactured by it through marine dealers. (CX 94D, 94E; Dillon, Tr. 290–91, 308, 310.)

124. Sales of high horsepower outboard engines to consumers is a more complex business and requires more skill and service than sales of low horsepower outboards and are therefore handled through marine dealers. (BX 24 [Bradley], pp. 12–13.) The "Andresen Report" in analyzing the distribution channel of high horsepower outboards stated: "Because of their need for skilled service and their large size, higher horsepower motors will probably continue to be distributed through marine dealers." (BX 12Q.)

125. As of 1969, there were an estimated 11,000 retail marine

dealers in the United States. Of these, 91% were said to carry one or more lines of outboard motors in their product inventory. (CX 90Z–19.) The other 9% carried boats and accessories but no outboard motors. In 1971, Mercury sold outboard motors through approximately 2,500 to 3,000 marine dealers. (Anderegg, Tr. 768.) In 1972, OMC sold outboard motors through approximately 5,000 marine dealers, with 90% of the dealers handling only OMC's Johnson or Evinrude brand outboards. (Strang, Tr. 336, 532.)

126. Marine dealers feel they need a full line of outboard motors which includes both low and high horsepower models in order to offer the widest possible range of choice to potential customers. (Strang, Tr. 428; Anderegg, Tr. 795.) Although this full line can be obtained by carrying two brands (Strang, Tr. 505–06), it is difficult to deal in more than one brand. (Eguchi, Tr. 696.)

127. Marine dealer contracts for outboard motors are generally renewable on an annual basis. (Strang, Tr. 429; Anderegg, Tr. 779.) There is a continual dealer turnover, and OMC, Mercury and Chrysler compete vigorously for new dealers. (Strang, Tr. 432–33; Anderegg, Tr. 798.) [32]

## VI. Brunswick and the Joint Venture

### A. Brunswick's Objectives

128. Mercury's share of the outboard motor market reached a plateau between 1965 and 1970 after which only minor fluctuations in market share occurred. (Finding 76; Anderegg, Tr. 784.) In 1970, Mercury began planning and discussion of a second line of outboard motors which it hoped would be the means whereby it could increase its market share. (Anderegg, Tr. 769–70; CX 13A.) Sometime in 1970 or early 1971 the decision was made to proceed with this second line of outboard motors. (Anderegg, Tr. 188.)

129. The basic reason that Mercury decided on a second brand was that Mercury hoped that production of a second brand would provide an opportunity to broaden its dealer base by increasing the number of marine dealers selling Mercury products and thereby increase its earnings. (Anderegg, Tr. 770.) With a second line, Mercury could supply dealers located next door to existing Mercury dealers, and thereby increase the number of dealers it sells to. (Anderegg, Tr. 770.) As of 1972, many voids existed in the marine dealership network and a new line could help to fill such voids. (Anderegg, Tr. 245; CX 8E.)

130. When formulating plans for a second line, Mercury also felt this line might be used as a vehicle by which Mercury could enter some markets in which it was not then selling, such as private labeling for

mass merchandisers or discount stores. (Anderegg, Tr. 794; CX 7C, 8E, 13A, 17.) Mr. Anderegg and Mr. Reichert, the President and Chairman of Mariner, respectively, believed the domestic United States market in 1972 could support a new major brand of outboard motors which initially could be sold through camper retailers, sporting goods stores, fishing and tackle outlets, camping outlets and fishing outlets. (Anderegg, Tr. 239; CX 7D, 8D; Brunswick Admissions, No. 6, p. 6.)[9] [33]

131. In addition, Mr. Reichert, who is also President of the Mercury Marine Division of Brunswick, summarized the "compelling reasons why new entry . . . should be successful" (CX 8A):

> From both a "defensive" and "offensive" viewpoint, it is obvious that we (Mercury) need new, simple, low cost, low horsepower offerings. So, too, do all of the other U.S. marine manufacturers. Everyone is vulnerable and using the approach of market segmentation any new entry will start in the low horsepower area. It is not unlike the automotive industry and the price which they paid to foreign firms for abandoning the low price, compact market. We can expect a similar foreign challenge—with or without us. Add to this the global opportunities for low horsepower engines resulting from less availability and higher cost for fuel, as well as different usage of the product.

132. Mercury's second line of outboard motors could be used as a means of meeting already existing competition as well as foreclosing entry by foreign outboard motor manufacturers in the low horsepower market (CX 2A):

> Our [Mercury's] marketing people can use a second line of engines competively against Johnson and Evinrude. A low-priced line strong in the low horsepower area could additionally compete with small engines being produced not only in Japan but in Italy, Yugoslavia and Sweden as well. Traditionally, newcomers start with small engines and move up in horsepower and it benefits us to make it harder for these newcomers to prosper.

## B. Joint Venture as Alternative to Additional Production Facilities

133. When the decision was made for Mercury to have a second line, production facilities were being utilized to the fullest and large amounts of capital were being put in to expand the existing capability of Mercury, so it was not practical to add a second line production on top of the manufacturing capability of Mercury itself. (Anderegg, Tr. 771; CX 71D; Finding 71.) [34]

134. The record contains little direct evidence going to the issue of the feasibility of Mercury building new production facilities to provide its projected second line of outboard motors. In February 1973, a Mercury "MerCruiser Plant Justification" study proposed construction

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[9] The economic outlook subsequently changed and the second line "Mariner" could not, from a cost standpoint, be sold through private labelers and mass merchandisers. (CX 108H – 108I.) See Finding 147.

of a new plant for manufacturing and distributing all its inboard marine engines to be completed by 1977 at a total project cost of approximately $25 million. (CX 71B, 71F, 71H.) Completion of this new plant would "release a portion of our vital parts making capacity for the production of 50 plus horsepower outboards . . . ." (CX 71E.) The record does not reflect if, or how much, this transfer of production capacity would alleviate Mercury's inability to provide all outboard motor needs; nor is it possible to determine if similar costs and time would be incurred in building a new outboard motor production facility.

135. Current plans to prepare Mercury plants to be in a position to provide both the Mercury and Mariner lines of outboard motors by 1979 or 1980 suggest that within five years Mercury's production capacity can be increased to handle the second line. (CX 81A, 82B – 82C, 82G.) In the event the joint venture terminates, the only source being considered to provide the Mariner line is Mercury. (Anderegg, Tr. 792; CX 82C.) Mercury manufacturing has been instructed to plan for the production of both Mercury and Mariner products should the joint venture end. (Anderegg, Tr. 792.) The 1975 objectives prepared by Mariner's President states that by the end of 1979 it is "not only desirable but absolutely essential that we be positioned to source the entire Mariner line from Mercury plants . . . ." (CX 81A.)

## C. Selection of Yamaha as Joint Venture Partner

136. The search for a source for Mercury's second line of outboard motors began in late 1971. (Anderegg, Tr. 771–72.) In describing this search, Mr. Anderegg testified:

> We went to look at companies that were in the outboard motor business and we looked primarily in Japan. We visited Japan and talked to several companies that were then building outboards.
>
> They were in the business, they had two-cycle technology. And they might be logical partners for Mercury and become the source of this product. (Tr. 771; see also CX 5A, 7A.) [35]

137. Mercury expected that its joint venture partner would put its existing outboard business into the joint venture. (CX 5A.)

138. Mercury initiated discussions with Yamaha regarding a possible joint venture in 1971. (CX 7C, 79C; Stipulation, Tr. 678.) Yamaha at this time had strong distribution capabilities for outboard motors in some parts of the world (CX 9D) and, in 1972, had more experience in outboard motor engineering and manufacturing than any other Japanese outboard motor manufacturer. (Yamaha Admissions, ¶ 48.) At the investigational hearings, Mercury's President stated that

Yamaha was the strongest joint venture partner among possible joint venture partners looked at by Mercury. (Brunswick Admissions, pp. 12–13.)

139. Mercury favored Yamaha as a joint venture partner because of its technical competence and the broad base it could provide from which to launch a second line of outboard motors. (CX 9C, 13B.) The new "Mariner" product produced by such a joint venture also "would benefit from the backing of both of our well-known names in the marine field. It would not be like a new company, unknown in the industry, trying to introduce a fourth major outboard line . . . ." (CX 9C.)

140. Yamaha and Brunswick each brought to the joint venture assistance in and guarantees for raising funds. (CX 1 O, 79D.)

141. In 1972, Mercury executives believed Mercury could also benefit technically from a joint venture with Yamaha. (Alexander, Tr. 829–30.) Mr. Reichert, Mercury's President, recognized this anticipated technological benefit during the investigational hearings when he stated:

> They [Yamaha] had technology that came from the motorcycle business. You may or may not know Yamaha motorcycle is a two-cycle engine so they had engine technology from the two-cycle from the motorcycle business which we felt was particularly applicable to the lower or smaller horsepower, if you will, from, oh, 25 horsepower down kind of thing. (Brunswick Admissions, p. 12.) [36]

142. Some technology involved in manufacturing the powerheads in motorcycles can be applied to the manufacturing of powerheads for outboard motors. (Yamaha Admissions, ¶ 49.) OMC frequently purchases motorcycles of various makes and models, disassembles and examines them in order to study their manufacturing and design techniques for anything that might be applicable to outboard motors. When Mr. Strang was at Mercury, Mercury also purchased motorcycles for the same purpose. (Strang, Tr. 373.)

143. Loop-scavenged engine design is an example of the application of motorcycle engine design to outboard motor design. Outboard motors had traditionally been cross-scavenged. When OMC wanted to produce a loop-scavenged outboard motor, it obtained a good general picture of this type of engine design from motorcycles. (Strang, Tr. 374.) In the loop-scavenged engine in its most basic form, the cylinder has essentially three parts. The fresh charge enters the cylinder in two streams which are directed and rise within the cylinder to a focal point, then reverse over the top of the cylinder and go out through the exhaust port, forming a loop, hence the name "loop-scavenged." "Since the directed ports control the entering airstream, the piston doesn't

need a deflector on top of it and can be flat or slightly crowned." (Strang, Tr. 483–84.)

144. In January 1973, after the joint venture agreement was entered and in furtherance of the exchange of technical information between Yamaha and Mercury, Mr. Alexander took two top Mercury engineers to tour the Yamaha plants. Mercury was interested in many things that Yamaha was doing with the motorcycle engine that might be applicable to future outboard motors, such as chrome plating technology, whereby chromium is plated directly on an aluminum cylinder bore which eliminates the need for a cast iron cylinder liner. This process not only saves weight but perhaps even costs less in the long run. It improves the cooling of the piston because it eliminates the surrounding layer of cast iron the piston has to cool through to get to the waterjet. (Alexander, Tr. 855.)

145. Mercury has recently examined Yamaha's piston ring motorcycle technology which maintains a seal and prevents the piston from overheating. (Alexander, Tr. 855.) Overheating has been a problem for Mercury in its high horsepower engines. Mercury is presently developmentally testing a Yamaha-styled piston ring to solve its piston heating problems in the Mercury 175 h.p. outboard motor. (Alexander, Tr. 855–56.) [37]

146. In 1971, Mercury's then President, Mr. Abernathy, believed a joint venture with Yamaha also would move Mercury rapidly from a weak position to a strong position in the Japanese marine market. (CX 2A.)

## D. Delayed Entry by Joint Venture

147. In early 1972, Mercury hoped to start producing a second line of outboards through the proposed joint venture in about one year. (CX 8E). In July 1972, Mercury planned to start marketing Mariner outboards in the United States by the start of calendar year 1974 (CX 16A - 16B), and to start private label sales by the start of calendar year 1975. (CX 16B.) During 1972 and 1973, spiraling inflation in Japan and the weakening of the dollar in relation to the yen eliminated the cost advantage of manufacturing in Japan and prevented entry of Mariner outboards into the United States market unless they were to be sold at a loss. (BX 1H.) In addition, the top of the Mariner line was a 55 h.p. outboard and Mariner thought that they could not successfully recruit a dealer organization without a larger outboard. (Anderegg, Tr. 776.)

148. In 1976, Mariner was able to get from Mercury an 85 h.p. model with the prospect of higher horsepower models to come. (Anderegg, Tr. 776.) Mariner had franchised 51 marine dealers, in an 11-state area in the north central part of the United States, and finally

introduced the Mariner line in September 1976. (Anderegg, Tr. 774.) Mariner planned for a network of 250 to 300 dealers by the end of 1977. (BX 25Z–70.) Mariner's line includes outboards of 2, 3.5, 5, 8, 15, 20, 28, 60, and 85 h.p. (BX 25Z–30.)

149. Mariner decided to come into the United States market as the fifth major brand, alongside Johnson, Evinrude, Mercury and Chrysler. (Anderegg, Tr. 777.) For this reason, Mariner did not want its line in the marine dealer's shop as a second line to another brand. (CX 108T.) The Mariner line of outboards was inteded to compete to some extent with the Mercury line, although the breadth of the line would not be as great. (CX 8B.) Mariner hoped to form a network of exclusive marine dealers in the United States "by switching competitive dealers (except Mercury) and developing new marine dealers." (CX 108S.) None of the present 51 Mariner dealers switched from another manufacturer. (Anderegg, Tr. 813.) [38]

150. Mariner outboards have a retail price 5% to 8% lower than comparative outboards sold by OMC, Mercury and Chrysler. (BX 25Z–78; BX 25B.)

## VII. Yamaha's Interest in United States Outboard Motor Market

151. In 1964, a director of Yamaha visited the United States to view the market situation for outboard motors. (Yamaha Admissions, ¶ 75.) Prior to the joint venture, Yamaha twice exported outboard motors for sale in the United States. It first attempted to sell its outboard motors through YIC in 1968. In 1971 and 1972, Yamaha sold five hundred 1.5 h.p. outboard motors to Sears for private label sale in the United States. (Eguchi, Tr. 693.)

### A. Yamaha's 1968 Entry

152. In 1968, YIC prepared for Yamaha an outboard engine market analysis for the United States. (CX 67A – 67C.) The report studied geographical areas in the United States in which Yamaha might be able to gain market share. (CX 67B.)

153. In a news release dated March 5, 1968, YIC announced the introduction of Yamaha outboard motors for sale in the United States through YIC. (CX 61.) Yamaha planned to market their outboard motors through marine outlets and, to some extent, through Yamaha motorcycle dealers. (CX 61.)

154. In 1968, YIC imported from Yamaha 1700 low horsepower engines (3.5 h.p., 5 h.p. and 7.5 h.p.) and attempted to sell them in this country. (CX 68.) About 900 of these motors were delivered to dealers

and 800 returned to Yamaha unsold. As of January 1969, retail sales to customers amounted to about 20% to 30% of the dealers' stock. "Most of them are still on the dealer's floor, especially the motorcycle dealers are carrying most of their units and they are requesting Yamaha to buy back those units." (BX 5A.)

155. Among the reasons that this 1968 attempt failed were that the United States market preferred water-cooled and two-cylinder engines, and Yamaha motors were air-cooled and single engine. (Eguchi, Tr. 695; see CX 68 for other deficiencies.) **[39]**

B. Yamaha Sales to Sears

156. In 1971–1972, Yamaha sold about five hundred 1.5 h.p. outboard motors to Sears under the "Sears" label for marketing in the United States. (Eguchi, Tr. 693; BX 24 [Bradley], p.8.) Sears purchased only the 1.5 h.p. motor because the other outboards offered by Yamaha were too expensive. (BX 24 [Bradley], pp. 30–31.)

157. Sears did not purchase from Yamaha after 1972 because the Yamaha outboards were not selling well enough. (BX 24 [Bradley], p. 36.) The reason for the failure to sell was that the outboards were too expensive (BX 24 [Bradley], p. 37) and were better than they needed to be for the Sears market. (BX 24 [Bradley], pp. 17–18.)

158. Sears then got a 1.2 h.p. outboard motor from Tanaka. (BX 24 [Bradley], p. 37.) It is a slightly lighter, less expensive outboard than the Yamaha, but the quality is fairly close. (BX 24 [Bradley], p. 46.)

C. Yamaha's Plans To Enter the United States Markets

159. In June 1969, Yamaha developed a plan for a 25 h.p. outboard motor because of a request by Sears, Roebuck and Co. and because of the need for a motor big enough for water skiing. It was to go into production in May 1971. (CX 24D.)

160. In 1970, Yamaha planned for the development of a 40 h.p. outboard motor. (CX 25, 26.) The plan stated, "in the export sector, this engine is a part of the plan to set up a distribution chain featuring a line of merchandise covering 1.5 to 40 horsepower." (CX 26D.) Yamaha compared its proposed 40 h.p. model with the similar OMC, Chrysler and Mercury models. (CX 26G.)

161. A Yamaha development plan in November 1971 for a 6 h.p. outboard motor stated that: ". . . this is the model which can be exported to the United States as the major model; it can also be used to expand the European market, emphasizing Yamaha characteristics in performance and in quality." (CX 20D.) This horsepower model was scheduled to go into production in March 1973. (CX 20D.) "As an export

item into the United States, this is a new model." (CX 20D.) Features to be included in this 6 h.p. model included a water-cooled, two-cylinder engine, separate gas tank, water pollution control, noise and vibration counter measures and CDI. (CX 20D–20E.) Yamaha [40] planned to "hasten to develop this as a model which can advance into the American market. . . ." (CX 20G.) The Yamaha plan further stated, ". . .this model is to be designed from scrap both in the basic specification and in graphic design, and is to become a model which can squarely face the competitive models by the three majors of outboards OMC, Mercury, Chrys.). Additionally, we must incorporate characteristically Yamaha traits of performance and quality." (CX 20G.)

162. In November 1971, Yamaha prepared a development plan for a 10 h.p. outboard motor to be exported for sale to the United States and Europe. (CX 22A – 22M.) The Yamaha 10 h.p. outboard motor was scheduled to go into production in January 1973. (CX 22D.) That plan stated, "as a Yamaha merchandise mainstay in the United States, both in performance and quality construction, this engine should be suitable to the United States . . . [i]n terms of the U.S. market, this is a new edition." (CX 22D.) Features of the 10 h.p. outboard motor include a water-cooled, two-cylinder engine, separate fuel tanks, water pollution measures, and CDI. (CX 22D – 22E.) Yamaha showed great interest in the United States market. "Development of a 9.5 h.p. outboard is a must when we think in terms of expansion into the U.S. market. This will become a major drawing card." (CX 22G.) "In order to plan for Yamaha outboard market expansion and increase in sales, we have to plan for expansion into the U.S. market which is the place for outboards. In the U.S., the most popular outboard models are in the 9.5 h.p. class, occupying about 22% of the total demand." (CX 22F.) "To advance into the market built by the world's three largest makers, namely OMC, Mercury and Chrysler, and to squarely compete with their 9.5 h.p. class products, our product will have to have advance merchandising characteristics (such as performance, quality and dependability). . . ." (CX 22G.) The plan recognized, however, that this competition would cause severe problems in terms of cost: "[A]t the same time we are placed in an ever increasingly severe situation in terms of cost-competitiveness as well." (CX 22G.)

163. In July 1971, Yamaha completed a development plan for a 45 h.p. outboard motor. (CX 27, 28.) The plan recommended intended production of the 45 h.p. model in October 1972 for export to Europe and contemplated future export to the U.S. (CX 28B.) The report stated, "it seems that there is an urgent need for development of a high horsepower model of 40–45 h.p. category as a major drawing card among the Yamaha outboards, after the completion of the 25 h.p. P 450

project . . . also, as a drawing card in our advance into the export (overseas) trade." (CX 28D.) [41]

In the United States, the 1970 outboard motor sales statistics broken down according to horsepower rates indicates that over 30% of the total sales was in the 45 h.p. or higher category. So, the 45 h.p. machine occupies considerable share. (CX 28D, 28G.)

## VIII. Yamaha's Capacity To Enter the United States Markets

164. In 1968, Yamaha offered four outboard motor models which were air-cooled, single-cylinder engines. (Eguchi, Tr. 667, 695.) After 1968, Yamaha developed two-cylinder, water-cooled outboard motors. (Eguchi, Tr. 702.) By 1971, Yamaha had developed six models up to 15 h.p., which included two-cylinder, water-cooled models; by 1972, Yamaha had developed eight models up to 25 h.p. (Yamaha Amended Ans., ¶ 2; CX 3.) By 1972, Yamaha had both water and air-cooled outboard motors which were manufactured by Sanshin. (Eguchi, Tr. 669–70.) In 1972, Sanshin manufactured all component parts of Yamaha brand outboard motors. (Eguchi, Tr. 672.)

165. Charles G. Strang, President of OMC, testified concerning the 25 h.p. outboard motor developed by Yamaha in 1971 (Tr. 346–50):

Q. You testified that you knew that Yamaha was a strong competitor in Europe. When did you become aware that Yamaha was a strong competitor in Europe, Mr. Strang?

A. I became very vigorously aware of it in the fall of 1971.

Q. And what happened then?

A. We have sales meetings in Europe every fall, which I attend, and we attended the sales meetings in October.

* * * * * * *

THE WITNESS: And it was brought to our attention by our distributors in Europe that Yamaha was making inroads in Europe.

* * * * * * *

[42] Q. Now, do you recall what Yamaha's marketing practices in Europe were that were mentioned at this meeting you attended in October or the late fall of 1971?

* * * * * * *

A. These were sales meetings attended by our European distributors and one subject brought up was the activity of Yamaha in particular in Europe, and our distributors were reporting this to those of us from OMC headquarters.

And they were talking specifically of Yamaha's practices of varying the price to get the dealer, and being willing to go to what they termed any length to be able to establish a dual dealership with an OMC franchised dealer.

* * * * * * *

Q. Did you do anything in response to these field reports?

A. Yes. The reports were specifically aimed or vociferous, I should say, about a 25-horsepower engine that Yamaha had, and we decided to get ahold of one of those engines and find out about it, and through our Evinrude and Johnson Distributor in Japan, we were able to obtain one.

Q. This was a 25-horsepower Yamaha outboard motor?

A. Yes.

Q. Did you test it?

A. Yes.

Q. Where?

A. In our engineering facilities at Waukegan.

Q. Do you recall when?

A. It was sometime in the winter of '71, '72. [43]

Q. Did you ever see this test report?

A. Yes.

Q. Did you ever see the engine torn down and disassembled?

A. Yes, I did.

Q. What were your conclusions from the test report and your personal observations?

A. An excellent engine, styled, shall we say, very closely after the Outboard Marine product and a very good performer in both speed and fuel economy.

Q. In your opinion, was that suitable for marketing in the US, then?

A. Yes.

Q. How did it compare with the Johnson, Evinrude and Mercury outboards of comparable horsepower, then?

A. Unfortunately, it out-performed both of them.

166. Mr. Strang went to the Tokyo Boat Show in the fall of 1972 and was surprised to see the emphasis on larger and better outboard motors. In a summary of his trip he reported (CX 107B - 107C):

> The thing that was new here at this show, was the entry of many of the top motorcycle makers and other well-known firms into the outboard business and in larger sizes.
>
> For instance, not too long ago, last fall, in fact, Yamaha, a big motorcycle maker, who is also the world's largest maker of pianos of all things, came forth with a new 25 horsepower outboard. As some of you know, we got a sample of that, and ran it, and found it to be a very fine engine capable of out-performing not only our own 25, but Mercury's, and being a topnotch, ultra-modern outboard - no cheap junky. Well, we, of course, have been concerned about that Yamaha 25, so you can imagine my feeling when I got to the show and found five other new 25 horsepower outboards on exhibit from such manufacturers as Kawasaki, the big motorcycle maker, Tohatsu, Suzuki, another of the big motorcycle makers, Yamato, and our friends at Yanmar showed a new 25 horsepower version of their rotary Wankel outboard. [44]
>
> As I say, these are not second-rate economy machines, but they are top-notch, ultra-modern machines, and in those areas where we competed head-on, we find that they can come in with prices approximately 20% below ours, which gives a little idea of the way we have to go.

167. The 1972 OMC test report of the Yamaha 25 h.p. outboard motor (CX 89) shows that the Yamaha 25 h.p. model was considerably superior in horsepower over the entire operating range from 3,000 to

6,000 RPM to both the Mercury and OMC tested engines. (Strang, Tr. 354.) The test report also showed that with a light load, namely one man, the Yamaha 25 h.p. engine pushed a boat at roughly a mile and a half faster than an OMC engine. (Strang, Tr. 356.) The Yamaha engine also got much better gas mileage than the OMC engine, getting almost twice as many miles per gallon at 15 m.p.h. (CX 89D.)

168. Mercury tested the Yamaha 25 h.p. outboard motor, and in a report dated May 25, 1973, the Mercury engineer felt that the motor moved test boats as well as the competitive Mercury motor; that it resisted salt water corrosion well; that spark plug life was very good for a standard ignition system (it lacked a CDI); and that the manual rewind starter was simpler and better than the Mercury starter. However, the engineer reported, among other slighter defects, an aggravating problem with the Yamaha 25 was that it broke propeller shear pins, as many as three a day and that: "A Mercury owner would really appreciate his rubber clutch propeller if he would test drive a Yamaha for a few hours." (CX 42C - 42H.)

169. Pursuant to the engineering agreement signed by Yamaha and Brunswick in November 1972, Yamaha agreed to send samples of outboard motors to Mercury for testing. (BX 21.) The general evaluation (excluding idle) by Mercury engineers of eight Yamaha engines (2, 3.5, 5, 8, 12, 15, 20 and 25 h.p.) in September 1973, rated three "good," three "fair," and two "poor." (CX 53.) This report was very critical of the idle of the motors. One Mercury engineer reported his first impression (CX 48):

> They perform quite well and would be as good as any other low feature engine on the market. They are easy to operate, responsive and surprisingly quiet. There is one great problem, however, with the 12, 15 and to some extent the 20 h.p. engines. The problem is extremely rough idle. While the engine does not seem to be missing, it shakes so badly it seems as though the engine and boat are both going to come unglued. . . . I don't feel we can sell the 12 or 15 h.p. engines until that [45] condition is cured. We could live with the 20 h.p. but it could use some work also.

170. Yamaha had a 55 h.p. outboard motor at the 1972 Tokyo Boat Show. It was a prototype and was not made available for inspection as were other Yamaha outboards. It lacked through-the-hub (jet prop) exhaust. (Strang, Tr. 446–47.) At the 1973 Tokyo Boat Show, the Yamaha 55 h.p. still was not available for inspection. It now had through-the-hub exhaust. (Strang, Tr. 448.) Yamaha sold 109 of these outboard motors in Japan in 1973 and 585 in 1974. (CX 98A.) OMC tested this motor in 1974 and Mr. Strang testified that it was a "very nice engine, very good performer. . . ." (Strang, Tr. 449.) However, as soon as Mariner saw the costs of the motor they urged a cost reduction study since it "could not be sold competitively at a satisfactory profit."

In 1974, Sanshin and Mariner conducted a cost study resulting in changes for reduction of costs on production of this motor, including the addition of an American-made starter motor and Mercury capacitor discharge ignition. (BX 17A - 17B.)

171. Yamaha needed a 55 h.p. outboard motor to successfully come into the United States market in 1972. (Eguchi, Tr. 699.) Sanshin built the first models for sale by Mariner in mid-1974, but by that time costs has spiraled in Japan and Mariner thought they could not successfully recruit a marine dealer organization with a line that went up only to 55 h.p. Mariner got a 85 h.p. model from Mercury in 1976 and entered the United States market. (Anderegg, Tr. 776.)

172. The two-cycle technology expertise of Yamaha in snowmobiles and motorcycles would be an advantage to Yamaha in marketing outboard motors. (CX 76C; Strang, Tr. 375–76.) A journeyman mechanic who is able to repair the powerhead unit of the Yamaha-manufactured motorcycle is also able to repair the powerhead unit of the Yamaha-manufactured snowmobile. (Stipulation No. 2.) Dealers skilled in repairing two-cycle motorcycles could repair two-cycle outboards. (Strang, Tr. 372, 378; see Finding 181.)

173. In 1972, Yamaha was selling outboard motors throughout the world, with the exception of the United States. (CX 15B - 15C.) It sold in Europe, Canada, South East Asia, Africa, the Middle East, Oceania (Australia and New Zealand) and in Central and South America. (CX 15B - 15D; Eguchi, Tr. 664.) Europe, Canada, Australia and the Far East (principally Japan) constituted the most important foreign markets. (BX 12T.) [46]

174. By 1972, Yamaha had about 70% of the Japanese outboard motor market. (CX 5B, 59A.)

175. During 1972, the horsepower range of outboard motors sold by Yamaha in Japan ranged from 2 through 25 h.p. (CX 111B.) In 1971, Yamaha exported over 25,000 outboard motors ranging in horsepower from 2 through 25 h.p. (CX 15A; Eguchi, Tr. 661.)

176. Yamaha-manufactured motorcycles were first marketed in the United States in 1959. By 1974, over 30 models of "Yamaha" motorcycles were being sold by YIC in the United States. (Stipulation No. 2, #25, #27.) YIC developed a network of retail dealers in the United States for "Yamaha" motorcycles. (Yamaha Supplemental Admissions, p. 3, 6/18/76.) In 1974, approximately 20% of all motorcycles sold in the United States were "Yamaha" motorcycles distributed by YIC. (Stipulation No. 2, #28.)

177. Yamaha also manufactures snowmobiles, which were first sold by YIC in the United States in 1968. (Stipulation No. 2, #30.) By 1974,

eleven or twelve models of Yamaha brand snowmobiles were sold by YIC. (Stipulation No. 2, #32.)

178. "Yamaha" brand name recognition is important to Yamaha and YIC for the successful marketing of "Yamaha" products in the United States. (Stipulation No. 2, #23.) From 1964 to date, YIC has been able to gain name recognition in the United States for "Yamaha" brand products through consumer and trade advertising. (Stipulation No. 2, #24.)

179. In 1972, some "Yamaha" brand franchised dealers in the United States sold both "Yamaha" motorcycles and snowmobiles. (Stipulation No. 2, #33.)

180. In 1972, OMC sold both snowmobiles and outboard motors. Snowmobile and outboard motor dealerships are compatible in that both are two-cycle engines and use numerous common parts. The outboard motor dealer is in a good position to service both snowmobiles and outboard motors. A line of snowmobiles give a marine dealer a year-round business–he can sell snowmobiles in the winter and outboard motors in the summer. (Strang, Tr. 375.) [47]

181. Motorcycle dealers are skilled in servicing two-cycle engines which are common to outboard motors and motorcycles. (Strang, Tr. 372.) Motorcycle dealers could provide a way for Yamaha to enter the United States market initially. (Strang, Tr. 372–73; CX 79J, 90Z–60, 108T.) Motorcycle dealers are not prime distributors of outboard motors, however, unless they are marine dealers, carrying boats and accessories as well as a full line of accessories. (Eguchi, Tr. 696–97; Strang, Tr. 373.) The main reason for this is that the sales seasons for motorcycles and outboard motors coincide (CX 90Z–61), whereas the season for snowmobiles is complementary to those products. (Strang, Tr. 375; Anderegg, Tr. 796.)

## IX. Yamaha and the Joint Venture

### A. Yamaha's Position on the Edge of the Market

182. Prior to the joint venture, Yamaha had a relatively simple, economical low horsepower line, suitable for salt water and used primarily for commercial fishing and transportation. In 1972, Yamaha's largest outboard motor was 25 h.p. (BX 1K; Eguchi, Tr. 669.) Many of the parts of the Yamaha outboards were stainless steel to prevent corrosion, since they were constructed for salt water use. (CX 42G.) Low horsepower outboards in the United States, by contrast, are used mostly on lakes, rivers and streams and rarely in salt water. (BX 3A, 12Q.) This is one of the reasons that the Yamaha low horsepower

motors were too costly to compete in the United States market. (BX 24 [Bradley], pp. 36–37.)

183. The Yamaha brand of outboard motors sold in Japan and Europe were, in 1972, low horsepower motors, lacking the power and features which were common on outboard motors sold for pleasure boating in the United States. (Alexander, Tr. 834–35; BX 1K.)

184. Yamaha went into the European outboard market in 1968. (Eguchi, Tr. 660.) Because Europeans have less disposable income and smaller cars (for boat towing), and due to the cost of fuel, the European outboard motor market favors a lower horsepower engine. (Strang, Tr. 452.) Outboards of less than 25 h.p. comprise 75% of that market. (CX 15B). By 1972, Yamaha had 12% of the low horsepower market in Europe, and was second to OMC. (CX 15B.) [48]

185. Yamaha's outboard motors suit the market in Japan, Southeast Asia, Africa, Oceania (New Zealand and Australia), and Central and South America. (CX 15B - 15D.) These markets call for simple, less costly motors with few features which are used primarily for commercial fishing and transportation. (BX 20E.)

186. From its attempt to penetrate the United States outboard motor market in 1968, Yamaha learned the value of a full line and marine dealers in this market. (BX 8F, 8J.) Mr. Eguchi, Managing Director of Yamaha, testified on this subject (Tr. 695–96):

> Q. Can you tell me, sir, why it is that Yamaha Motor—well, Yamaha, as you have testified, selects marine dealers through which to sell its products rather than in some other way?
>
> A. Outboard motor market is pretty well established market already, and those products are handled by marine dealers, and unless you go to marine dealers you will have no access, practically, to the marine product customers.
>
> Q. Now, sir, you've testified that Yamaha had by 1972 increased its range of models to include a 25 horsepower model?
>
> A. Yes.
>
> Q. And you have testified that—and Yamaha has increased its horsepower models since then, has it not?
>
> A. We increased up to 55 since then.
>
> Q. Yes, sir.
>
> Now, based upon your experience, Mr. Eguchi, why is it that a company does that? Namely, expands its line of outboard motors. What's the business reason for that effort?
>
> A. When you try to be one of the top class outboard manufacturers, you have to have a full range of the models, so naturally we want to develop more or bigger horsepower motors in our line. [49]
>
> Q. What effect, if any, sir, in obtaining marine dealers for your product does having a broad line have?
>
> A. Every top-class outboard motor manufacturer has its own full line, and for the dealers, marine dealers, unless they have full line of the products they cannot operate successfully its marine business. And if you only have a certain limited models, the dealer has to go to somebody else to get the rest of the models in the lineup, and that is pretty difficult to divide the sources of the products by category.

187. Most consumers are conditioned to purchase outboard motors from marine dealers. (CX 90Z–61, 90Z–62.) They often buy outboard motors at the same time and place that they buy other hunting, boating and/or fishing gear. (CX 90Z–61.)

188. Motorcycle dealers, while able to repair two-cycle engines like most outboards, do not offer long-term promise for entry to the United States outboard markets. (CX 90Z–60 - 90Z–61.) The seasons for outboards and motorcycles coincide, and they both would compete for a dealer's floor space, inventory investment and merchandising. (CX 90Z–6, 90Z–46, 90Z–61.) Yamaha based its 1968 attempted United States market penetration on sales through 70 motorcycle dealers and 30 marine dealers. This attempt failed "especially" through the motorcycle dealers. (BX 5A.)

## B. Benefits to Yamaha from Joint Venture

189. Yamaha believed that the joint venture was advantageous to it. Yamaha would receive the designing and manufacturing techniques for high performance outboard motors, especially large engines over 50 h.p. The increase in production would lead to production rationalization and total cost reduction. And, in addition, because of the joint venture, Yamaha would finally be in the United States outboard market, though not with the "Yamaha" brand. (BX 8B.) **[50]**

190. The disadvantages considered by Yamaha in determining whether to attempt entry on its own included the lack of a full line, high costs, the need for a network of marine dealers, and the present inability to meet the particular needs of the market for power and performance. (BX 8F.)

191. Yamaha wanted to avoid the price and cost competition existing in the low horsepower outboard market in the United States. (BX 3D, 3E.) The high horsepower outboards, with higher prices and more accessories, generate higher profits. (BX 12CC.) Yamaha wanted to enter the high horsepower outboard market in the United States as a top class manufacturer. (Eguchi, Tr. 696.)

192. Yamaha regarded the joint venture as an alternative to entering the United States market under the Yamaha brand. Yamaha had determined that it would take much time to develop high horsepower outboard motors and the full line necessary to enter the market. Yamaha was not considering entering on its own in the near future and had no concrete plan to do so. (BX 8D - 8E; Alexander, Tr. 856–58.)

193. After the unsuccessful attempts to enter the United States market in 1968 and 1971, Yamaha engineers continued their interest in developing outboard motors which would sell in the United States

market. (BX 5B; CX 19 - 28.) The engineers had a plan to develop a line of pleasure-type outboards from 3 h.p. to 45 h.p. suitable for sale in the United States and Europe. (CX 5B.) In 1971, Yamaha engineers planned to redesign their 10 h.p. outboard motor to include features such as CDI and jet prop exhaust. (CX 22D - 22E.) In 1975, Mariner engineers reported the history of this project:

> Yamaha designed and developed a 10 h.p. engine during the past several years but dropped it (after tooling partially completed) because of high manufacturing costs. This spring MIC [Mariner] Engineering made a study of the engine and set a tentative reduction of $50.00 in manufacturing costs. At MIC instigations, the program was started again with a thorough redesign of the engine in mind to produce both 10 h.p. and 15 h.p. models and to reduce cost. At present, Japanese engineers are in our office doing the redesign work under MIC guidance. . . . (BX 17B.) [51]

194. Mr. Charles F. Alexander, Jr., Mercury's Vice President in Charge of Engineering, testified about Yamaha's lack of readiness to enter the United States outboard motor market in 1972 and the benefits it obtained from the joint venture (Tr. 856–58):

> Q. Mr. Alexander, with respect to the technology that Mercury transferred to Yamaha that you testified to involving the CDI and the jet prop and the rest of it, could you put a dollar value on what that information or technology is worth?
>
> A. No, I don't think I could. But I know that it saved Yamaha a lot of time. I know that it brings them very rapidly up to the state of the art, and has to be worth an awful lot of money to them as a possible future manufacturer in this business.
>
> I don't think we would sell it to anyone, because it's worth too much.
>
> Q. You are saying it is worth more than a million dollars?
>
> A. Oh, of course.
>
> Q. Would it be worth $25 million?
>
> A. I can't put a value on it, but when you are in a business of hundreds of millions of dollars a year, and you give away the essential technical information that enables somebody else to get up to your state of the art, it has to be worth quite a bit.
>
> Q. Speaking about the state of the art, what was Yamaha's posture with respect to the state of the art in 1972 with respect to outboard motors?
>
> A. At the time they had a low-powered line of outboards, not particularly different from several others in the world. They had basically copied as best they could OMC models in the lower end of the horsepower range.
>
> They certainly would not have been able to be a factor at that time in the U.S. market, because they did not have the product. [52]
>
> Q. Would you say that by virtue of this input of technology they have advanced their known state of the art by several years?
>
> A. I am sure that they have saved a lot of time in getting up to date and being in a position to be competitive in this market.
>
> Q. Could you give us, when you say "save time" could you measure that in either months or years or days?
>
> A. It is hard to do, because they did not have an outboard engineering organization that even understood the problems. If you said they would have had to first develop the organization and then the product line, I don't know.
>
> It would have to take them at least two or three times as long as with our help, and

we probably saved them some field disasters and some recalls, because when you try to plunge headlong into these things you sometimes make mistakes.

And then you have massive recalls which hurt the image as well as cost money.

195. Yamaha and Sanshin obtained valuable know-how from Mercury after the joint venture agreement. Mr. Alexander testified about this subject (Tr. 830–33):

Q. When was the first point in time that Mercury began exchanging technology with Yamaha after the execution of the joint venture agreement?

A. It was in January, 1973.

Q. What were the circumstances of that exchange?

A. We invited Yamaha engineering people to send representatives to Oshkosh, design engineering people, so that we could work closely with them on the design of certain new outboards that Sanshin would make that would be suitable for sale in the U.S. market, and it would upgrade the line both in horsepower and in features to be more like the currently successful U.S. outboard companies. [53]

Q. What kinds of information did you make available to these Yamaha engineers?

A. We decided that we could not simply mail them a bunch of drawings and patents, that we had to get them to come to Oshkosh so that we could teach them from Mercury drawings how to design these features into the new outboards.

So we rented space in the University of Wisconsin, Oshkosh, space for them to live, space for them to work. And we assigned people full-time to work with them.

I, personally, participated in this and they were there for several months, four, five, six months, with drawing boards that we moved into this dormitory area, which was part of the university.

We brought our drawings out and we had their designers at the board, because they had to make Japanese notations in the drawings.

They had to make the drawings so they could use them in Japan, and we knew we could not do that. We wanted to be sure that the information from our drawings was properly put on their drawings to adapt it to their engines, their powerhead part.

Our contribution was primarily below the powerhead. The Yamaha people know very well how to make an engine, although they did not know everything that was required of a two-cycle engine to be an outboard.

For example, they did not have the engines idling slowly enough and consistently enough. But basically they had good engine technology.

What we were contributing was the rest of the outboard motor, which is, perhaps, half of the package, the propeller and the gear case, the under-carriage, the rubber mounts, to make the engine push the boat properly.

So we worked with them for several months, as I said, in the design of new outboard motors which would eventually get into production in Sanshin for Mariner and also for Yamaha. [54]

Q. How many engineers came from Japan? Do you have any idea?

A. I think there were six or eight; something like that.

Q. These drawings and this know-how that you exchanged with Yamaha, is that information generally public? Is it made available to the trade or anything?

A. No, not at all.

Q. That is proprietary information?

A. Sure. It is all the know-how that goes into our outboard motors, some of which is patented, but most of which is simply trade secrets, know-how, little things you do to make things work properly.

## C. Future Unilateral Entry by Yamaha

196. The joint venture is unlikely to last beyond the ten-year term specified in the agreement. Yamaha's management has stated publicly that the reason Yamaha entered the venture was to benefit from Mercury technology and know-how, which will be gained during the ten-year period. Development of high horsepower models by Sanshin has not been practical due to high cost of development and tooling, and Mariner has obtained these models from Mercury. This is a signal to Yamaha that Mariner considers the joint venture a short-term arrangement. Once the notice of termination is given, three years prior to the ten-year term, it is likely that the joint venture will not continue past the notice date and dissolution will take place at that time. (BX 1 O - 1P.)

197. The joint venture agreement has facilitated future (post joint venture) unilateral entry by Yamaha into the United States outboard motor markets. Yamaha and Sanshin have received valuable technology and know-how from Mercury. (Alexander, Tr. 856–58.) This exchange has saved Yamaha much time in developing high horsepower outboards and a full line necessary to enter the United States markets. (BX 8E; Alexander, Tr. 856–58.) [55]

198. Except for Mariner's 85 h.p. outboard, which is made by Mercury, Mariner outboards made by Sanshin are identical to Yamaha outboards except for color and decal. (Respondents' Proposed Finding III(9)(b)(i); Complaint Counsel's Reply Brief, p. 21.) The 51 Mariner dealers franchised so far have signed a one-year franchise. (Anderegg, Tr. 779.) If the joint venture ends, they may be targets to become Yamaha dealers in the future if Yamaha enters the United States markets. (Anderegg, Tr. 798.)

199. The structure of the joint venture may end upon notice to terminate from either party in May 1979: ". . . it is likely that if such notice is given, there would be an agreement not to continue the joint venture subsequent to 1979 and an orderly dissolution would take place at that time." (CX 108 O.) Mercury manufacturing facilities have been instructed to include in its planning the production of the full requirements of both Mercury and Mariner by that time. (Anderegg, Tr. 792; CX 81A, 84A.)

## X. Yamaha as a Perceived Potential Entrant

200. In 1972, Mr. Strang, the President of OMC, visited the 1972 Tokyo Boat Show and reported that Yamaha was a potential entrant into the United States outboard motor markets. (CX 107B–107C.) (See Finding 166.)

201. Mr. Strang's notes at the 1972 Tokyo Boat Show indicated that Tohatsu was a potential entrant into the United States outboard motor markets (CX 107H):

*Tohatsu* . . . . They, too, as I said showed a new 25 horsepower engine and 23 1/2 cubic inches, which tops a line of 4 horsepower, 5, 8, 9.8, 12 and 18 horsepower engines. It follows the U.S. pattern very closely even to marketing their own outboard oil, their own remote controls and everything that the U.S. outboard companies do. And, as you can see, their display is completely modern and the equivalent of anything that Chrysler, Mercury or ourselves might have. One thing significant was pointed out to me here by Mr. Yuano of our distributors, and that was that all of the literature at this show covering the outboards was printed in English for the first time in this particular show, presumably as part of their preparations for launching a world-wide sales assault. [56]

202. Mr. Strang's notes of the 1972 Tokyo Boat Show indicate that Kawasaki was a potential entrant into the United States outboard motor markets (CX 107I, 107K):

*Kawasaki* . . . . This, too, was a shaker. . . .

* * * * * * *

Now they introduced two new models, 15 and 25 horsepower engines at roughly 16 and 25 cubic inches each, and here they are, the black engines up there. It was interesting. While most of the Japanese makers have chosen to, shall we say, duplicate the OMC engines both in design and styling, Kawasaki, instead, chose to follow the Mercury line of styling, and as you can see, they have even taken the plack [*sic*] paint, although they have highlighted it with a slash of orange on the side. The engines here - there are 2, 15-horse engines here and 2, 25-horse engines shown. These were so new that they didn't even have prices on them yet, but this is the start of their new line - they've retained their old line of 2 1/2 horsepower, 5 horsepower and 7 horsepower engines, topping it with these two new models. You can see there is trouble coming there.

203. Mr. Strang's notes of the 1972 Tokyo Boat Show indicate that Yamato was a potential entrant into the United States outboard motor markets (CX 107H - 107I):

*Yamato* . . . .

More important to us at this show was the engine just to the left of the racing engine, and that is Yamato's new 25 horsepower engine, which was indeed again a very modern, well developed, well styled and very professional looking 25 horse twin. Perhaps more importantly, behind the 25 on the far side of those boats, you can just see the power heads of their other new entry in the field. It is a 3 cylinder, 55 horsepower engine, very similar in appearance to our own 3 cylinder engine, and very similar in design. They did a good job on it, the best that I could see, and were kind enough to take the engine cover off and I could get a good look at it. I was so impressed with both of these engines that I asked our people to get one of each for us for engineering tests. These people are relatively small, but they have a lot of know-how [57] in the outboard field from their racing background. There is no question that they could be a real problem if they really get into the marketing aspects of this thing.

204. Mr. Strang's notes of the 1972 Tokyo Boat Show described Japanese competition as having "wiped out the rest of the world's motorcycle industry" and concluded (CX 107V - 107W):

> Needless to say, we don't want this to happen to OMC and we have to take steps to see that it doesn't - and it's going to be no small problem between the government intervention over there, to assist in the growth of this export market, and between the labor situation which they have there, the rates that they pay their workers and the productivity of the workers. Yamaha, for instance, pays its workers a flat monthly salary with no incentive pay and feel that what they call their nationalistic drive takes care of the incentive. That's very hard to compete against, and the government thing makes it almost impossible. So it behooves us, in our plan of work, and we should keep it in mind at the rest of this meeting and all of our future planning meetings that we have to keep all our product development ready for the Japanese invasion. The only way we are going to be able to fight it, it would appear, is by keeping ahead of them in products and by keeping ahead of them in manufacturing; hopefully, by keeping a step ahead of them in marketing techniques. I know this is not a very pleasant picture that I've painted before we get into this thing, but let's be blunt about it. We have to take steps to stay alive - and - with that grim warning - let's go on to the rest of the agenda.

205. OMC's initial reaction to the 1972 Tokyo Boat Show and its test report on the Yamaha 25 h.p. outboard motor was to improve the quality of its own 25 h.p. outboard motor. Mr. Strang, President of OMC, testified on this subject (Tr. 361–64):

> Q. What was the reaction of OMC to the test report and to your report of the Tokyo Boat Show? [58]
>
> A. The initial reaction was that we obviously needed a better engine in the 25-horsepower range to compete with the Yamaha that was then in existence. And we took steps to initiate the engineering and manufacturing of a better engine.
>
> Q. What exactly did you do to upgrade the OMC 25-horsepower?
>
> A. We started out on the premise that we would merely increase the bore a little bit and tune it a little more highly. As time wore on, we made sizeable changes to the engine and it eventually wound up as virtually a new engine of larger piston displacement.
>
> Q. After you had accomplished this upgrading of the OMC 25 horsepower, was its performance comparable to that of the Yamaha outboard you had tested?
>
> A. Yes.
>
> * * * * * * *
>
> Q. Did you improve the OMC outboard for sale in the US?
>
> A. Essentially, we tried to sell the same engines all over the world, so, yes.
>
> Q. So is the improved OMC 25 horsepower for sale in Europe the same as the one for sale in the US?
>
> A. Yes.
>
> Q. Did you plan to effect any of these improvements to the OMC outboards before you saw the test report on the Yamaha 25-horsepower—
>
> * * * * * * *
>
> A. . . .

We had no plans to upgrade the 25-horsepower engine until the Yamaha came along. [59]

206. In October 1972, after he saw the test report on the Yamaha 25 h.p. outboard, Mr. Strang, of OMC, called for a five-year projection of the effect on OMC's sales and earnings which would result from the possibility of Yamaha's entry into the United States with outboard motors. (Strang, Tr. 365.) The projection was based on the "arbitrary assumption that activity of Japanese outboard manufacturers would reduce [OMC's] world-wide sales below what we had otherwise forecast in the 50 horsepower and under category." (BX 23.)[10]

207. OMC's reaction clearly was for defense of its position in the United States as well as Europe. (Strang, Tr. 383–84):

Q. Mr. Strang, Did you have more concern about any one of the outboard motor exhibitors at the 1972 Tokyo Boat Show then others?

* * * * * * *

THE WITNESS: Yes, we were most concerned about Yamaha.

By Mr. Dolan:

Q. And what was the nature of that concern, sir?

A. We had been stung by them abroad and we were very fearful of an invasion of the US market.

Q. Is that one of the reasons why you upgraded the OMC 25-horsepower outboard?

* * * * * * *

THE WITNESS: Since our engines are basically sold all over the world, we were improving the 25-horsepower outboard for defensive purposes in the US as well as abroad. [60]

208. Mr. Strang testified about the most likely entrants into the United States outboard motor markets (Strang, Tr. 338, 340):

Q. In 1972, were there, in your opinion, likely entrants into the manufacture and sale of outboard motors in the US?

* * * * * * *

THE WITNESS: I can't really say there was any likelihood of manufacture in the US. There was certainly the likelihood of sale in the US.

Q. And who would this be, Mr. Strang?

A. Foreign producers such as Volvo, Carniti, the Japanese manufacturers such as Yamaha, Suzuki, Kawasaki and Tohatsu.

209. The President of Eska believed in 1972 that potential entrants

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[10] BX 23 was prepared on June 9, 1975, to describe the 1972 projection.

into the United States outboard motor market included Yamaha, Volvo, Suzuki and TAS. (Kascel, Tr. 615–17.)

210. In April 1975, the President of Mariner stated that (BX 1N):

> For many years there were no real competitors in the outboard field outside the United States, except Yamaha. But there are signs that this is going to change; Volvo-Penta is already mounting a vigorous effort world wide, Renault is attempting to get into the outboard business, Tohatsu and Suzuki are expanding their lines to higher horsepower and are beginning to move out of Japan and there will certainly be others who will make the effort even though they may not succeed. [61]

## CONCLUSIONS OF LAW

### I. Jurisdiction

The complaint alleges that the joint venture agreement, by eliminating Yamaha as one of the few likely entrants into the United States outboard motor market, constitutes a violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Section 7 of the Clayton Act states in part that:

> . . . *[N]o corporation engaged in commerce* shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of *another corporation engaged also in commerce*, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition . . . . (Emphasis added.)

The acquired company here, Sanshin, has never by itself engaged in commerce, within the meaning of the statute. Complaint counsel argue, however, that Sanshin is part of a corporate family with Nippon Gakki at the head, Yamaha and YIC as sister corporations, and Sanshin as the offspring of Yamaha. The existence of any such corporate "family" is irrelevant in my opinion. The issue, rather, is whether Sanshin was dominated by Yamaha before the joint venture or by Yamaha and Brunswick (through Mariner[11]) at the time of the joint venture. Since both Yamaha and Brunswick were in interstate commerce,[11a] their domination over Sanshin would put that company in commerce. This involves the more familiar doctrine of piercing the corporate veil.

Sanshin, a Japanese corporation, was established in 1960, and its principal office is in Hamamatsu City, Japan. In May 1969, Yamaha purchased control of Sanshin. As a majority shareholder, Yamaha had the power to control Sanshin by, *inter alia*, appointing all of its directors. (CX 1Y.) Yamaha also acquired all the assets of Sanshin and transferred Yamaha tooling and equipment for outboard motor production to the Sanshin plant. (Findings 25–27.) For these reasons, Yamaha dominated Sanshin before the joint venture agreement. [62]

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[11] The domination of Mariner by Brunswick was not contested.

[11a] Findings 6 and 24.

Furthermore, Sanshin was dominated by both Yamaha and Brunswick (through Mariner) at the time of the joint venture agreement. When the memorandum of understanding for the joint venture was signed on March 9, 1972, Yamaha and Brunswick agreed to create a manufacturing joint venture to be established in Japan "between Yamaha Motor Co. . . . through its subsidiary Sanshin Industries, Co., Ltd., and the Mercury Mariner Division of Brunswick Corporation." (Finding 36.)

Yamaha and Mercury agreed that an outboard engineering group was to be established at Sanshin with responsibility for the design and development of all Sanshin products. Yamaha agreed to assist Sanshin in securing personnel for that engineering group. (Finding 54.)

On November 21, 1972, Brunswick entered into the joint venture agreement with Yamaha wherein it was provided that Mercury Marine International Company, a wholly-owned subsidiary of Brunswick, would be formed to purchase 62,000 shares of newly issued stock of Sanshin for $1.4 million. With the purchase of that stock, Mercury Marine International Company and Yamaha each owned 38% of the outstanding stock of Sanshin. The remaining 24% of the Sanshin stock is held by individual Japanese stockholders. (Findings 37–38.) Since 1972, Sanshin has manufactured outboard motors only for Yamaha or Mariner. (Finding 45.)

The joint venture agreement gives Yamaha the right to appoint six of Sanshin's eleven directors and the right to select the day-to-day operating officers of Sanshin, including the representative director (president) of the company. Mariner is given the right to appoint the other five directors. (Finding 40.) Mariner communicates on a daily basis with Sanshin, by telex, telephone and mail, regarding the joint venture and marketing of "Mariner" brand outboard motors. (Finding 13.)

Sanshin became a new enterprise when the joint venture was formed. Five of its eleven directors were appointed by Mercury. It then obtained technical advice from Mercury. (Finding 197.) Yamaha, through Sanshin, obtained access to the United States market through Mariner's experienced sales force. Upon the signing of the joint venture agreement, Sanshin became the joint venture company, formed by companies engaged in commerce for the purpose of manufacturing outboard motors in Japan for sale, among other places, in the United States by a sales company to be engaged in commerce. [63]

A similar issue was before the Court in *United States* v. *Penn-Olin*

*Chemical Co.*, 378 U.S. 158 (1964). There, the joint venture company was not engaged in commerce at the time it was formed, but was so engaged at the time of the suit. The Court held that the jurisdictional requirement of Section 7 had been met, *id.* at p. 168:

> The test of the section is the effect of the acquisition. Certainly the formation of a joint venture and purchase by the organizers of its stock would substantially lessen competition—indeed foreclose it—as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise. Realistically, the parents would not compete with their progeny. Moreover, in this case the progeny was organized to further the business of its parents, already in commerce, and the fact that it was organized specifically to engage in commerce should bring it within the coverage of § 7. In addition, long prior to trial Penn-Olin was actually engaged in commerce. To hold that it was not "would be illogical and disrespectful of the plain congressional purpose in amending § 7 . . . [for] it would create a large loophole in a statute designed to close a loophole." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 343 (1963). In any event, Penn-Olin was engaged in commerce at the time of suit and the economic effects of an acquisition are to be measured at that point rather than at the time of acquisition. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957). The technicality could, therefore, be averted by merely refiling an amended complaint at the time of trial. This would be a useless requirement.

Here, Sanshin was (through domination by Yamaha) engaged in commerce before the joint venture. Furthermore, as the joint venture company, Sanshin was formed by companies engaged in commerce and which appoint *all* of the directors and *all* of the day-to-day operating officers of the company. Sanshin is dominated by Yamaha and Brunswick (and Mariner), and since they are engaged in commerce, so is Sanshin. [64]

Since the joint venture company Sanshin was formed by companies engaged in commerce, for the purpose of manufacturing outboard motors and selling them through a company engaged in commerce, Sanshin was also engaged in commerce. "To hold that it was not 'would be illogical and disrespectful of the plain congressional purpose in amending § 7 . . . [for] it would create a large loophole in a statute designed to close a loophole.' " *United States* v. *Penn-Olin Chemical Co., supra.*

Even if Sanshin has not engaged in commerce, and Section 7 did not apply here, the complaint also alleges that the joint venture violates Section 5 of the Federal Trade Commission Act. Section 5 was amended on January 4, 1975, to expand the Commission's jurisdiction to cover violations "affecting" commerce, Section 201(a) of Title II of the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, Pub. L. 93–637, 15 U.S.C. 45(b). The complaint was amended on May 7, 1976, to allege that the joint venture affected commerce. Although the joint venture took place in 1972, before the amendment, the effects of a joint venture are weighed at the time of the suit. *United States* v. *Penn-Olin Chemical Co., supra; United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957). So the issue is whether the Commission has jurisdiction now, not in 1972. Since the joint venture is affecting commerce in the United States at the time of the suit, the Commission has jurisdiction under Section 5.[12]

## II. Line of Commerce

The joint venture in this proceeding would violate Section 7 of the Clayton Act if "*in any line of commerce* in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." (Emphasis added.) The relevant section of the country has been stipulated to be the entire United States. The issues at contest are the lines of commerce and the effects of the transaction upon competition. **[65]**

In a Section 7 suit, it is necessary first to define lines of commerce for the purpose of evaluating the anti-competitive effect of the proposed acquisition. Line of commerce has been defined to mean the relevant product market. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 324 (1962). In determining the outermost boundaries of a product market, analysis should be guided by examination of the reasonable interchangeability of use, or the cross-elasticity of demand, between the product and substitutes for it. *Id.* at p. 325. Lack of interchangeability in use does not automatically bar recognition of a broader line of commerce where, for technical or other reasons, there is commonality in production and distribution resulting in a distinct and recognized "industry" of firms who sell a broad line of products. *Liggett & Myers, Inc.*, Trade Reg. Rep. (1973–76 Transfer Binder) ¶ 21,151 at pp. 21,055–56 (FTC April 29, 1976 [87 F.T.C. 1074 at 1152]) (appeal pending [XIS+D749]); *L. G. Balfour Co.* v. *FTC*, 442 F.2d 1, 10–12 (7th Cir. 1971). In *British Oxygen Co., Ltd.*, Trade Reg. Rep. (1973–76 Transfer Binder) ¶ 21,063 at p. 20,908 (FTC December 22, 1975 [86 F.T.C. 1241 at 1345]) (appeal pending [XIS+D587]), the Commission held industrial gases to be a relevant market, despite their lack of interchangeability of use, since buyers prefer to get delivery from one supplier,[13] and technical skills used in production are very similar for many gases.

In the outboard motor industry, except for some overlap near the dividing line, there is very little interchangeability of use between high and low horsepower engines. (Findings 89–90, 102–03.) And there is little commonality of production and distribution between them. Advanced technology and know-how and different production facilities are required in the manufacture of high horsepower outboards. (Findings 92, 105–19.) Low horsepower outboards are sold through mass merchandisers. (Finding 97.) By contrast, since selling high horsepower outboards to consumers is a more complex business and requires more skill and service, they are sold almost exclusively through marine dealers. (Findings 124–27.) Because of these variations in the industry, **[66]** all outboard motors sold in this country do not constitute a relevant product market for the purpose of determining the effect of an acquisition alleged to violate Section 7 of the Clayton Act.[14] Furthermore, an analysis of the differences in the manufacturing and merchandising of low and high horsepower outboard motors, using the criteria specified in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962), will show that they constitute two separate relevant product markets.

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[12] In the order of May 7, 1976, I also stated that the Magnuson-Moss amendment has retroactive application, because of the maxim "Expressio unius est exclusio alterius." Since Congress specifically excluded retrospective treatment to two parts of the statute, it is implied that the rest of the statute, including the jurisdictional amendment, should be read to apply retrospectively. I found it unnecessary to hold that the amendment applies retroactively since the present effect of the joint venture gives the Commission jurisdiction.

[13] Another example of looking at the buyers' need in determining market boundaries, is setting "commercial banking" apart as a line of commerce because of the "cluster of products and services" offered in response to "settled consumer preferences." *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 356–57 (1963); *United States* v.

*(Continued)*

There are distinct differences between the two relevant markets in this case: low horsepower gasoline outboard motors and high horsepower gasoline outboard motors.[15] The products in these markets differ substantially in price. (Findings 93–94, 120.) Manufacturers of low horsepower outboards establish prices for their products without referring to the prices of high horsepower outboards. (Finding 94.) Manufacturers of high horsepower outboard motors establish prices for their products without referring to prices of low horsepower outboards. (Finding 120.) The products are sold to different customers for different uses. (Findings 89, 102.) Small outboards cannot be used for water skiing and pushing large boats, and it is impractical to use large outboards on small boats. Production facilities for the two differ greatly, and the large outboards cannot be made on a production line meant to make small outboards. (Findings 92, 119.) **[67]**

In *British Oxygen Co., Ltd., supra*, the Commission held that "inhalation anesthesia equipment and accessories" was not a relevant line of commerce, pointing out that a manufacturer of one item within the product grouping could not readily produce other items and there

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*Connecticut Nat'l Bank*, 418 U.S. 656, 660–66 (1974); *United States* v. *Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, 360 (1970).

[14] The shoe industry has been rejected as a relevant market under Section 7. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 299 (1962). The Supreme Court there upheld the district court's finding that there were three markets involved: shoes for men, women and children. *Id.* at 325–28.

[15] There is some overlap in use and characteristics near the dividing line between the two markets. The fact that some of the outboards near this line are limited substitutes for each other does not preclude a finding of distinct markets. *Beatrice Foods Co.* v. *FTC*, Trade Reg. Rep. (1976–2 Trade Cases) ¶ 61,086, at p. 69,616 (7th Cir. 1976).

was no evidence that manufacturers offered a full line of such products.[15a] Here, there is a similar lack of production flexibility in the manufacture of all outboard motors. The smaller manufacturers, producing only low horsepower outboards, do not have the capability of producing high horsepower outboards, and they do not offer a full line of outboard motors. (Findings 84, 99, 105.)

The characteristics of large outboards are distinct, requiring advanced technology and know-how. (Findings 105–19.) High horsepower outboards are sold almost exclusively through marine dealers offering a full line of outboard motors, replacement parts and service, as well as boats and accessories. (Findings 97, 123–27.) Low horsepower outboards, by contrast, are also sold by mass merchandisers, hardware stores, sporting goods stores, as well as through private label distribution. (Finding 97.) The barriers to entry to both markets are significant, but, as to the manufacture and sale of large outboards, they are particularly high, and include the requirement of high capital investment and the need for specialized technology, a broad line, and access to distribution through a network of marine dealers offering sales and service at convenient locations and a full line of marine products. (Finding 81.) There is evidence of industry recognition of the division of the markets by horsepower. (Findings 82; 83, footnote #3.)

With the lower barriers to entry in the market for low horsepower outboards and distribution through mass merchandisers, price competition is "quite severe." (Finding 96.) The market for larger outboards with its substantial entry barriers, by contrast, is distinguished by mild price competition and higher profits. (Findings 73–81, 100–01, 121–22.) [68]

All outboard motors are used to propel boats through water and are attached to the back of the boat. In this sense they are related. But the realities of the market place, and this record, show that there are additional factors which determine where to weigh the effects of the joint venture involved in this case, and those factors lead to two markets: (1) low horsepower gasoline outboard motors; and (2) high horsepower gasoline outboard motors.

## III. Effects of the Joint Venture on Competition

### A. Section 7

The legislative purpose for the amended Section 7 of the Clayton Act was to effect a policy "that corporate growth by internal expansion is socially preferable to growth by acquisition" and to preserve "the possibility of eventual deconcentration." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 365 n.42, 370 (1963). And, "[i]t is the basic premise of [§ 7] that competition will be most vital 'when there are many sellers, none of which has any significant market share.' " *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280 (1964). Section 7 was designed not only to arrest monopolistic practices after they are in full swing but also to prevent anticompetitive effects of market power concentration in their incipiency. S. Rep. No. 1775 and No. 2734, 81st Cong., 2d Sess., 1950–52 U.S. Cong. Admin. News 4295-98. In *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967), the Court held, at p. 577 that:

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[15a] Trade Reg. Rep. (1973–76 Transfer Binder) at p. 20,922.

> The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. . . . The section can deal only with the probabilities, not certainties.

But, while Section 7 does not require certainty of anticompetitive effect, "proof of a mere *possibility* of a prohibited restraint or tendency to monopoly will not establish the statutory requirement." *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 598 (1957). The language of the statute prohibits acquisitions whose effect "may be" substantially to lessen competition. The statute "look[s] not merely to the actual present effect of a merger but instead to its effect upon future competition." *United States v. Von's Grocery Co.*, 384 U.S. 270, 277 (1966). Section 7 [69] prohibits the elimination of potential competition as well as of actual competition. *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 580–81 (1967). *United States* v. *Phillips* Petroleum Co., 367 F. Supp. 1226 (C.D. Cal. 1973, *aff'd mem.*, 418 U.S. 906 (1974).

B. Potential Competition

In *General Mills, Inc.*, Trade Reg. Rep. (1973–76 Transfer Binder) ¶ 20,457 (FTC 1973 [83 F.T.C. 696]), the Commission summarized the two theories of injury to competition by removal of a potential entrant by a merger, *supra*, at p. 20,360:

> First, the existence of what is *perceived* to be a significant potential competitor at the edge of a concentrated market may act as a restraint upon high prices in that market even though actual entry never occurs or has been internally rejected by management. Removal of one of a few such "perceived" entrants may dilute this competitive force. *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973).
>
> Secondly, aside from whether it is viewed as a potential competitor by firms in the market, elimination of a potential entrant by acquisition of a leading firm in that market

> will eliminate the competition that would have been added had the acquiring firm entered the market *de novo* or by toehold acquisition.[16]

[70] And the potential competition doctrine has been applied to a joint venture. *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), *complaint dismissed on remand*, 246 F. Supp. 917 (D. Del. 1965), *aff'd by an equally divided Court*, 389 U.S. 308 (1967). In that case, Pennsalt Chemicals Corporation and Olin Mathieson Company formed a joint venture for the production of sodium chlorate. After holding that §7 of the Clayton Act extended to joint ventures, the Court reversed the lower court's dismissal of the suit based on the finding that Pennsalt and Olin Mathieson would not both have entered the sodium chlorate industry but for the joint venture. See *id.* at 167–73. The Court held that the lower court should have decided whether, but for the joint venture, one corporation would have entered the market while the other remained on the edge of the market exerting a procompetitive effect. See *id.* at 173–74. The Court held (*id.* at 174) that:

> The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be substantial incentive to competition which cannot be underestimated.

The potential competition doctrine has previously been applied in international mergers or acquisitions. *United States* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal.), *aff'd without opinion*, 385 U.S. 37 (1966). Enforcement action has also been taken against foreign companies participating in joint ventures and making acquisitions in this country. See, *e.g.*, *United States* v. *Monsanto Co.*, Trade Reg. Rep. (1967 Trade Cases) ¶ 72,001 (W.D. Pa. 1967, consent decree); *United States* v. *Standard Oil Co.*, Trade Reg. Rep. (1970 Trade Cases) ¶ 72,988 (N.D. Ohio 1970, consent decree). See also *United States* v. *Standard Oil Co.*, 253 F. Supp. 196, 227 (D.N.J. 1966). [71]

## C. Actual Future Potential Entry

In *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), the Court again recognized that a merger between potential competitors may lessen competition within the meaning of Section 7 if the effect is to eliminate a present beneficial influence on a market resulting from the "outside" company's position as a perceived potential entrant. The Court remanded the case for an assessment by the trial court of this possibility, but declared that it was "leaving for another day" the second theory of potential competition which the Court described as involving:

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[16] The Supreme Court has not yet found a violation where an acquisition was challenged under § 7 only on the grounds that the acquiring company could, but did not, enter *de novo* or through a "toe-hold" acquisition and that there is less competition than there would have been had entry been in such a manner. *United States* v. *Falstaff Brewing Co.*, 410 F.2d 526, 537 (1973); *United States* v. *Marine Bancorporation*, 418 U.S. 602, 625, 639 (1974).

> a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter *de novo* or through "toe-hold" acquisition and that there is less competition than there would have been had entry been in such a manner. [410 U.S. at 537.][17]

In *United States* v. *Marine Bancorporation*, 418 U.S. 602 (1974), the Court faced the question left open in *Falstaff*. The Court's opinion sets forth three prerequisites that must be shown before "the doctrine comes into play": (1) A concentrated market that is not performing competitively (*id*. at 631); (2) The acquiring company has available feasible means for entering the market other than by acquiring a leading company; and (3) A showing that "those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects" (*id*. at 633).[18] [72]

The court found the latter two prerequisites were not met in that case and stated (*id*. at 639):

> Accordingly, we cannot hold for the Government on its principal potential-competition theory. Indeed, since the preconditions for that theory are not present, we do not reach it, and therefore we express no view on the appropriate resolution of the question reserved in *Falstaff*. We reiterate that this case concerns an industry in which new entry is extensively regulated by the State and Federal Governments.

Although the Supreme Court has thus stated that it has never squarely decided the question, the Commission and a number of courts have held that elimination of a "probable future entrant" may violate Section 7.

This theory is the principal basis of the Commission's opposition to geographic market-extension mergers by large dairy companies.[19] The Commission has recognized the doctrine in a number of other cases.[20]

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[17] The Court observed (*id*. at 537-38):

> There are traces of this view in our cases, see *Ford Motor Co.* v. *United States*, 405 U.S. 562, 567 (1972); *id*., at 587 (Burger, C.J., concurring in part and dissenting in part); *FTC* v. *Procter & Gamble Co.*, 386 U.S., at 580; *id*., at 586 (Harlan, J., concurring); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S., at 173, but the Court has not squarely faced the question, if for no other reason than because there has been no necessity to consider it.

[18] One such procompetitive effect is a future perceived potential entrant effect where the acquiring company would have been on the edge of the target market and exerted a procompetitive effect in the *future*. *British Oxygen Co., Ltd.*, *supra*, Trade Reg. Rep. (1973-76 Transfer Binder), at 20,912.

[19] See, *e.g.*, *Beatrice Foods Co.*, 67 F.T.C. 473, 720-22 (1965); *FTC Enforcement Policy with Respect to Mergers in the Dairy Industry*, 1 CCH Trade Reg. Rep. ¶ 4532.

[20] See *British Oxygen Co. Ltd.*, CCH Trade Reg. Rep. ¶21,063 (1976) (on appeal); *The Budd Co.*, Trade Reg. Rep. (1973-76 Transfer Binder) ¶ 20,996 (FTC 1975 [86 F.T.C. 518]); *General Mills, Inc.*, 83 F.T.C. 696, 732 (1973); *Beatrice Foods Co.*, 81 F.T.C. 481, 528 (1972); *Bendix Corp.*, 77 F.T.C. 731, 817-19 (1970), *rev'd and remanded on other grounds* 450 F.2d 534 (6th Cir. 1971).

Likewise, a number[21] of courts have applied the actual potential entrant doctrine. [73]

The actual future potential entry doctrine calls for examining the feasible means of entry other than the challenged transaction, and analyzing the incentive and capability of the acquiring firms to enter the market either *de novo* or by toe-hold acquisition.[22] *United States* v. *Marine Bancorporation*, 418 U.S. 612, 633, 642 (1974). In looking at incentive, the firms' maturing present markets, commitment to growth by acquisition and the attractiveness of the market are important. *United States* v. *Phillips Petroleum*, 367 F. Supp. 1226, 1245 (C.D. Cal. 1973), *aff'd per curiam*, 418 U.S. 906 (1974). In determining the firms' capabilities to enter *de novo* or by a toe-hold acquisition, factors which may be considered include: the firms' expertise in manufacturing technology (extensive time necessary to develop the product by firms knowledgeable and active in the field corroborates the technical sophistication involved); availability of engineering expertise and purchased components; transferability of technical knowledge from present production methods; availability of distributors; and marketing strength through servicing capability, brand name recognition and advertising capability. *United States* v. *Black and Decker Mfg. Co.*, Trade Reg. Rep. (1976 Trade Cases) ¶ 61,033, at pp. 69,585–92 (D. Md. 1976).

### D. Perceived Potential Entry

In *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), the Supreme Court recognized that a potential competitor can have *present* procompetitive effects on the market, as well as providing a means of *future* deconcentration by actual entry into the market, *id.* at 532–33. The Court remanded for a determination of the question whether the presence of Falstaff on the edge of the market had any present procompetitive effect prior to the acquisition. See also *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 581 (1967).[23] [74]

A good explanation of the procompetitive effects of perceived potential competition is in *United States* v. *Phillips Pet. Co., supra*, at 1232–33.

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[21] *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. at 1232 (C.D. Cal. 1973), *aff'd without opinion*, 418 U.S. 906 (1974); *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67, 77–78 n.8 (10th Cir. 1972), *cert. denied*, 416 U.S. 909; *United States* v. *Wilson Sporting Goods*, 288 F. Supp. 543, 560 (N.D. Ill. 1968); *United States* v. *Standard Oil Co.*, 253 F. Supp. 196, 227 (D.N.J. 1966); *United States* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 147 (N.D. Cal. 1966), *aff'd without opinion*, 385 U.S. 37 (1966); *Ekco Prods. Co.* v. *FTC*, 347 F.2d 745, 752–53 (7th Cir. 1965).

[22] A firm with less than 10% market share presumably may qualify as a toe-hold. *Budd Co.*, Trade Reg. Rep. (1973–76 Transfer Binder) ¶ 20,998, p. 20,857 (FTC 1975); *Beatrice Foods Co.*, Trade Reg. Rep. (1973–76 Transfer Binder) ¶ 20,944, p. 20,792 n.8 (FTC 1975 [86 F.T.C. 1 at 66]).

[23] In *Procter & Gamble*, the acquisition violated § 7 not only because of the fact that P&G's edge effect influenced the behavior of members of the target market, but also because the acquisition raised entry barriers and dissuaded smaller firms from aggressively competing. *Id.* at 578.

> The edge effect, sometimes termed the "waiting-in-the-wings" or the "on-the-fringe" effect, is the beneficial effect upon competition exerted when a company is poised on the edge of the market, threatening to enter if market conditions become sufficiently favorable. The importance of the edge effect derives from the realization that the competitive behavior of companies is not determined solely by the actions and intentions of those in the market, but also by the actions and perceived intentions of those outside the market who may come in. The presence of a potential entrant on the edge of the market exerts a moderating influence on those inside. If the firms inside raise prices beyond a certain level, for instance, a company on the edge may decide to enter because the profitability of entering would be enhanced by the higher prices. Its entry, in turn, would make conditions in the market more competitive.

In addition to the economic facts considered in the actual potential entry theory, the reasonable expectations of the competitors in the market are relevant in determining the perceived potential entry effects. *United States* v. *Black and Decker Mfg. Co., supra,* at p. 69,596. This branch of the potential competition doctrine looks to evidence of the probability that the acquiring firm on the edge of the market in fact exerted a present procompetitive influence. The Supreme Court in *Marine Bancorporation, supra,* defined the perceived potential entry doctrine as follows at pp. 624–25:

> Unequivocal proof that an acquiring firm actually would have entered *de novo* but for a merger is rarely available. Thus . . . the principal focus of the doctrine is on the effects of the premerger position of the acquiring firm on the fringe of the target market. In developing and applying the doctrine, the Court has recognized that a market extension merger may be unlawful if the target market is substantially concentrated, if the acquiring firm has the characteristics, capabilities, and economic incentive to render it a perceived potential *de novo* entrant, and if the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market. In other words, the Court has interpreted § 7 as encompassing what is known as the "wings effect"—the probability [75] that the acquiring firm prompted premerger procompetitive effects within the target market by being perceived by the existing firms in the market as likely to enter *de novo*. . . . The elimination of such present procompetitive effects may render a merger unlawful under § 7.

The Court in *Marine Bancorporation,* while reserving final decision on the status of the actual potential entrant aspect of the potential competition doctrine, stated as two preconditions to its application: (1) that the acquiring firm have feasible alternative means of entering the relevant market other than by acquisition of the target company, and (2) that those alternative means "offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects." 418 U.S. at 633, 639. The Court suggested that these same preconditions are relevant to the perceived potential entrant aspect of the doctrine. *Id.* at 639.

The facts of *Marine Bancorporation* redefined the potential competition test. There, even if the acquiring company could have entered the target market *de novo* or by a foot-hold merger, bank regulations against branches made it highly unlikely that significant procompetitive deconcentration would occur. *Id.* at 636–39. *Marine Bancorporation* however, retained the basic tenets for finding perceived potential competition. That doctrine was set out in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 533–34 (1973):

> The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into the market. Surely, it could not be said on this record that Falstaff's general interest in the New England market was unknown; and if it would appear to rational beer merchants in New England that Falstaff might well build a new brewery to supply the northeastern market then its entry by merger becomes suspect under Section 7. The District Court should therefore have appraised the economic facts about Falstaff and the New England market in order to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition.

[76] Thus, if entry into the target market *de novo* or by foothold acquisition would not "offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects," the acquiring company could not "be said to be a potential competitor on the fringe of the market with likely influence on existing competition."

It is the *inferred* effect of the presence of the acquiring company on the edge of the market due to the perception of those firms in that target market which the theory tries to save. And no actual market response to the influence of the acquiring company need be introduced. *United States* v. *Black and Decker*, *supra*, at p. 69,598.[24] In *British Oxygen*, *supra*, the Commission reversed the administrative law judge's finding that BOC's position on the fringe of the market exerted a procompetitive influence, because of the failure of record evidence of that effect. *Id.* at p. 20,911 n.8. The better rule is expressed in *United States* v. *Phillips Petroleum Co.*, *supra*. There the court found that the objective evidence demonstrated a procompetitive effect from the position on the edge of the market of the potential entrant prior to the acquisition. But even in the absence of evidence of specific actions by firms in the market prior to the acquisition, the court would have inferred such influence if the market were concentrated. *Id.* at 1257: "Whether or not it can be shown that specific actions of companies in the market have been influenced by the presence of the potential entrant on the fringe, it must be assumed that such influence exists where the market is concentrated." This reasoning is in line with *United States* v. *Falstaff Brewing Corp.*, *supra*, which stated at 534 n. 13, that "[t]he Government did not produce direct evidence of how members of the [target] market reacted to potential competition from Falstaff, but circumstantial evidence is the life blood of antitrust law . . . especially for § 7 which is concerned 'with probabilities, not certainties.' " At the least, objective economic facts showing a reasonable probability of potential entry reaches the *prima facie* stage. *United States* v. *Penn-Olin Co.*, *supra*, 378 U.S. at 175. [77]

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[24] Absence of any actual market response, however, tends to corroborate objective factors indicating that the acquiring company was not one of the most likely perceived potential entrants. *Id.* at pp. 69,598–99.

## E. Applicability of the Doctrine of Potential Competition

### 1. Concentration Ratios

The Supreme Court stated in *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974), that the potential competition doctrine is applicable only in cases in which the relevant market or submarket is oligopolistic, *id.* at pp. 630–31:

> The potential-competition doctrine has meaning only as applied to concentrated markets. That is, the doctrine comes into play only where there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods or services. If the target market performs as a competitive market in traditional antitrust terms, the participants in the market will have no occasion to fashion their behavior to take into account the presence of a potential entrant. The present procompetitive effects that a perceived potential entrant may produce in an oligopolistic market will already have been accomplished if the target market is performing competitively. Likewise, there would be no need for concern about the prospects of long-term deconcentration of a market which is in fact genuinely competitive.

If there is evidence of high concentration ratios, a *prima facie* case is established that the relevant market is a candidate for the potential competition doctrine. *United States* v. *Marine Bancorporation*, at p. 631. At this point in a case, the burden then shifts to the respondents to show that the concentration ratios, which can be unreliable indicators of actual market behavior, (see *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974)), did not accurately depict the economic characteristics of the market. *United States* v. *Marine Bancorporation*, *supra*, at p. 631.

The market shares here in 1973 for low horsepower (Finding 86) or high horsepower (Finding 101) show that OMC was the dominant firm, with half of the sales of low horsepower outboards and over 60% of the high horsepower [78] market. Mercury had about one-quarter of both markets, with the rest being shared by three domestic manufacturers.[25] Chrysler had the rest of the high horsepower market, and shared the remainder of the low horsepower market with Eska and Clinton.

In *Stanley Works* v. *FTC*, 469 F.2d 498, 504 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973), the cabinet hardware industry with a four-firm concentration ratio of 49–51% was held to be concentrated. The California retail gasoline market in which the top four firms accounted for 61% of the refining capacity and 58% of the sales was held to be highly concentrated. *United States* v. *Phillips Petroleum Co.*, *supra*, 367 F.2d at 1252. And in *British Oxygen Co.*, *supra*, at p. 20,909, the Commission held that the industrial gases industry, with a four-firm concentration ratio of 70% and an eight-firm ratio of over 80% was highly concentrated.

The market shares here show a tight oligopoly by these standards, and the burden shifts to respondents to demonstrate with evidence of actual competitive market performance that these concentration ratios do not accurately reflect the competitive nature of the markets.

### 2. Competitiveness of the Markets

In analyzing the relevant markets to decide whether the potential competition doctrine is applicable, the factors which were considered by the court in *United States* v. *Black and Decker Mfg. Co.*, *supra*, 1976 Trade Cases at pp. 69,579–86, in determining the competitiveness of the market included: demand for the product (growth is significant since it can provide incentive for new entry); a fluid market (market entry and exit can indicate competitive behavior and new entrants add production capacity, encouraging lower prices); entry barriers (such as technical manufacturing expertise); ability to obtain marketing outlets; product improvements and innovation (industry commitment to research and development); the impact of private label sellers and price competition. **[79]**

These same factors applied to the markets here show as follows:

1. Demand for the product - For several years demand has exceeded supply in the industry. (Findings 64–71.) The total United States market for outboards in units is expected to double in the next 10 years. (CX 108U.)

2. Fluid market - Historically, this industry has had a declining number of firms. (Finding 77.) Since the early 1970's, however, several

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[25] The market share findings are not precise because they do not exclude foreign sales by United States manufacturers and do not include sales in this country by foreign manufacturers (which have not been an important factor in the United States market - Finding 67.) These market share findings do show the broad picture of oligopoly, however. "[P]recision in detail is less important than the accuracy of the broad picture." *United States* v. *Brown Shoe Co., Inc.*, 370 U.S. 294, 342 n.69 (1962). See also *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 364 n. 40 (1963); *A.G. Spalding & Bros., Inc.* v. *FTC*, 301 F.2d 585, 610–11 & n.20 (3d Cir. 1962).

new firms, including Mariner, have started selling outboards in the United States. They are not yet a factor in the market. (Findings 87, 88.)

3. Entry barriers - The entry barriers here, especially to the high horsepower outboard market, are significant, including capital costs, technology and know-how, the need to produce a broad line and to develop a sales network. (Findings 81, 99, 105.)

4. Ability to obtain marketing outlets - High horsepower outboard motors are sold almost exclusively through marine dealers, and establishing a network of marine dealers is a substantial entry barrier. (Findings 123–127; Anderegg, Tr. 816.)

5. Product improvement - Both markets have seen substantial product improvement. (Findings 72, 205.) There has been intense competition in the high horsepower market in offering product features. (Finding 105.) OMC has initiated programs for the design and development of low horsepower engines to be competitive in that market. (Findings 95, 205.)

6. Impact of private label sales and price competition - Price competition in the low horsepower market, primarily because of sales by mass merchandisers and private label sellers, has been quite severe. (Findings 96–98; CX 90Z–44, 49.) In the high horsepower market, competition has been less intense and profits have been higher. (Findings 70, 72–76.) In 1969, the following pricing existed for 4 or 5 horsepower outboards (CX 90U):

| | |
|---|---|
| Chrysler (5 h.p.) | - $295 |
| Mercury (4 h.p.) | - 240 |
| Johnson/Evinrude (4 h.p.) | - 207 |
| Eska (5 h.p.) | - 160 |
| Clinton (5 h.p.) | - 150 |

[80] In *Black & Decker*, *supra*, the market analysis demonstrated that competitive performance in the gasoline powered chain saw market offered conflicting indications, *id*. at p. 69,583:

> As the foregoing analysis demonstrates, various facets of competitive performance in the gasoline powered chain saw market offer conflicting indications. The market was a rapidly growing one that had attracted a number of new entrants, notably foreign gasoline powered chain saw manufacturers. While these entrants enjoyed significant growth, their arrival provoked no discernible trend to deconcentration, and, in fact, their market share remains low. Moreover, significant technological barriers to entry exist: marketing, servicing and advertising also pose problems for a new entrant. Yet the market has been characterized by aggresive product innovation as well as by the expansion of production facilities.

These factors, combined with a lack of clear price competitiveness, led the court to hold that defendants had failed to meet their burden to establish that the high concentration ratios there did not accurately depict the economic characteristics of the market.

Here, the competitive indicators of the markets are also mixed. The markets are rapidly growing, attracting new entrants, but these new entrants have not yet established a trend to deconcentration. Significant technological barriers, especially to the high horsepower market, exist. Marketing and servicing barriers, again especially for high horsepower outboards, pose problems for the new entrant. Both markets have had impressive product innovation and expansion of production facilities.

These factors show a mixed review of competitive behavior. But one—perhaps the most important[26]—competitive factor remains: price competition. The low horsepower market has intense price competition, because of sales by mass merchandizers and through private labels. That market "performs as a competitive market in traditional antitrust terms." *Marine Bancorporation, supra,* at pp. 630–31. Therefore, even though the market has high concentration ratios, it is not a candidate for the potential competition doctrine. *Id.* at p. 631. The market for high horsepower outboards, on the other hand, has no similar indication of competitive behavior, and the potential competition doctrine is applicable to that market. [81]

F. Reasonable Probability Test

The issue for determining potential competition in this case is whether it is "reasonably probable" that, but for the joint venture, Yamaha would have entered, or Brunswick would have expanded its production facilities in the high horsepower market here found relevant. Certainty is not required. *British Oxygen Co. Ltd., supra,* at p. 20,916.

In *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1974), the Court, after reviewing objective factors that indicated that each of the parties to the joint venture had the ability and incentive to enter the market alone, concluded (*id.* at 175):

> Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the *statutory requirement of reasonable probability into a requirement of certainty. This we will not do.* [Emphasis added.]

The "reasonable probability" standard was applied in *Ekco Prods. Co.* v. *FTC*, 347 F.2d 745 (7th Cir. 1965) where the actual potential entrant issue was the question before the court. Citing *Penn-Olin*, the court stated that "the test is whether there is a 'reasonable probability' that the acquiring corporation would have entered the field by internal expansion but for the merger." *Id.* at 752–53. In that case the court agreed with the Commission that the acquisition by Ekco Products Company of the leading manufacturer of commercial meat-handling equipment violated Section 7 of the Clayton Act because there was a "reasonable probability that Ekco would have entered the commercial meat handling industry by internal expansion." *Id.* at 753.

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[26] *Black & Decker, supra,* at p. 69,562.

And in *Marine Bancorporation*, both the district court and the Supreme Court assumed throughout their opinions that the reasonable probability standard was applicable in a potential entrant case. *United States* v. *Marine Bancorporation*, 1973–1 Trade Cases ¶ 74,496 at p. 94,246 (W.D. Wash. 1973), *aff'd*, 418 U.S. 602, 616, 617 (1974). [82]

*FTC* v. *Atlantic Richfield Co., et al.*, (4th Cir. decided January 12, 1977), No. 797 BNA AT&T Reg. Rep., is to the contrary. There, the court of appeals affirmed the district court which refused preliminary relief pending resolution of administrative proceedings, in part, on the grounds that there was not a substantial likelihood that the Commission would be able to establish a violation of § 7 under the actual potential entry doctrine. The circuit court required a higher burden of proof in mergers alleged to eliminate future potential entry than in horizontal or vertical mergers or in a perceived potential competition case. (See pp. 12–15 slip opinion.) The court pointed out that the conglomerate merger there was for purpose of diversification and involved no product or market extension. Further, the acquiring company was not poised on the fringe of the market; it had no technological skills readily transferrable to the market; and it had no channels of distribution which might be used in that market.

In that context, it is not surprising that the circuit court adopted a different standard of proof. The standard adopted, however, is very stringent. The court would require certain, unequivocal proof that, but for the merger, the acquiring company would have entered the market *de novo* or the equivalent. In creating this rule, the court read *United States* v. *Falstaff Brewing Co.*, 410 U.S. 526 (1973), as holding that in a future potential competition case "very little evidence is required to prove that there would not be *de novo* entry." (See p. 14 slip opinion.) The court based this on its observation that "the Supreme Court did not disturb the district court's finding that Falstaff was not an actual potential entrant" and "that the district court relied almostly solely on management's post acquisition statements that Falstaff would not enter *de novo*." (See p. 14 slip opinion.) In fact, the Supreme Court clearly and specifically refused to pass on the actual potential competition issue. That question was left "for another day." 410 U.S. at 537. Therefore, no weight should be given to the Court's failure to revise the district court's disposition of the actual potential competition case.

The standard of proof in a Section 7 case is stated in the language of the statute. That test does not call for certain proof, only for a reasonable probability of violation. The type of acquisition involved may, however, lead to different standards of proof of economic evidence needed to show a violation, as for example in a horizontal merger case as contrasted with a vertical or conglomerate. A horizontal merger removes an independent decision-making force from the market; a vertical or conglomerate simply substitutes one firm for another.[27] Thwarting horizontal mergers may [83] more readily lead to procompetitive internal expansion since the entry barriers are lower to a firm already in the market.[28] And vertical and conglomerate mergers, although not without possibilities of anticompetitive consequences, may lead to economies and do not increase the market position of the merged firms in either of the markets involved. This would suggest varying standards of proof which are: hardest on horizontal mergers, easier on vertical, and least severe on conglomerates. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1320–22 (1965). Further stratification of the standards of proof required may be appropriate where the acquisition involves a product or market extension or a joint venture, or where the type of potential competition involved is future or perceived. But none of these ramifications remove "may" from the standard set forth in the statute.

### G. Potential Competition in the High Horsepower Market

The thrust of complaint counsel's case was directed at showing the unlawful effects of the transaction by concentrating on the alleged elimination of Yamaha as a potential future entrant and as a perceived potential competitor on the edge of the market. The effects of the joint venture, however, should be analyzed to see not only whether Yamaha was removed as a potential competitor, but also whether the transaction eliminated potential competition by the unilateral expansion of a second line by Mercury. Since this latter theory was not alleged or proved, no finding of violation can be based on it, *Bendix Corp.* v. *FTC*, 450 F.2d 534 (6th Cir. 1971), and it is explored here only to put the transaction in context and to show its full impact on competition in the relevant market.

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[27] A joint venture may in fact add another decision-making force, *infra*.

[28] See, *e.g.*, *United States* v. *Falstaff Brewing Co.*, *supra*, at p. 568 n.20 (Mr. Justice Marshall concurring).

In order to determine whether Yamaha was a potential entrant and whether, but for the joint venture, Mercury would have unilaterally increased its production facilities, the following factors are considered: (1) the fact that Yamaha was already in the business of producing low horsepower motors, and entry into the United States market for high horsepower outboards would be a product and market extension; (2) Yamaha's interest in the market and unsuccessful attempts to enter the United States market for low horsepower outboards; (3) Yamaha's capability to enter the United States market unilaterally; (4) Yamaha's incentives to enter the United States market; (5) recognition by [84] United States manufacturers that Yamaha was a potential entrant; (6) Mercury's capability and incentives unilaterally to bring in a second line; (7) feasibility of a unilateral move by Yamaha or Mercury; and (8) economic facts relating to the structure and degree of concentration of the market and barriers to entry therein.

On the basis of the objective evidence, I find that Yamaha was a likely potential unilateral entrant into the United States high horsepower outboard market, and in fact was the most likely potential entrant; and Yamaha exerted, prior to the joint venture, a substantial procompetitive effect on the behavior of those in the market from its position on the edge of the market.

### 1. Incentive of the parties to the joint venture

Mercury began planning a second line of outboard motors which it hoped would be the means of increasing its market share. (Finding 128.) Mercury wanted to obtain new dealers, and with a second line available, a marine dealer selling this new line could be located near an existing Mercury dealer, thereby adopting a sales tactic long used by OMC. (Findings 125, 129.) Mercury also wanted to try new distribution through private labeling and mass merchandisers and through camper retailers, and sport and fishing stores. (Finding 130.) In addition, Mercury wanted to meet the demands of the low horsepower market to preempt foreign entrants. (Findings 131–132.)

Yamaha's incentive for entering the United States outboard market was that it is the largest market in the world (Findings 65–66), as well as a very profitable market. (Findings 73–76, 121, 122.)

### 2. Capability

When the decision was reached for Mercury to have a second line, its production facilities were already strained to meet demands for existing Mercury marine products. (Findings 71, 134.) In addition to the expense involved, a wait of about five years would be necessary to build new plants to produce the second line. (Finding 135.) Mercury therefore started looking for a joint venture partner. (Finding 136.)

[85]

Before entering the joint venture, Yamaha tried twice to market outboards in the United States. In 1968, Yamaha tried to market three low horsepower outboards but the attempt failed because of product deficiencies and because it tried to market the outboards primarily through motorcycle dealers. (Findings 154, 155.) In 1971, Yamaha tried again through Sears, Roebuck but again failed because its outboards were too expensive. (Findings 156–58.) Yamaha continued to have great interest in the United States market and increased the quality of its outboards. (Findings 159–170.)

By 1972, Yamaha had 70% of the Japanese outboard market, and sold throughout the world, except the United States. (Findings 173, 174.) Yamaha went into the European market in 1968, and by 1972 had 12% of the low horsepower market and was second to OMC. (Finding 184.)

Yamaha had a successful history of entering United States markets for motorcycles and snowmobiles. Yamaha had entered the United States market for motorcycles in 1959. By 1974, it had 20% of the market. (Finding 176.) Yamaha entered the United States market for snowmobiles in 1968 and by 1974 sold eleven or twelve models in this country. (Finding 177.) The "Yamaha" brand name carries public recognition in the United States through consumer and trade advertising. (Finding 178.)

Prior to the joint venture, Yamaha generally had a simple, economical low horsepower line of outboards suitable for commercial fishing and transportation. (Findings 182, 185.) The Yamaha line lacked the high horsepower and some of the features common on outboards sold for pleasure boating in the United States. (Finding 183.) From the attempt to penetrate the United States outboard market in 1968, Yamaha learned the value of a full line and distribution through marine dealers. (Findings 186–188.) Yamaha had also determined that it would take time to develop higher horsepower outboard motors necessary to enter the market. (Finding 192.)

Yamaha increased the size of its largest outboard from 8 h.p. in 1969 (Eguchi, Tr. 667) to 55 h.p. in 1972. (Finding 170.) By that time, Yamaha had added some of the features necessary for the United States market, such as water cooling and two-cylinder engines. (Finding 164.) Yamaha's 25 h.p. was a "topnotch, ultra-modern outboard" (Finding 166), able to compete favorably with similar outboards sold in the United States. (Findings 167, 168.) Yamaha's 55 h.p. was not as good, lacked features and had a cost problem, but was basically a good engine (Finding 170), and since Yamaha developed the excellent 25 h.p. outboard, they "must have had the technology to develop a larger engine." (Strang, Tr. 418.) [86]

With a higher horsepower outboard, Yamaha would probably be able to gain distribution in this country through marine dealers. Yamaha's full line of boats would make it an attractive supplier for marine dealers. (CX 107L.) Marine dealers are generally franchised on an annual basis by one of the three largest outboard motor firms, OMC, Mercury or Chrysler, and handle only one line. (Findings 125-127.) Dealers sometimes switch brands. (Anderegg, Tr. 798.) Over the past several years, demand has exceeded supply in the industry and "manufacturers have taken an independent attitude which has been an irritant to many existing and potential dealers." (BX 25Z-73.) Many existing marine dealers "are open to discussion to switch. This is due in part to availability problems, plus independent attitudes of manufacturers." (BX 25Z-77.) Mariner was able to gain 51 marine dealers, and had plans to have up to 300 after a short period of promotion. (Finding 148.) Distribution through marine dealers is necessary in the market for high horsepower outboards and is a barrier to entry (BX 12R), but, with time, a determined entrant can overcome this hurdle.

At the time of the joint venture in 1972, Yamaha was capable of entering the relevant market.

While the subjective evidence in testimony and statements of the respondents for this litigation was to the effect that Yamaha was not considering entering the market on its own in the near future (Finding 192), the objective evidence of Yamaha's incentive and history of great interest in the market, as well as its growing capacity to overcome the technological barrier to entry, leads inexorably to the conclusion that it eventually would have entered the United States market for high horsepower outboard motors.[29] Yamaha was therefore a potential future entrant. Given Yamaha's substantial financial strength (CX 114E, I) and history of successful market entry in the United States (Findings 176, 177), it is reasonable to conclude that the unilateral entry of Yamaha into the United States market for high horsepower outboards would offer a substantial likelihood of ultimately producing deconcentration of that market as well as other significant procompetitive effects.

### 3. Yamaha as a perceived entrant

Yamaha was not only a potential future entrant. The technical strength of its 25 h.p. outboard and the success of the motor in the

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[29] There are no features of the high horsepower outboard market, not already discussed, which would make such entry infeasible. *United States* v. *Phillips Pet Co.*, 367 F. Supp. 1226, 1247 (C.D. Cal. 1973).

European market caused a procompetitive market reaction by OMC. After seeing a test report on the [87] Yamaha 25 h.p., and after seeing the impressive display of Yamaha outboards at the 1972 Tokyo Boat Show, OMC made "sizeable changes" in its own 25 h.p. outboard which "eventually wound up as virtually a new engine of larger piston displacement." (Finding 205.) OMC had no plans to upgrade the 25 h.p. engine until the Yamaha outboard came along. OMC's President testified as to the reason for the product improvement: "We had been stung by them abroad and we were very fearful of an invasion of the U.S. market." (Finding 206.)

The 1972 Tokyo Boat Show convinced OMC that several Japanese firms were potential entrants into the United States market. As a result, OMC started considering the projected effect on OMC's sales and earnings from such possible activity by Japanese outboard manufacturers. (Finding 207.)

Of all the outboard firms displaying their products at the 1972 Tokyo Boat Show, Yamaha was the most impressive to OMC. (Strang, Tr. 446.) OMC's President reported that Yamaha's display was the "biggest display in the place" and that he had seen the "new 25, 2-cylinder loop-scavenged ultra modern engine, quality and performance right on a par with anything we have in the U.S." (CX 107L – M.)

OMC is a competitor of respondents and opinions of OMC officials are "not necessarily the last work," *cf.*, *United States* v. *Falstaff*, *supra*, at pp. 534–36. But much of this evidence was not prepared for litigation and corroborated the credible testimony of Mr. Strang. In addition, it is supported by objective economic facts. I conclude, therefore, that it was reasonable for manufacturers of high horsepower outboards in this country in 1972 to believe, and that they in fact did perceive, that Yamaha was a potential competitor at the edge of the market. Furthermore, this perception had a procompetitive effect in the increased quality of OMC's 25 h.p. outboard, as well as in causing OMC and others to take a backward glance at Yamaha before making marketing decisions after the 1972 Tokyo Boat Show.[30] [88]

### H. Effects of the Joint Venture

Unlike a merger or acquisition, a joint venture can *add* to an industry a new decision-maker and additional production facilities. Unless the parties withdraw from the market because of the joint venture, then it may in fact add a procompetitive force. Determining the competitive effects of a joint venture alleged to violate Section 7 because potential competition has been eliminated, therefore, requires a balancing of the procompetitive effects which might have occurred through the potential competition against the procompetitive effects which have occurred due to the entry of the joint venture into the market. Although Yamaha was a potential future entrant and was perceived as a potential competitor, those procompetitive effects must be compared to the procompetitive effects of the joint venture, which put a new entrant into the market and has enhanced Yamaha's potential as a future entrant.

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[30] OMC apparently did not perceive that Mercury might increase its manufacturing facilities. (Strang, Tr. 840.)

In *Penn-Olin, supra*, the Court recognized that a joint venture may add a new competitive force to the market, and held that it is not controlled by the same criteria as a merger or conglomeration. 378 U.S. at 170. Since the Court found that the joint venture added a new firm to the market, the government on remand had to show that, but for the joint venture, one of the firms probably would have entered the market (thereby adding at least the competition added by the joint venture), plus that the other firm would have remained on the edge of the market, continually threatening to enter.[31]

Here, the joint venture has added to the market a new competitive force–Mariner outboard motors produced by Sanshin and sold by Mariner. These motors compete with many of the motors produced and sold by Mercury and others. [89] In arguing that the joint venture violates Section 7, complaint counsel assert that the transaction eliminated the probability that Yamaha would enter the market in the future and stopped the present edge effect on competitors in the market who perceived Yamaha as a likely potential entrant.[32] But since the joint venture added a competitor to the market, complaint counsel have the burden of showing that the procompetitive effect of the potential competition provided by Yamaha prior to the joint venture was substantially greater than the actual entry of the new competitor, Mariner. See *Penn-Olin* on remand, *United States* v. *Penn-Olin Chemical Co.*, 246 F. Supp. 917, 919 (D. Del. 1965), *aff'd by a equally divided Court*, 389 U.S. 308 (1967).

In analyzing the competitive effects of the joint venture, I considered the subjective evidence (such as the testimony of officials o respondents and respondents' competitors, and the documents prepared with one eye on this litigation) as "biased commentary on th nature of the objective evidence" and as a "counterweight to weak o inconclusive objective data." *United States* v. *Falstaff Brewing Corp*

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[31] Although Pennsalt was in the market and was replaced by the joint venture company, *id.* at 164, the c freight in shipping from its plant in Portland, Oregon, made it an ineffective competitor in the southeastern m *United States* v. *Penn-Olin Chemical Co.*, 217 F. Supp. 110, 120–22 (D. Del. 1963). So the joint venture did, in ef add a new competitive force to the market. Here, Mercury was in the market prior to the joint venture and rem the market now. The joint venture here also added a new competitive force to the market.

[32] Although the theory was not alleged or developed, an anticompetitive effect of the joint venture could h been the elimination of additional production facilities and a second line of outboard motors by Mercury.

410 U.S. 526, 570 (1973) (Mr. Justice Marshall concurring). Evidence of what occurred after the joint venture agreement could not alone override all probabilities, but was considered as relevant in determining whether the transaction violates Section 7. *FTC* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965); *United States* v. *Phillips Pet. Co.*, 367 F. Supp., at p. 1260. This evidence was considered in the light of the main objective fact in this case, which is that the joint venture added to the relevant market a new procompetitive force – the Mariner line of outboard motors. In addition, the transaction had the following effects:

Yamaha has received substantial benefits from the joint venture. It has provided Yamaha with designing and manufacturing techniques for making high performance outboard motors, especially larger engines over 50 h.p. (Finding 189.) Six or eight Yamaha engineers came to Mercury's factory and lived there for several months in early 1973, so they could [90] learn the technology required in making high horsepower outboards. They learned valuable proprietary know-how from Mercury's experienced engineers, which was not otherwise available. (Finding 195.) Mercury has continued this educational program, and Yamaha engineers continued in 1975 redesigning the outboards under the guidance of Mercury engineers. (Finding 193.)

The joint venture has saved Yamaha time in creating a line of outboards which are being marketed through marine dealers in the United States. The entry of the Mariner line was delayed in part due to spiraling inflation in Japan and the weakening of the dollar in relation to the yen. (Finding 147.) This economic difficulty changed the plan to have the joint venture selling outboards in the United States in early 1974.[33] (Finding 147.) Without the technology supplied through the joint venture, it would have taken two or three times as long, and several years would have passed, before Yamaha would have been able to build on its own the high horsepower outboards with the features needed for the United States market. (Findings 192, 194.) Yamaha certainly could not have been ready to enter the market by the beginning of 1974. The 55 h.p. outboard made by Sanshin for Yamaha—its only true high horsepower outboard—was not ready for the United States market by 1974 even after receiving help from Mercury engineers. (Finding 170.)

Yamaha got valuable help from Mercury through the joint venture which, with the product rationalization from increased production, led to cost reduction in outboards produced by Sanshin. (Findings 189, 190,

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[33] Entry of the Mariner line was also delayed pending the production of an outboard larger than 55 h.p., with Mercury finally supplying an 85 h.p. outboard for the 1976 entry of Mariner into the United States. Presumably this could have been done in 1974 but for the economic difficulty.

193, 195.) Yamaha also probably avoided some field disasters and some massive recalls because mistakes are made when a firm plunges into a new market with untried products and "massive recalls hurt the image as well as cost money." (Finding 194.)

Moreover, the joint venture has allowed Yamaha to avoid the highly competitive market for low horsepower outboards [91] in the United States (Finding 191) which has lower entry barriers and which would have been the natural access to the high horsepower market. (CX 8A.) Yamaha recognizes the advantages it received from the joint venture: "Yamaha-Sanshin will be able to enter the U.S. market, whatever the brand name of . . . product may be." (BX 8B.)

Mercury's gains from the joint venture also had a procompetitive effect. When Mercury decided to have a second line, its production facilities had been unable to meet demands for Mercury outboards for several years. (Finding 133.) Mercury decided that it was not practical to build additional plant facilities because of the cost and time involved. (Findings 133–34.) It would have taken about five years for Mercury to provide the second line through plant expansion. (Finding 135.) When Mercury entered the joint venture, it planned to start marketing Mariner outboards in the United States in one and one-half years (Finding 147), a saving of three and one-half years compared to internal expansion. Unforeseen world economic difficulties were in part the reason for the elimination of this procompetitive effect of the joint venture, but it must be weighed in favor of the transaction.[34] In addition, Mercury has obtained valuable technical information from Yamaha through the joint venture. (Findings 141, 144–45.)

A substantial present procompetitive effect of the joint venture is that there is another decision-maker in the oligopolistic United States market for high horsepower outboard motors. Mariner has joined the other three outboards, Johnson/Evinrude, Mercury and Chrysler, in this market. This entrant "adds new production capacity and has significant incentive to avoid the anticompetitive oligopolistic market practices in order to realize and expand a market share." *United States v. Black and Decker Mfg. Co., supra*, 1976 Trade Cases, at p. 69,572.

Most importantly, Mariner launched its entry by price competition. Mariner outboards have a retail price [92] 5% to 8% lower than comparative outboards sold by OMC, Mercury and Chrysler. (Finding 150.) The Chairman of Mariner concluded in January of 1972, *before the joint venture was created*, that in order for the Mariner line successfully to compete in the United States market: "The product must have a price advantage." (CX 8F; see also BX 1F.) Mariner intends to price low enough to "get a reading on the question of dumping." (CX 84A.) In other words, unless prohibited by the government under the antidumping regulations prohibiting territorial price discrimination on foreign-manufactured goods, Mariner intends to gain market share by engaging in substantial price competition.

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[34] Another Mercury purpose for the joint venture was building a second line as a "fighting" brand to preempt the low horsepower market as an entry place for foreign competition. (Findings 181–82.) Because of higher costs than anticipated, this purpose was later abandoned to some extent, and rather than private label sales or distribution through mass merchandisers the Mariner line is being marketed solely through marine dealers. (Finding 149; BX 11.)

The manufacturing of high horsepower outboard motors has high fixed costs. (Strang, Tr. 556.) In a high fixed cost industry, leading firms are prone to avoid price competition. *British Oxygen Co., Ltd.*, *supra*, 1973–76 Trs. Bd., at p. 20,920. Here, the introduction of price competition through the Mariner line of outboard motors may very well have the "effect of shaking up established industry leaders [setting] in motion pressures on them to compete more vigorously in price or services in order to retain their existing market shares." *Ibid.*

Another procompetitive effect from the joint venture is that it has enhanced Yamaha as a potential future unilateral entrant. Both parties expect the joint venture to end in 1979. (Findings 196, 199.) Yamaha has obtained vital technical information from Mercury. At the end of the joint venture, Mariner dealers in the United States will be ideal distributors for Yamaha outboards, since they will have been selling identical engines, with only the decal and color different from Yamaha outboards. (Finding 198.)

Mercury has already decided to expand its production facilities to be able fully to provide the Mariner line by the end of the joint venture in 1979. (Finding 199.)

In summary, the joint venture has had the procompetitive effects of actually introducing a new line of outboards into the United States market with the promise of causing price competition, as well as enhancing the probability of an early unilateral entry by Yamaha into the market. Furthermore, after the joint venture is terminated, Mercury will have a new second line, provided by its own additional production facilities. **[93]**

These actual procompetitive effects, in my opinion, outweigh the loss of the effects by the temporary removal of Yamaha from the edge of the market. And since the joint venture has actually enhanced Yamaha as a future potential entrant, there has been no anticompetitive effect of the transaction in that regard.

## IV. Division of World Markets

When the joint venture was first being organized, Mercury's proposal was that Mariner have the exclusive right to sell in North America, Europe and Australia; Yamaha would have the exclusive right to sell in Japan; and a marketing joint venture would sell in the rest of the world. (CX 16A.) There was some discussion in November 1971, in which Mercury advised Yamaha that Mercury was "looking for a Japanese partner with 2-cycle capabilities" and "would expect our partner to put his existing outboard business into the joint venture and not compete directly or indirectly with the joint venture." (CX 5A.) And in July 1972, one Mercury official expressed his opinion to another Mercury official that: "With respect to Europe, I believe that we should not attempt to market Mariner until that point in time that Yamaha has, in effect, pulled out of Europe. I don't think we want at anytime, a situation where Yamaha and Mariner are both in the same marketing area." (CX 16A.)

When the parties entered the joint venture agreement in November 1972, Article 8.4 of the agreement provided that, as to the products of Sanshin, Yamaha shall have the exclusive right to sell in Japan; Mariner shall have the exclusive right to sell in North America and Australia; and a joint venture sales company would be formed to sell in the rest of the world. (CX 1K–L.)[35]

In subsequent discussions culminating in an amendment to the joint venture agreement in October 1973, the parties agreed that it was inappropriate to attempt to form a joint venture company for the marketing of Sanshin products, and, as a result, [94] it was agreed that both Yamaha and Mariner are free to conduct their own marketing programs independent of each other in those territories which the joint venture agreement contemplated would be served by the joint venture sales company.[36] (CX 78A.)

The Senior Managing Director of Yamaha wrote to the President of Mercury in July 1973, requesting that (CX 76B):

> in establishing MMI [Mercury Marine International] sales network in the non-exclusive markets, you refrain from inviting Yamaha's existing distributors/dealers to join MMI's sales network. Also, in order to avoid struggling with each other for new distributors/dealers by competing in the terms and conditions each party offers, we would like to propose to have as frequent meetings as possible.

In response, the President of Mercury, who was also Chairman of the Board of Mariner, replied in August 1973 (CX 77C):

> We agree that we will not seek out Yamaha's distributors or dealers in the non-exclusive market but, in some area, such as Europe with its great number of subdealers, we may find dealers handling not only Yamaha and International's line but Mercury, OMC and

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[35] Under Article 8.1, Yamaha, Mariner and the joint venture sales company were appointed the exclusive purchasers from Sanshin; under Article 10.1 Yamaha agreed not to make marine engines or buy them from other than Sanshin.

[36] The term "North America" as used in the joint venture agreement was defined to include Canada, the United States, and Mexico, with the exclusion for an arrangement between the government of Mexico and Yamaha for three fishing engines. Also, Yamaha agreed that Mariner would have the exclusive right to sell Sanshin products in New Zealand. (CX 78C.)

> other brands as well, in spite of our efforts to keep them separate. As a matter of good business, we recognize that, although we have separate marketing organizations, our basic philosophy must be to respect each other's position and to concentrate on making inroads against other outboard manufacturers.

This agreement was a qualification of competition by the parties to a joint venture agreement in one of the markets where the joint venture product would be sold.

Yamaha also agreed for the life of the joint venture, not to sell Yamaha brand outboards in New Zealand and Australia [95] (where it had been handicapped by a 25% import duty, CX 15D), and Canada (where it ceased selling in 1972 or 1973, Eguchi, Tr. 664). And Yamaha agreed during the life of the joint venture not to enter Yamaha outboard motors any further in the markets in the United States and Mexico. Because it owns half of sales to Mariner, of course, Yamaha was not foregoing these markets completely.

The Supreme Court recognized in *United States* v. *Penn-Olin, Chemical Co.*, 378 U.S. 158, 168 (1964) that:

> Certainly the formation of the joint venture and purchase by the organizers of its stock would substantially lessen competition—indeed foreclose it—as between them, both being engaged in commerce. This would be true whether they were in actual or potential competition with each other and even though the new corporation was formed to create a wholly new enterprise. Realistically, the parents would not compete with their progeny.

Yet the Court did not rule that joint ventures are unlawful *per se*. The lessening of competition which naturally occurs between the parties to the joint venture must be weighed against the increase in competition caused by the new entrant. *Id.* at 169–70.[37]

Here, when Yamaha requested that its established distributors in Europe be left alone, and when it agreed to the sale of Mariner products in lieu of Yamaha products in some markets, the restraint was reasonable in the context of the joint venture agreement. "If a joint venture or partnership is formed for the purpose of a lawful business enterprise and restraints result from the right to protect established business interests no violation of law occurs." *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 312 (N.D. Ohio 1949), *aff'd* 341 U.S. 593 (1951). Both *Timken* and *Penn-Olin* recognize that a joint venture between potential or actual competitors is different from a horizontal territorial division of markets having no purpose other than restraining competition. The rule of the *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608 (1972), is therefore inapplicable. [96]

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[37] A conspiracy to divide markets, fix prices and eliminate competition cannot "hide from the effects of the law under the cloak of a joint venture." *United States* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 312 (N.D. Ohio 1949), *aff'd*, 341 U.S. 593 (1951). But "it is not illegal *per se* for competitors to combine their resources in a manufacturing joint venture to exploit a particular product or a particular market." *United States* v. *E. I. du pont de Nemours & Co.*, 118 F. Supp. 41, 219 (D. Del. 1952), *aff'd* 351 U.S. 377 (1956).

### A. Technical Assistance Agreement As A Division of Markets

Mercury and Yamaha each entered into technical assistance agreements with Sanshin in accord with provisions of the joint venture agreement. These agreements provided that Mercury and Yamaha would disclose and license to Sanshin all Mercury and Yamaha patents and know-how applicable to making marine engines. (Finding 52.) Mercury and Yamaha also entered a technical assistance agreement between themselves pursuant to the joint venture. (Finding 48.) Complaint counsel attack provisions of this latter technical assistance agreement as violating Section 5 of the Federal Trade Commission Act. The specific provisions involved are: (1) Article 2.1 which is a cross licensing agreement, limiting the use of exchanged technical information to noncompeting goods, and (2) Article 6.7 whereby Mercury agreed not to manufacture any product competitive with those manufactured by Yamaha, except snowmobiles. (Finding 48.)

These provisions of the technical assistance agreement provide for a free flow of information between the parties to the joint venture, which may go directly to Mercury or Yamaha, or come to them through Sanshin. For example, snowmobiles, motorcycles and outboard motors all use two-cycle engines. Yamaha makes motorcycles and snowmobiles. Mercury makes snowmobiles and outboard motors. Article 2.1 does not prohibit Yamaha from using, in the production of motorcycle engines, information it obtains from Mercury concerning outboard motors. Article 2.1 does not prevent Mercury from using, in the production of outboard motors, information it obtains from Yamaha concerning motorcycles. Article 2.1 does prevent either Yamaha or Mercury from using, in the production of snowmobiles, information gained from the other in the exchange of technical information meant to increase Sanshin's ability to produce better outboard motors.

Similarly, Article 6.7 prevents Mercury from gaining technical knowledge from Yamaha because of the joint venture relationship and using this information in starting to produce motorcycles or boats. Mercury had disposed of its boat manufacturing facilities prior to the joint venture after suffering heavy losses, and it has no intention of manufacturing motorcycles. Therefore, the agreement has no adverse effect on competition. [97]

A moderate competitive restraint in the cross license is lawful if respondents can show that the main purpose of the agreement serves a legitimate business objective and the restraint is ancillary to that purpose. *Standard Oil Co.* v. *United States*, 283 U.S. 163, 171 n.5 (1931)

(Brandeis, J.) (a cross license involving patent improvements is frequently necessary if technical advancement is not to be blocked by threatened litigation); *In re Multidistrict Vehicle Air Pollution*, 367 F. Supp. 1298, 1303 n.7 (C.D. Cal. 1973) (cross licensing agreement in which parties agreed to withhold publication of development data and to withhold offering for public use developed devices for air pollution control except with the concurrence of all the parties); *United States* v. *E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 219 (D. Del. 1953), *aff'd on other grounds*, 351 U.S. 377 (1956) (territorial limitation ancillary to lawful transfer of trade secret).

Here, the restrictions in the cross license are reasonably related to the main purpose of the agreement—to provide for the free flow of technical information concerning the patents and know-how used in making outboard motors which can compete in the United States market. The restrictions are reasonable[38] and ancillary to the lawful purpose of the joint venture. [98]

## ORDER

The joint venture agreement does not violate Section 7 of the Clayton Act. Although the complaint alleges that the joint venture violates Section 5 of the Federal Trade Commission Act, the proof offered under that statute related solely to the jurisdictional issue.[39]

Furthermore, the agreements not to compete, made pursuant to the joint venture, do not adversely affect competition, and are reasonable and ancillary to the lawful purpose of the joint venture.

The complaint must therefore be dismissed.

## OPINION OF THE COMMISSION

BY PITOFSKY; *Commissioner:*

The complaint in this case charges respondents Brunswick Corporation ("Brunswick"), Yamaha Motor Company, Limited ("Yamaha") and Brunswick's wholly-owned subsidiary Mariner Corp. ("Mariner") with violating Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by a transaction involving a joint venture agreement. The complaint alleges that the effects of the joint venture may be substantially to lessen competition or to tend to create a monopoly in the manufacturing and/or marketing of outboard motors in the United States by, *inter alia*, eliminating substantial potential competition between Brunswick, Yamaha and Mariner, and increasing barriers to entry and concentration levels in the relevant market.

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[38] Complaint counsel's main argument concerning the asserted lack of reasonableness of the restrictions in the cross license, was that technical information provided by Mercury pursuant to the agreement (CDI, jet prop exhaust, high pressure die casting, and lower unit design and styling) lacked value. This argument contradicts the finding that one of the barriers to entry to the United States market for outboard motors is technology and know-how, and is contrary to facts in the record.

[39] Since the theory of the case-in-chief was shaped to fit Section 7, the established concepts of that statute (rather than an additional standard introduced by Section 5) should control the substantive law involved in this proceeding. See *Perpetual Federal Savings & Loan Ass'n*, FTC Initial Decision, decided March 28, 1977, p. 19 (90 F.T.C. 608).

The administrative law judge (ALJ) issued an order on May 2, 1977 dismissing the complaint. He determined that the addition of a "new entrant into the market" by this venture, combined with its enhancement of "Yamaha's potential [2] as a future entrant," I.D. p. 88,[1] outweighed any anticompetitive effects the agreement may have had. The ALJ further rejected Complaint Counsel's contention that the agreement constituted an illegal division of world markets. I.D. p. 95.

For reasons discussed below, we disagree and find that this joint venture in several respects substantially lessened actual and potential competition. Specifically, the joint venture violated the antitrust laws in that it eliminated likely independent entry by Yamaha, eliminated actual existing competition provided by Yamaha in the United States market, and because a series of collateral agreements entered into in connection with the joint venture constituted an illegal limitation on competition between Yamaha and Brunswick. Measuring and balancing the pro-competitive and anti-competitive effects of a joint venture is often a very delicate task and this case is no exception. Nevertheless, we believe the anticompetitive effects are sufficiently pronounced here to require a finding of a violation.

## I. The Parties and the Industry Involved

Brunswick is a diversified manufacturer and marketer of medical products and recreational items with a net income in 1973 of $39 million on net sales of $683 million. Brunswick commenced manufacturing marine engines in 1961 when it acquired what is now its Mercury Marine Division ("Mercury"). Mercury manufactures and sells outboard motors, stern drives and inboard marine engines and snowmobiles. In 1973, Mercury sold 130,000 units of outboard motors valued at $80 million. It is the second largest seller of outboard motors

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[1] The following abbreviations are used herein:

I.D. - Initial Decision
Finding of Fact No.
I.D.p. - Initial Decision Page No.
Tr. - Transcript of Testimony, Page No.
CX - Complaint Counsel's Exhibit No.
BX - Respondents Exhibit No.
CAB - Complaint Counsel's Appeal Brief
RAB - Respondents Appeal Brief

in the United States. Mercury also sells outboard motors in Canada, Australia, Europe and Japan.

Yamaha is a Japanese corporation. Nippon Gakki Co., Ltd., ("Nippon Gakki"), a Japanese corporation which manufactures musical instruments and sporting goods, incorporated Yamaha to manufacture motorcycles. Nippon Gakki owns 39.11% of Yamaha's stock; the next largest shareholder holds 5%. Since 1961, Yamaha has manufactured and sold snowmobiles, motorcycles and spare parts to Yamaha International Corporation, [3] a wholly-owned subsidiary of Nippon Gakki, which in turn distributes in the United States. In 1972, approximately 40 percent of Yamaha's total sales of $405 million were made for export to the United States.

Yamaha also manufactures outboard motors through Sanshin Kogyo Company Limited ("Sanshin"), a Japanese corporation. Yamaha acquired 60% of Sanshin's stock in 1969. Since then, Sanshin has produced all "Yamaha" brand outboard motors. In the year ending June 1971, Sanshin produced approximately 75,000 outboard motors for Yamaha. Twenty-five thousand of these were exported, mostly in Europe, but some of these Sanshin outboard motors had been exported to the United States prior to the joint venture.

On November 21, 1972, Brunswick entered into a joint venture agreement with Yamaha. In contemplation of this agreement, Brunswick formed Mariner Corporation ("Mariner"), a wholly-owned subsidiary. Under the terms of the joint venture agreement, Brunswick caused Mariner to purchase 62,000 shares of Sanshin stock for approximately $1.4 million, resulting in Mariner and Yamaha each owning 38 percent of the total outstanding stock of Sanshin.[2] Five of Sanshin's 11 directors were to be appointed by Mariner, 6 by Yamaha. The motors manufactured by Sanshin were to be marketed in Japan by Yamaha under the "Yamaha" label, in North America and Australia by Mariner under the "Mariner" label, and on a non-exclusive basis by either parent in the rest of the world.[3] Yamaha and Mariner are the sole purchasers of the products which Sanshin manufactures.

The joint venture agreement also incorporates licensing arrangements providing for the exchange among Mercury, Yamaha and Sanshin of patent and technical information and a technical assistance agreement. Technical information other than patents and the like exchanged pursuant to the agreements becomes the joint property of the parties, while patents and other licenses are renewable, at reasonable cost. The joint venture agreement is to remain in effect for an initial period of 10 years with automatic extensions for 3 year periods (subject to any necessary Japanese government approvals) unless notice of termination is given by either party 3 years prior to the expiration of the initial or any extended term. [4]

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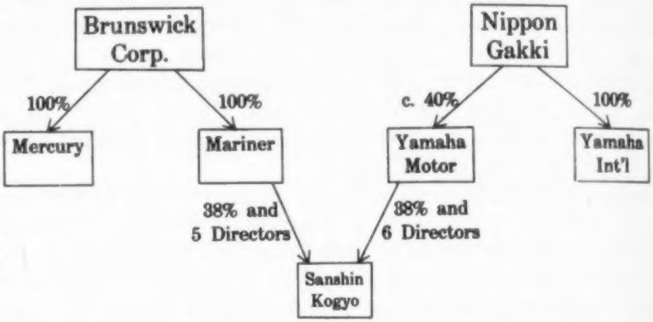
[2] The remaining 24 percent of the Sanshin stock is held by individual Japanese shareholders.

[3] In October 1973, the agreement was amended to provide that Yamaha could continue selling outboard motors to the Mexican government for their fishing program. Otherwise, Mariner's rights to sell Sanshin products in North America were exclusive.

The following is a diagram of the transactions:



The United States outboard motor industry, in both its low and high horsepower segments, is marked by the substantial dominance of a few firms. The four principal competitors in 1973 — Outboard Marine Corporation ("OMC") (through its Johnson and Evinrude brands), Brunswick (through the Mercury brand), Chrysler, and Eska – accounted for 94.9% of the market by units sold with the top two firms controlling 72.9%. I.D. 78. Dollar volume figures are even more dramatic: the top four firms accounted for 98.6%, with the top two controlling 85.0%. I.D. 78. If the figures are broken out by low horsepower and high horsepower motors, similar results obtain. In the low end, by unit volume, the concentration ratios are 4:98.1% and 2:69.3%; by dollar volume, the figures are 4:94.4% and 2:73.6%.[4] I.D. 86. In the high horsepower [5] end, figures are available only for the top three firms, since they control 100% both by dollar and by unit volume. The top two firms account for 88.8% both by units and dollars. I.D. 101.

"Historically, the outboard motor industry has been marked by a lack of significant entry and a declining number of firms," I.D. 77, quoting Yamaha Amended Ans., ¶19, even though it is an industry characterized by rapid sales growth and high profits. BX 12; CX 71D. While U.S. sales of outboard motors rose by 10.9% annually between 1963 and 1972, I.D. 64, imports in 1973 still made up an insignificant share. I.D. 67. Moreover, of the eight competitors in the U.S. industry in 1955, two had exited by 1969. Tr. 283–291, I.D. 77. Barriers to entry, including capital costs, technology and know-how, and the need to develop a sales network, have remained significant over time. I.D. 80, 81; Brunswick Amended Ans. ¶26, BX 12.

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[4] Brunswick's Mercury Division is the number two firm in all computations except low horsepower motors by unit volume, where its sales are exceeded by those of Eska. Eska does not manufacture motors but assembles them from components it purchases. Tr. 609. Brunswick's number two position is firm, however, in both unit and dollar figures in the overall market and high horsepower end, and in dollar volume sales in the low horsepower end.

## II. Market Definition

### A. Geographic Market

The relevant geographic market is the United States, as stipulated by the parties. Complaint, ¶21; Brunswick Amended Ans., ¶21; Yamaha Amended Ans., ¶14.

### B. Product Market[5]

The boundaries of our analyses under Section 7 of the Clayton Act are determined by the familiar litany of factors the Supreme Court has enumerated in various cases. In *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956) (the *"Cellophane"* case), the Court set forth the outer reaches of a relevant market:

> That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered. 351 U.S. at 404.

The Supreme Court elaborated upon the appropriate test for market definition not long after *Cellophane* in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962) where, after affirming that cross-elasticity of demand determines the "outer boundaries" of a product market,[6] the Court [6] enumerated certain criteria which, when present, may point to the existence of submarkets, or significant market segments in which the competitive implications of a transaction may be demonstrated.

> The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.[7]

The ALJ concluded that there was no overall outboard motor market, but rather that high and low horsepower outboard motors comprised two separate and distinct markets. I.D. 83, I.D. 99, and I.D. at 68. Complaint counsel contend that there is a broad overall outboard motor market, because outboard motor manufacturers constitute a recognized industry of firms selling outboard motors which are interchangeable within broad horsepower ranges. Complaint counsel further contend that despite the price differential between low and high horsepower outboards, there is commonality in their production, distribution, components, general technology, and basic end uses. CAB at 34–36. Complaint counsel took no position on the possibility of submarket categories within the overall outboard motor market.

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[5] The manufacture of electric outboard motors, inboard/outboard motors or stern drive motors have been excluded from the term "outboard motors" in this proceeding. (stipulation, Tr. 169.)

[6] 370 U.S. at 325.

[7] 370 U.S. at 325.

Respondents' position before the ALJ was that the relevant market consisted of sales of all outboard motors through marine dealers, excluding low price outboards marketed through mass merchandisers or by any other distribution system. Respondents apparently believe their position was essentially consistent with the ALJ's market determinations, RAB at 41, since high horsepower outboards have traditionally been sold exclusively through marine dealers and respondent regarded low horsepower motor sales as irrelevant to this case.

We think the ALJ's discussion of the factors which go into a market analysis should have led him to the conclusion that there is an overall outboard motor market. While it is not essential to disposition of this case, we further note that the record supports findings that the low horsepower and high horsepower segments are appropriate submarkets when examined in light of *Brown Shoe*. [7]

The basic end use of all outboard motors is the same—to push a boat through water. It would be too simplistic, however, for us to conclude on that basis that ten 6-horsepower motors can reasonably be used in place of one 60-horsepower motor. But such a strict standard need not be met for an entire industry to constitute a product market, and we have recognized this in the past. *See British Oxygen Co.*, 86 F.T.C. 1241, rev'd. on other grounds *sub nom. BOC International, Ltd.* v. *FTC*, 557 F.2d 24 (2d Cir., 1977) (industrial gases); *Coca-Cola Bottling Company of New York, Inc.*, FTC Docket 8992 (Jan. 23, 1979 [93 F.T.C. 110]) (wine); *Liggett and Myers*, 87 F.T.C. 1074 (1976) (dog foods). Here, the three companies in the higher end of the market are all active and substantial competitors in the lower end of the market. But, more important, three characteristics convince us that an overall market exists: industry recognition, technological overlap along the entire horsepower range, and, most significant, the economic incentive sellers have to manufacture and market a full line of motors.

First, both the industry trade association, the Boating Industry Association, and its individual company members recognize the existence of a United States outboard motor industry. CX 91; CX 90; BX 25; BX 12. A market study performed for American Honda discusses and describes an overall outboard motor market, as does a securities research report prepared for OMC. BX 12; CX 90.

Second, while a 200 h.p. motor is different in many ways from a 10 h.p. motor, there is considerable technological overlap throughout the line. All outboard motors are composed basically of an electrical system, a powerhead and a lower unit containing the gear train, propeller and fuel supply. I.D. 62. Certain features requiring advanced technology appear on high horsepower motors and not on low horsepower motors, such as jet prop exhaust and capacitor discharge ignition ("CDI"). I.D. 105. CDI is not as necessary on smaller outboards, and would add substantially to their cost. I.D. 116. Similarly, jet prop exhaust is costly and has not been incorporated by one major competitor, Chrysler, into any of its engines. I.D. 112. But these features are minor in the context of the overall technology involved in outboard motor manufacture.

Third, as respondents vigorously contend, the ability to market a full line of motors is of economic benefit to outboard manufacturers. OMC and Mercury, which together [8] accounted for 72.9% of all units sold in 1973, I.D. 78, both sell their motors exclusively through marine dealers. Chrysler sells its motors both through marine dealers and mass merchandisers like Sears and Montgomery Ward. Eska and Clinton, the other two competitors in the industry between 1971 and 1973, I.D. 77-79, sell their motors exclusively through mass merchandisers. I.D. 97. Well over 70% of total distribution of outboard motors is through sales to marine dealers. The dealers prefer a full line, usually sourced by a single brand, in order to offer the widest range of product choice to customers, I.D. 126, along with the boats, accessories, and skilled servicing they also provide. I.D. 124–5. So while the smallest outboards do not compete directly with the largest, there are economic reasons for viewing all motors as competing in one market.

In *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321 (1962), "the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking' " was held to constitute a distinct line of commerce, despite the lack of price sensitivity or head-on competition among the various components of the "cluster." 374 U.S. at 356. Because of considerations of "convenience", and also some economic reasons why customers were likely to prefer doing their banking business in one place, the cluster of banking services was seen as constituting in practical terms a distinct product market category. See *U.S.* v. *Phillipsburg National Bank*, 399 U.S. 350, 360–61 (1969). The outboard motor market involves the "cluster" aspect of *Philadelphia National Bank* from a retailer's point of view. In contrast to the situation which obtains with regard to "commercial banking," no single consumer has an economic incentive to purchase a number of outboard motors under a single roof rather than shopping around. But dealers have strong incentives to display a broad line from a single supplier, Tr. 696, and, as a result manufacturers have strong incentives to be able to supply that full line.

Such incentives, which respondents emphasize as part of their own case, RAB 34–36, point to an overall outboard motor market, and do not establish respondents' asserted market: outboard motors sold through marine dealers. The record shows that low horsepower motors, however sold, compete with each other; there is considerable price sensitivity across distributional lines. I.D. 98. Eska, for example, distributing through mass merchandisers, was able to make substantial inroads on OMC's share of low horsepower outboard-motor sales. I.D. 95.

Of course, the existence of an overall market does not bar scrutiny of the effects of this joint venture in appropriate submarkets. There are aspects of the outboard motor [9] industry which distinguish low horsepower motors from high horsepower motors.[8] In general, high horsepower motors are used on larger boats, for water skiing or cruising. I.D. 102, 103. Low horsepower motors are primarily used on smaller boats, for fishing, hunting and on sailboats[9] I.D. 89; CX 90-J, CX 90–Z; I.D. 90. Differences in production facilities between low and high horsepower motors seem generally to be attributable to the physical size of the motor to be manufactured. I.D. 92; Tr. 298–300, 393.

Mr. Strang of OMC, the largest competitor in both low and high horsepower outboards, testified that OMC's pricing decisions regarding high horsepower outboards are not affected by prices set for low horsepower outboards, and vice versa. Tr. ·397. In pricing high horsepower motors, OMC looked only to the prices set by Chrysler and Mercury. Tr. 537. Advertising, however, was generally "of the whole line in some publications, and then specific advertising aimed at the use of a given size engine in other publications." Tr. 397–8.

It is certainly true that "industry activities cannot be confined to trim categories."[10] A degree of imprecision always attends the attempt to fit dynamic economic operations into neat pigeonholes. Therefore, we are inclined to agree with the ALJ that there are significant differences between low and high horsepower motors. However, we do not agree that such differences are of a degree that warrants the finding of two entirely separate markets. Therefore, we [10] find that there is an overall outboard motor industry, with two submarkets: outboard motors of 20 h.p. and under, and outboard motors of over 20 h.p.[11]

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[8] While somewhat arbitrary, the ALJ determined the dividing line between "low" and "high" horsepower motors to be at 20 h.p. I.D. at 21, footnote 3., I.D. 83. We find this dividing line reasonable.

[9] There is, however, notable overlap in uses. As Mr. Dillon, General Manufacturing Manager of Chrysler's Marine Products group described it:

> Generally. . .we deal with different classes or markets that we aim at with our product line, and generally we speak of the small twins [up to 15 h.p. motors] as catering to the fishing market, but I hasten to say that there is an excellent fishing market at 106 horsepower, so I don't think our terminology is necessarily very firm. Tr. 304.

[10] *Cellophane*, 351 U.S. at 395.

## III. The Positions of Yamaha and Brunswick Vis-a-Vis the Market

### A. Yamaha

Outboard motors, like snowmobiles and motorcycles, have two-cycle engines. Yamaha entered the U.S. snowmobile market in 1968 and by 1974 was marketing eleven or twelve models. Stipulation No. 2, #32. Even more dramatic is the 20% share of the U.S. motorcycle market captured by Yamaha between 1959, the year it entered the U.S. market, and 1974. Stipulation No. 2, #25, #27, #28. "Yamaha" brand motorcycles are sold through a network of franchised retail dealers developed in the U.S. by YIC.[12] I.D. 176. There is heavy advertising and substantial brand recognition in the United States for the "Yamaha" name. Stipulation No. 2, #24.

Yamaha has marketed outboard motors in Europe, Canada, South East Asia, Africa, the Middle East, Australia, and Central and South America. I.D. 173. Those motors were both water and air-cooled, with all component parts manufactured by Sanshin. I.D. 164. Yamaha was marketing motors of up to 25 h.p. in 1972, I.D. 175, with development plans in progress for higher horsepower engines.[13] Yamaha exhibited a prototype 55 h.p. motor at the 1972 Tokyo Boat Show with a jet prop exhaust system and marketed that motor in Japan in 1973. I.D. 170. Japanese ignition systems makers were able to provide a CDI system at that time. I.D. 117.[14] Thus there seems little doubt that the [11] technology was available to Yamaha to produce and sell in the United States—as it was then selling in other foreign markets—outboard motors suitable to compete effectively in this market.

Yamaha had made two unsuccessful attempts to enter the U.S. outboard motor market prior to the joint venture agreement. In 1968, Yamaha attempted to market air-cooled, single-cycle outboards ranging from 3.5 to 7.5 h.p. through its motorcycle dealers. Only about 900 motors were delivered to dealers. The Yamaha motors suffered a price disadvantage in certain parts of the U.S. due to freight costs, and were air-cooled single engines, while the U.S. preference was for water-cooled two-cylinder engines. CX 61, CX 68; I.D. 153–155. In 1971–72, Yamaha sold about 500 1.5 h.p. motors to Sears for marketing under the "Sears" brand. The Yamaha motors did not sell well at Sears because the quality and the price were too high for Sears' market. I.D. 156, 157.

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[11] In light of our disposition of the relevant product market question, it is unnecessary to nicely distinguish between the overall outboard motor industry and its low and high horsepower segments because we find that both are market categories in which anticompetitive effects can occur and, as will be demonstrated below (see note 27 p. 19 and following text), Yamaha was a potential and actual participant in each of those markets.

[12] Some of those dealers also market "Yamaha" brand snowmobiles. I.D. 179.

[13] In 1970, a 40 h.p. motor was in planning at Yamaha for "the export sector." CX 26–D.

[14] Many companies, including Japanese producers, offered CDI systems for sale in 1972. I.D. 115. Jet prop exhaust technology has been available from a long expired 1921 patent. I.D. 112. Even when the patent was in effect, it did not prevent the development of such systems, or "inventing around" the patent, by other producers. Tr. 401–406.

As noted, the U.S. market for outboard motors was the world's largest and was expanding. Yamaha's plans in 1971 called for the export of a two cycle 6 h.p. motor, featuring water-cooling, noise and water pollution controls, and CDI. The engine was scheduled for production in early 1973 as "the major model" for export into the U.S. CX 20–D; I.D. 161. Similar plans for motors to be exported into the U.S. were developed during 1971 for 10 h.p., 9.5 h.p., and 45 h.p. models. I.D. 162, 163.

### B. Brunswick

Brunswick, through its Mercury division, is the second largest seller of U.S. outboard motors accounting annually during the period 1971–73 for 20–22% of units sold. I.D. 78. Since at least 1971, Mercury has sold outboards in Europe, Canada, Australia and Japan as well as in the U.S. I.D. 5; CX 91–A–I; CX 101–A–C. In the U.S., Mercury's market share had remained relatively stable since 1965. I.D. 78, 128. Prior to entering the joint venture, Mercury decided to pursue production of a second line of outboards as a means of increasing its share. A second line would allow Mercury to enlist additional marine dealers in close proximity to those carrying the "Mercury" brand, thus expanding its dealer network, and, at the same time, explore marketing through other retail outlets. I.D. 129, 130; Brunswick Admissions No. 6, p. 6. "Mariner" brand engines were to become that second line. Brunswick Admissions, No. 5, p. 5.

Brunswick also hoped to use its second line as a means of forestalling perceived new entry:

> From both a "defensive" and "offensive" viewpoint, it is obvious that we (Mercury) need new, simple, low cost, low horsepower offerings. So, too, do [12] all of the other U.S. marine manufacturers. Everyone is vulnerable . . . It is not unlike the automotive industry and the price which they paid to foreign firms for abandoning the low price, compact market. We can expect a similar challenge—with or without us. Add to this the global opportunities for low horsepower engines resulting from less availability and higher cost for fuel, as well as different usage of the product. CX 8–A.

### C. The Joint Venture Agreement

A joint venture agreement was entered into to further the mutual aim of the Mercury Division of Brunswick and Yamaha to manufacture and sell a new line of outboards. CX 1–A, 1–B. The implementing device was capital participation by Brunswick in Sanshin, Yamaha's manufacturing subsidiary, through a subsidiary created for that purpose—Mariner. Yamaha and Mariner were each to hold 62,000 shares of Sanshin stock.

Sanshin's Board was to be composed of eleven directors: 6 approved by Yamaha (including the President), and 5 by Mariner. Certain transactions, like approval of Sanshin's budgets and expansion or discontinuance of Sanshin's product line, required approval by seven directors. The Operating Committee, appointed by the Board, was to be composed of two Yamaha-appointed and two Mariner-appointed directors.

The original Article 8 of the agreement provided for the formation of a joint sales company, with the sales company, Mariner and Yamaha to buy all of Sanshin's output.[15] It further provided that "Yamaha shall have the exclusive right to sell in Japan the product of Sanshin; and [Mariner] International shall have the exclusive right to sell in North America and Australia the products of Sanshin." CX 1–K. The joint sales company was to be the exclusive marketer of Sanshin products in the rest of the world. This article was amended in October, 1973, to eliminate the joint sales company, and to add New Zealand to Mariner's exclusive territories. As a result, Mariner brand, Mercury brand and Yamaha brand motors could all be marketed outside the designated exclusive territories by Yamaha and Mariner.[16] Under the terms of the agreement, Yamaha remained free to continue its practice of purchasing various motors for resale in Japan, [13] but it was barred from manufacturing "directly or indirectly" the same motors or those "substantially the same" as the motors "which are or will be manufactured by Sanshin." CX 1–M.

The agreement was to extend for one initial ten-year period with automatic three-year extensions unless notice was given of intention to terminate three years before the expiration of the original or any extended term. CX 1–R.

The joint venture agreement contained ancillary agreements between Mercury and Sanshin, between Yamaha and Sanshin, and between Yamaha and Mercury, regarding technical assistance. CX 1–Z–5–46. Under these agreements, Mercury and Yamaha granted non-exclusive, non-assignable licenses to each other and to Sanshin to use

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[15] Sanshin was to charge its three buyers "identical prices" Article 8.2, CX 1–K.

[16] However, Mariner had already agreed, in response to a Yamaha inquiry, that it "would not seek out Yamaha's dealers in the non-exclusive markets" and that "our basic philosophy must be to respect each other's position and to concentrate on making inroads against other outboard manufacturers." I.D. at 94; CX 77–C.

"Technical Information", defined to include patents, designs, technical knowledge, data, manuals, experience and the like, in the manufacture of motors in accordance with the joint venture agreement.[17] Such licenses were limited however in that each company could not use the information to "make, use or sell 'goods' which are competitive to the goods manufactured" by the other company.[18] CX 1-Z-30.

## IV. Commerce Requirement

Insofar as the conclusions reached in this opinion as to the legality of the Brunswick-Yamaha joint venture are grounded in Section 5 of the FTC Act there is no dispute that the jurisdictional "commerce" requirements of that statute are satisfied. Both respondents are admittedly engaged in commerce. I.D. 6, 24

To the extent that Section 7 of the Clayton Act is the operative statute, this issue becomes somewhat more complex. Section 7 states, in pertinent part, "[n]o corporation [14] engaged in commerce shall acquire . . . the stock . . . of another corporation engaged also in commerce." The sole acquisition involved in the transactions at issue is that by Brunswick (via Mariner) of the stock of Sanshin, the joint venture vehicle. For Section 7 to apply here, Sanshin as well as Brunswick must be "engaged in commerce."

The ALJ initially found that Sanshin "has never by itself engaged in commerce, within the meaning of the statute." (I.D. at 61) He reasoned, nevertheless, that Sanshin, because it was dominated by Yamaha and Brunswick (both engaged in commerce) prior to and after the formation of the joint venture, was engaged in commerce sufficient to meet the requirements of the statute.

We agree with the ALJ's conclusion that the commerce requirements of Section 7 are satisfied. We do so, however, for slightly different reasons. Based upon the ALJ's findings of fact, we conclude that Sanshin was itself "engaged in commerce" within the meaning of Section 7 of the Clayton Act without resort to any theory of vicarious participation through Yamaha and Brunswick.

"Commerce" for the purposes of the Clayton Act includes the foreign commerce of the United States.[19] A foreign corporation, by virtue of its exporting, or selling for import, its products to the United States, may be engaged in that foreign commerce.[20] A substantial portion of the outboard motors manufactured by Sanshin in Japan are sold to Mariner for import to the United States where they are distributed under the Mariner label. Were there no more to this arrangement than the transactions described above, the question of Sanshin's involvement in the foreign commerce of the United States would be a closer one. Certainly not every foreign corporation whose products are actually sold in this country through intermediaries is engaged in U.S. foreign commerce. This simple case is not, however, the one presented us by the Mariner-Sanshin arrangement. [15]

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[17] Like the joint venture agreement, this agreement was to remain in effect for ten years, with automatic three year renewals. *See, e.g.*, Article 11.1, CX 1-Z-13.

[18] Indeed, Mercury's promises go even further. Article 6.7 provides:

> Because of the difficulty of identifying when a product of Mercury incorporates part of the Yamaha Technical Information, in order to induce Yamaha to enter this Agreement in its capacity as licensor, and because it presently has no intention of producing such goods, Mercury agrees not to manufacture any product competitive to those manufactured by Yamaha at the date of execution of this agreement, notwithstanding the foregoing, Mercury may manufacture snowmobiles. CX 1-Z-39.

[19] Section 1 of the Clayton Act provides: " 'Commerce,' as used herein, means trade or commerce among the several States *and with foreign nations*" (emphasis supplied). *See generally* W. Fugate, Foreign Commerce and the Antitrust Laws (2d ed. 1973) 394.

We are not required to blind ourselves to the reality of the relationships between Mariner, Sanshin, Yamaha and Brunswick. Sanshin is not any Japanese corporation to whom Mariner has come as any purchaser. Sanshin exists for the purpose, made express in the joint venture agreement, of manufacturing motors for Mariner and Yamaha. Sanshin has no other customers for its motors. Sanshin's owners (Mariner and Yamaha), and perforce its management, knew and intended that a large part of Sanshin's production would be sold in the United States and such was in fact the case. There is evidence as well that Sanshin's product was designed and engineered with the American market in mind.

We do not challenge the reality of the separate corporate identities of Sanshin and Mariner or of the sales between them. But the interposition of a separate corporate entity as distribution arm and the formality of passage of title do not alter (though they may obscure) the fact that Sanshin's operations were intended to be and were, in fact, part of the flow of foreign commerce to the United States.[21]

## V. The Legal Standard

The joint venture is in some respects a "quasi-merger," where cooperation between formerly independent companies often acts to benefit and spur competition. The combined capital, assets, or know-how of two companies may facilitate entry into new markets and thereby enhance competition, or may create efficiencies or new productive capacity unachievable by either alone. As a result, relatively lenient merger standards usually apply to joint ventures,[22] rather than straight *per se* rules that may apply to cartel behavior.

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[20] *See, e.g., United States* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129 (N.D. Cal), *aff'd per curiam*, 385 U.S. 37 (1966). *See also* W. Fugate, *supra.*

[21] *See U.S.* v. *Aluminum Co. of America*, 148 F.2d 416, 443–4 (2d Cir. 1945); *see also Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 608–14 (9th Cir., 1977); *Deutsche Lufthansa Aktiengesellschaft* v. *C.A.B.*, 479 F.2d 912, 917 n.9 (D.C. Cir. 1973); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968).

[22] *See U.S.* v. *Penn-Olin*, 378 U.S. 158, 170–2 (1964).

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But "[t]he talisman of 'joint venture' cannot save an agreement otherwise inherently illegal."[23] A price-fixing scheme or other cartel-like behavior cannot be insulated from review simply by fixing the "joint venture" label to a device used to engage in behavior inherently pernicious to competition. Thus, a threshhold question is whether a transaction can properly be characterized a "joint venture." [16]

While the issue is a close one, we believe the Brunswick-Yamaha agreement is indeed a joint venture. There are factors which could point to a contrary answer. Sanshin already existed before the reallocation of its stock so no new productive capacity was created. Both joint venturers produced outboard motors, and between them, marketed all over the world before the venture was formed so the venture was not necessary to create a new competitor in otherwise unserved markets. However, each parent corporation made substantial contributions to the venture—essentially capital and some important technology from Brunswick and technology plus an existing manufacturing facility from Yamaha. A new product emerged combining these respective technologies which was designed especially to compete in the U.S. market. This combination of assets and the new product generated seems adequate to dispel any claim that the agreement was a "naked agreement" between the parties designed solely to eliminate existing or potential competition. *See* Bork, The Rule of Reason and the *Per Se* Concept: Price Fixing and Market Division, 75 Yale L.J. 373, 462–4 (1966); *cf. U.S.* v. *Topco Associates*, 405 U.S. 596 (1972).

Therefore, we approach this transaction with the kind of analysis usually applied to mergers under Section 7 of the Clayton Act.[24] The test is the effect of the joint venture on actual or potential competition in the joint venture market. Here, there are three possible theories according to which the Brunswick-Yamaha joint venture might have lessened competition: (1) as a result of the joint venture, Yamaha may have been eliminated as an actual potential entrant into the United States market, *see FTC* v. *Procter and Gamble Co.*, 386 U.S. 568 (1967); *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 809 (1974); (2) the joint venture may have substantially reduced existing competition between Yamaha, Mercury, and others in the United States market, *see U.S.* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); and (3) collateral agreements between Brunswick and Yamaha, purportedly ancillary to the joint venture, may have constituted an illegal limitation on competition between the two parent firms. Our review of the record leads us to believe that all three anticompetitive effects are present here. [17]

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[23] *Engine Specialities, Inc.* v. *Bombardier Ltd.* 605 F.2d 1, slip op. at 20 (1st Cir., July 25, 1979). *But see U.S.* v. *Minnesota Mining & Mfrg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

[24] "Overall, the same considerations apply to joint ventures as to mergers, for in each instance we are but expounding a national policy enunciated by Congress to preserve and promote a free competitive economy." *U.S.* v. *Penn-Olin*, *supra*, 378 U.S. at 170. *See also U.S.* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 178–9 (S.D.N.Y. 1960); *but see U.S.* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950).

Complaint counsel also argued that Section 7 was violated by the removal of Yamaha's "in-the-wings" effect on the U.S. outboard motor market. In our view, it is not necessary to address that theory here, in light of our discussion of *U.S.* v. *El Paso Natural Gas Co., supra*, pp. 24-5, *infra*. *El Paso* involves the elimination of actual competition from the market, and involves anticompetitive effects which are similar to but less ambiguous than those addressed by the perceived potential competition theory.

## A. Elimination of Yamaha as a Potential Entrant into the U.S. Outboard Motor Market

Our starting point is that Brunswick, through Mercury, already was a vigorous competitor in the U.S. market, selling a product that competitive with the planned product of the joint venture. If the effect of the Brunswick-Yamaha joint venture, operating as it does in the identical product and geographic markets as Brunswick, was to eliminate Yamaha as a most likely potential entrant into the U.S. outboard motor market, that could constitute a substantial lessening of competition under Section 7.[25] [18]

In that event, there would be no introduction of effective new competition into the U.S. market. It is on this key point that we part company with the reasoning of the ALJ. Mercury was already competing in the U.S. and, as we will discuss below, it could not be expected that Mariner would compete vigorously with its own parent.

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[25] In this respect, the case is significantly different from *United States* v. *Penn-Olin Co., supra*. There, the Court found that if either parent had entered the target market, that would have led the other parent of the joint venture to remain on the sidelines. If there was any lessening of competition in that situation, it necessarily would have been the loss of a sidelines procompetitive effect whereby the threat of entry by the second parent, eliminated by its participation in the joint venture, could have been a significant factor in affecting competitive decisions by existing sellers in the market. 378 U.S. at 173-4. By contrast, the theory to be explored here is that but for the joint venture, Brunswick would have continued to compete effectively on outboard motor sales in the U.S. market and Yamaha would have entered the market as a separate independent competitor. Arguably, that possibility was lost when Yamaha joined Brunswick in a joint venture. *Cf. U.S.* v. *Marine Bancorporation*, 418 U.S. 602 (1974); *U.S.* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *FTC* v. *Procter and Gamble Co.*, 386 U.S. 568 (1967).

While the Supreme Court expressly reserved decision on the validity of the actual potential competition doctrine, *U.S.* v. *Marine Bancorporation, supra*, 418 U.S. at 625, 639; *U.S.* v. *Falstaff Brewing, supra*, 410 U.S. at 587; *see also FTC* v. *Procter and Gamble, supra*, 386 U.S. at 575 ("If Procter had actually entered Clorox's dominant position would have been eroded and the concentration of the industry reduced"); the Commission, together with numerous federal courts, has endorsed the doctrine and we are confident that it eventually will receive the Supreme Court's approval. *See, e.g., U.S.* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1232 (C.D. Cal. 1973), *aff'd without opinion*, 418 U.S. 906 (1974); *U.S.* v. *Jos. Schlitz Brewing Co.*, 253 F. Supp. 129, 147 (N.D. Cal.), *aff'd without opinion*, 385 U.S. 37 (1966); *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67, 77-78 n.8 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974); *Ekco Products Co.* v. *FTC*, 347 F.2d 745, 752-53 (7th Cir. 1965); *U.S.* v. *Wilson Sporting Goods Co.*, 288 F. Supp. 543, 560 (N.D. Ill. 1968); *U.S.* v. *Standard Oil Co. (New Jersey)* 253 F. Supp. 196, 227 (D.N.J. 1966). The validity of the doctrine is also supported by eminent legal scholars. *See, e.g.*, Brodley, Potential Competition Mergers: A Structural Synthesis, 87 Yale L.J. 1, 45-52 (1977); Sullivan, *Handbook of the Law Of Antitrust*, 651-2 (1977).

Yet Yamaha, by joining in the joint venture, would as a practical matter no longer have any incentive to compete independently in the U.S. market.

Unlike *Penn-Olin*, a conclusion that the joint venture (operating through the Mariner brand) would not compete vigorously with Brunswick (operating through the Mercury brand)—at least not as vigorously as Yamaha would if it had entered as an independent competitor—can be reached as a matter of evidence rather than speculation.[26] Under the joint venture agreement, Brunswick had the right to appoint five of Sanshin's 11 directors and therefore obviously would have a significant say in Sanshin's decisions concerning price and output. Indeed, some key decisions required a Board majority of seven, and Brunswick in those matters would have an absolute veto. While Mariner was set up to market Sanshin output in the U.S. and Mercury was to remain separately incorporated and sell the Mercury brand, the same **[19]** individual (Reichert) served as Chairman of Mariner and President of Mercury. I.D. 130, 131. It was understood motors were not to be sold to existing Mercury dealers, CX 7-D; CX 8-C; and Mariner engines were designed to appeal to and were sold to the extent possible to "a different type or class of customer," CX 7-C. In short, the entire transaction was organized to minimize, to the extent possible, competition for dealers and customers between Mercury and Mariner, an arrangement which would not have pertained if Yamaha had entered the U.S. market independently. Thus the tradeoff of an independent Yamaha for a dependent and controlled Mariner would clearly constitute a possible lessening of competition—roughly equivalent to the acquisition by Brunswick, a 20 to 22% factor in a very highly concentrated market,[27] of a small but potentially vigorous new competitor.

Although Yamaha's sales in the U.S. during 1971–2 accounted for less than 1% of the relevant market, we do not think that sales figures accurately reflect the degree to which Yamaha would be a factor in that market. Given its financial resources, technological abilities, brand name recognition in the U.S. and quality of product, we believe actual sales in the year or two before entry seriously understate its competitive potential—if it can be demonstrated that it would have entered independently. *Cf. U.S.* v. *Aluminum Co. of America,* 377 U.S. 271 (1964); *Stanley Works* v. *FTC,* 469 F.2d 478 (2d Cir. 1972).

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[26] In *Penn-Olin* the Court noted: "If the parent companies are in competition, or might compete absent the joint venture, it may be *assumed* that neither will compete with the progeny in its line of commerce." (emphasis added) 378 U.S. at 169.

[27] We are assuming in this discussion that the market in which Yamaha would have competed is the overall outboard motor market and there the top four companies accounted for 94.9% of units sold and 96.0% of dollar volume (*supra*, page 4). If we were to view Yamaha as a potential entrant only into the low horsepower submarket, the top four companies would account for 98.1% of units sold and 94.4% of dollar volume. See *supra*, page 4. Either way, these concentration figures are extremely high and create a presumption that the addition of a new competitor would lead to significant deconcentration. *U.S.* v. *Marine Bancorporation*, *supra*, 418 U.S. at 631.

We turn next to the question whether Yamaha was a likely candidate to enter the U.S. outboard motor market, and the high or low horsepower submarkets, absent the joint venture. To establish that Yamaha was an actual potential entrant into the U.S., complaint counsel would have to show that Yamaha had the capacity, interest, and economic incentive to enter on its own. To establish a violation of Section 7, complaint counsel would also have to show that the target market was substantially concentrated and that independent entry offered a substantial likelihood of ultimately producing deconcentration or other significant pro-competitive effects. *U.S.* v. **[20]** *Marine Bancorporation, supra; U.S.* v. *Falstaff Brewing, supra.* There is also authority that the Government must show that entry was likely to occur in the reasonably near future. *See BOC International, Ltd.* v. *FTC,* 557 F.2d 24, 29 (2d Cir. 1977).

The record is unusually clear in this case showing that Yamaha would have entered the U.S. outboard motor market and also its two submarket components if the joint venture had been unavailable to it. The agreement with Brunswick was, to Yamaha, an alternative to direct entry. CX 79–E. The U.S. market is the world's largest and most sophisticated for outboard motors. It was the only developed market in the world in which Yamaha was not selling "Yamaha" outboards before the commencement of the venture and was practically the only significant part of the world in which Yamaha was not selling substantial numbers of outboards at all. I.D. 173.

Yamaha's participation in the joint venture is itself some proof of Yamaha's interest in the U.S. market, and its economic self-interest and the profit potential of this market made continued efforts to enter highly likely. An additional proof of interest is the fact that Yamaha attempted to enter the U.S. market on two separate occasions.[28] Most important, Yamaha had concrete plans to enter the market by 1973, abandoned only when the joint venture alternative arose. I.D. 159–163.

While capacity to achieve independent entry successfully is always somewhat speculative, the record here is again unusually clear that Yamaha had what it would take to sell outboard motors in the United States. There were no technological or other reasons why Yamaha could not have successfully carried out its entry plans. Yamaha was engaged, at the time it entered the joint venture, in a vigorous product development program, aimed at the kind of high horsepower motors for which the U.S. is the prime market. In 1969, Yamaha planned to have a 25 h.p. motor for sale in the U.S. by 1971. CX 24–D. It planned for export a 40 h.p. engine to go into production in October, 1971, I.D. 160, and in 1971 planned a line of motors from 2 to 45 h.p.—*i.e.*, covering substantially the full range of high and low horsepower units—for production in 1972 for export to Europe and contemplated future export to the U.S. I.D. 163.

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[28] *See* discussion p. 11, *supra.*

Yamaha exhibited a 25 h.p. motor it was marketing at the time and a prototype 55 h.p. motor at the 1972 and 1973 Tokyo Boat Shows. I.D. 166, 170. OMC, Brunswick's principal competitor, after it performed its own engineering evaluations, was so impressed with the performance of Yamaha's 25 h.p. motor that it took steps to upgrade the quality of its own 25 h.p. motor. I.D. 204. [21]

Yamaha's management was experienced in producing and marketing outboard motors. Moreover, it was adept at marketing in remote areas. Not only were its outboards marketed virtually worldwide, but Yamaha's history of sales successes far from Japan, including the sale of motorcycles and snowmobiles in the United States, show the feasibility of Yamaha selling, servicing, and establishing dealership systems for its motorized products in the U.S. While it is true that imports of outboard motors had not been a major market factor prior to 1972, we believe this record establishes that Yamaha was ready and able to commit itself to a full scale entry.

Respondent argues that in 1972 Yamaha could not have entered the U.S. market because it needed a "more complete line" to attract necessary dealers. RAB 36. There is considerable evidence in the record, however, that Yamaha was producing a broad enough range of motors to enter the U.S. market by Mercury's, OMC's, and Yamaha's own estimations.

Thus, in 1972, Yamaha produced and sold "Yamaha" engines up to 25 h.p. The 55 h.p. model exhibited by Yamaha in prototype in Tokyo in 1972 was being manufactured and marketed in Japan in 1973. I.D. 170. OMC tested this engine in 1974 and found it a "very good performer." Tr. 448. In 1974, Mercury's Vice-President for Marketing defined a "full-line producer" as one "who is offering a reasonable spread—I don't think he would have to have every model—a reasonable spread from 3 or 4 horsepower to 40 or 50 horsepower." Answer of Brunswick to Complaint Counsel's Initial Request, pp. 18–19.[29]

Yamaha was in substantial agreement with that assessment. Mr. Eguchi, a Managing Director of Yamaha and a member of Sanshin's Board of Directors testified that "from our opinion, with the addition of the 55 horsepower, that is about the time we can go into a developed market like the United States or Canada." Tr. 699. OMC agreed, and in its 1972 studies of the likely impact of foreign entry on U.S. market shares, assumed that entry would occur with a line up to and through 50 h.p. Tr. 446. Yamaha had such a line in place in prototype in 1972, and on the market in 1973.

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[29] When Mariner began selling the U.S., it included an 85 h.p. Mercury motor, not part of the joint venture output, but it had not been anticipated before or after entry that this motor was essential to entry. CX 8–D.

Respondents' "full-line" contention relates to its argument that "Yamaha had to develop a marine dealer network to enter the relevant United States market as a first-class competitor." RAB 23. We have already determined that the relevant market in this case is not just high horsepower [22] alone, as the ALJ found,[30] but is all outboards as well as submarkets of high and low horsepower engines. Even in the high horsepower submarket, though, insofar as the record sheds any light on what constitutes a "full line", Yamaha had it. In addition, as we discuss below, there were various other ways for Yamaha to compete in the United States short of establishing a wholly new outboard motor distribution system. But if that *were* necessary, there is every reason to believe Yamaha could have done it.

As noted, though it is clear that Yamaha was a likely entrant, the potential competition doctrine has meaning only as applied to concentrated markets. "[T]here would be no need for concern about the prospects of long-term deconcentration of a market which is in fact genuinely competitive."[31] The outboard motor market in the U.S. would benefit from aggressive new entry. Two firms control 85.0% of the overall market. The concentration ratios for both the high and low horsepower submarkets are also extremely high: 2:88.8% in the former, and 2:73.6% in the latter. Demand had been increasing, barriers to entry are significant, and profits are high. The number of firms in the high horsepower end of the market has declined over time, and while there has been some entry in the low end, it has been insignificant to the market leaders whose shares have remained constant. I.D. 87. Competition in the high horsepower end is primarily based on technical innovation. I.D. 105.[32] Overall, competition in the outboard motor industry in the U.S., including both low and high horsepower submarkets, would be invigorated with the entry of a strong new seller.

Deconcentration was all the more feasible because Yamaha could have entered the U.S. market in a variety of ways absent the joint venture. The record evidence shows Yamaha could have entered *de*

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[30] *See* discussion, p. 6, *supra*.

[31] *U.S. v. Marine Bancorporation*, 418 U.S. at 630-1.

[32] While the ALJ found the potential competition doctrine to be inapplicable to low horsepower outboard motor sales, we do not find the record evidence to support his statement that there is "intense price competition" in that segment, I.D. at 80, based as it was largely on the fact of sales of low horsepower engines by mass merchandisers and through private labelling as well as through marine dealers.

*novo*, sourcing its own line of motors from the Sanshin plant, through its U.S. sales company. Its motorcycle and snowmobile dealers could have [23] provided sales outlets and servicing.[33] Alternatively, Yamaha could have again gone to mass merchandisers, with its own brand or a private label. Marine dealers are almost universally on one-year contracts and could, of course, be wrested from competitors by an aggressive entrant, or convinced to carry a second line. Other merchandisers, including camping and sports supply stores, were potential distributors, already under consideration as sales outlets by U.S. outboard manufacturers. I.D. 130. By 1972, Yamaha was producing motors for sale of up to 25 h.p., enabling it *at that moment* to enter the U.S. at least through the low horsepower end of the market,[34] where substantial growth was occurring and substantial profits were available. CX 8–B. Thus deconcentration was feasible and could occur in the near future.[35]

Independent entry by Yamaha would certainly have had a significant procompetitive impact on this market. Yamaha's financial strength overall, and its brand familiarity to U.S. consumers would have made its motors immediately acceptable. Yamaha intended to be "one of the top class outboard manufacturers" in the U.S. (Eguchi, Tr. 696). To do so, Yamaha would have to take on the market leaders "head-on," and compete fiercely to win market share.

Thus, the structure of the relevant market in this case is of the kind the Supreme Court described as being able to benefit from the effects of potential competition. *U.S.* v. *Marine Bancorporation*, *supra*. Moreover, given Yamaha's expansion history, strength in a variety of world and U.S. markets, development of an advanced motor that an existing U.S. competitor regarded as a market threat, with overall technological and financial capabilities, and stated entry plans regarding the U.S. outboard motor market, we think the "essential preconditions"[36] set out in *Marine Bancorporation* [24] are fully met, and that Yamaha was an actual potential entrant into the U.S. Given these factors, plus the absence of evidence that other potential entrants were poised at the edge of the market, we agree with the ALJ's finding below, that Yamaha was the most likely potential entrant. I.D. at 84.

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[33] The ultimate viability of an outboard motor distribution system composed of motorcycle dealers is not clear, but it was an option Yamaha had available to it, and actively considered. I.D. 172, 180, 181 *but see* I.D. 188.

[34] By 1972, Yamaha, with 12%, was second only to OMC in the European market. I.D. 184.

[35] *Cf. BOC International, Ltd.* v. *FTC*, *supra*.

[36] *U.S.* v. *Marine Bancorporation*, *supra*, 418 U.S. at 633:

> Two essential preconditions must exist before it is possible to resolve whether the Government's theory, if proved, establishes a violation of §7. It must be determined: (i) that in fact NBC has available feasible means for entering the Spokane market other than by acquiring WTB; and (ii) that those means offer a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects.

### B. The Elimination of Yamaha's Present Procompetitive Effect: El Paso Natural Gas Co.

We think the Brunswick-Yamaha joint venture also cannot withstand antitrust scrutiny on the theory of *U.S.* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964). El Paso Natural Gas, with a preacquisition market share exceeding 50%, acquired Pacific Northwest, described by the court as "the only other important interstate pipeline west of the Rocky Mountains." Pacific Northwest was not only on the verge of entering the California natural gas market, but it had gone further and entered into negotiations and reached a tentative agreement for a supply contract with the largest industrial user of natural gas in Southern California. El Paso defeated that potential inroad by cutting its price and thereafter by acquiring Pacific Northwest. In *Marine Bancorporation*, the Supreme Court described El Paso as an "actual competition rather than a potential competition case," presumably because, as the Court wrote in *El Paso*, Pacific Northwest was "a substantial factor in the California market at the time it was acquired by El Paso."

Yamaha's position is not unlike that of the Pacific Northwest Pipeline Corp. in *El Paso*. Yamaha's ability to inspire the fear of competition in the hearts of U.S. manufacturers was already clear before Yamaha entered the joint venture. The U.S. manufacturers, including Brunswick,[37] were wary of foreign entry, particularly in the low horsepower end of the market. Brunswick didn't want to pay the "price" it felt U.S. automakers had "to foreign firms for abandoning the low price, compact market." CX 8–A. For its part, OMC took quick steps to modify its motors to keep them competitive with the new Yamaha 25 h.p. models in 1972, I.D. 204, a product design modification that was a current response to Yamaha's competition.

Yamaha had in fact sold outboards in the U.S. on two separate occasions, and it was looking to try again. "Unsuccessful bidders are no less competitors than the successful one."[38] Pacific Northwest had a present impact [25] on the actions of competitors in the relevant market. No less so did Yamaha—particularly with respect to technological changes responding to features displayed by Yamaha at the Tokyo boat show. We, too, "would have to wear blinders" not to see that Yamaha's efforts to enter the U.S., its successes in outboard markets elsewhere, its track record with other products in the U.S., and the probability that U.S. entry efforts would continue absent the joint venture "had a powerful influence" on the U.S. outboard motor manufacturers.[39]

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[37] *See* pp. 11–12, *supra*.

[38] 376 U.S. at 661.

## C. The Problem of Duration of the Joint Venture

As noted, the competitive value of independent entry into the U.S. by Yamaha would far exceed that of the dependent Mariner. Respondents' argument that the joint venture improved competition by introducing a new competitive force into the U.S. market therefore fails.

But respondents argue, and the ALJ agreed, that any anticompetitive effects of the transactions were overcome by the fact that the joint venture was terminable by either party at the end of its initial ten-year term (in 1982) by giving notice of termination three years in advance. The short life of the venture, the ALJ found, would "enhanc[e] the probability of an early unilateral entry by Yamaha into the market" sometime after 1982. I.D. at 92.

We find this reasoning to be unpersuasive and unsupported by the record. Even putting the best face on it, respondent would have us ignore a significant lessening of competition for the ten-year life of the venture in return for a wholly speculative increase in competition in the future. Respondents assure us of the likelihood of the venture's timely demise, but have adduced no reliable evidence that it will terminate, that Yamaha, as a result of the joint venture, would be strengthened as a potential competitor in the U.S. outboard market over what it was in 1972, or that Yamaha would in fact enter the U.S. market upon the venture's asserted termination in 1982. [26]

Even assuming respondents are correct, and Yamaha does act to terminate the agreement at its first opportunity, we find nothing to support the contention that Yamaha in 1982 would be a more likely entrant than it was in 1972.[40] For example, respondents continually stressed the lack of a dealership system as a barrier to Yamaha's entry into the U.S. in 1972, based on Yamaha's purported inability to supply a line of motors of the requisite depth. We found such a barrier to have been surmountable by Yamaha in 1972, both through the availability of other distribution systems and by Yamaha's manufacture of a sufficiently "full" line.[41] Even if respondents were correct and distribution problems were a significant barrier in 1972, they fail to explain, and we fail to see, how Yamaha will be in a better position vis-a-vis a dealership system in 1982.[42]

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[39] 376 U.S. at 659.

> Certainly the exclusion of what would promise to be an important independent competitor from the market may be sufficient, in itself, to support a finding of illegality under §7.

*FTC* v. *Procter & Gamble Co.*, *supra*, 386 U.S. at 589 (Harlan, J., concurring).

[40] *See* discussion, pp. 17–24, *supra*.

[41] *See* discussion, p. 21, *supra*.

The record does not support respondents' assertion. While a limited term joint venture in many circumstances will be more procompetitive than one with an indefinite term, here we have only self-serving assertions by *Brunswick* that *Yamaha* will act to terminate the venture. CX 108-0; CX 81-A; Tr. 792. Such "uncabined speculation"[43] cannot replace the reduced competition that occurred when Yamaha entered the joint venture.

### D. Collateral Restrictive Agreements

Certain reductions in competition between the parents are an inevitable consequence of a joint venture agreement. For example, it is to be expected that the joint venturers will put their venture-related business into the venture and "not compete with their progeny."[44] The Supreme Court has recognized[45] that these limited reductions in competition are often necessary to make a joint venture operate efficiently, and therefore may escape the strict application of *per se* rules. [27]

But such agreements, to be legitimately ancillary to a joint venture, must be limited to those inevitably arising out of dealings between partners, or necessary (and of no broader scope than necessary) to make the joint venture work.[46]

Three collateral agreements, associated with the joint venture formation, strike us as unreasonable agreements under Section 5.

First, the joint venture agreement between Brunswick and Yamaha resulted in a separate territorial limitation on Yamaha's ability to sell outboard motors. Under the agreement, Yamaha had the exclusive right to market the joint venture output in Japan, under the "Yamaha" label. Mercury was permitted to continue to sell "Mercury" motors in Japan, CX 1-K; CX 79-G, but "Mariner" brand engines could not be sold there. As to competition in the U.S., Yamaha was precluded from selling joint venture output in North America, leaving Mariner as the exclusive marketer of Sanshin-produced motors, and of course Mercury continued marketing "Mercury" motors in the U.S. Yamaha was also barred from "directly or indirectly manufactur[ing] engines the same or substantially the same as those which are or will be manufactured by Sanshin" and from "purchas[ing] for resale such marine engines from any third parties." CX 1–M. Yamaha had been buying and reselling outboards before entering the joint venture. CX 9–F. The joint venture agreement made specific provision for Yamaha to continue its purchases of motors for resale, but only for resale in Japan. CX 1–M.

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[42] Arguably, Yamaha would be in a worse position, having to compete with an additional "major" brand that didn't exist in 1972—Mariner—for dealers in 1982.

[43] *BOC International, Ltd.* v. *FTC*, *supra*, 557 F.2d at 29.

[44] *U.S.* v. *Penn-Olin*, *supra*, 378 U.S. at 168.

[45] *See, e.g., U.S.* v. *Penn-Olin*, *supra*, 378 U.S. at 169; *U.S.* v. *Timken Roller Bearing Co.*, 83 F. Supp. 284, 312 (N.D. Ohio 1949), *aff'd.* 341 U.S. 593 (1951).

[46] *U.S.* v. *Columbia Pictures Corp.*, *supra*, 189 F. Supp. at 178. *See also* Sullivan, *Handbook of the Law of Antitrust*, 219-224.

Prior to the joint venture, Yamaha had sold Sanshin-produced outboards in Japan, in competition with Mercury. CX 97–D; CX 111–B. It may be that an agreement whereby Yamaha had the exclusive right to market joint venture output in Japan and Brunswick had the exclusive right to market joint venture output in North America *might* have been reasonably necessary to the operation of the joint venture, but we need not reach that question. The agreements here did more. The agreements left Brunswick free to market outboards in competition with the joint venture worldwide (including Japan) through its Mercury brand, but Yamaha is left unable to manufacture or acquire non-joint venture outboards for sale anywhere but Japan. In effect, Yamaha is foreclosed by the agreement from continuing pre-existing competitive efforts in the U.S., a division of markets [28] outside the ambit of the joint venture.[47] It cannot be argued that such a limitation is necessary to protect the joint venture. Here the venture was in direct competition with Brunswick in the U.S., and with both parents in Europe. There is no plausible reason Yamaha should not have been free—as Brunswick was free in Japan—to sell non-Sanshin products in the U.S. In any event, no reasons were offered by respondents. Elimination of Yamaha as an actual and potential competitor in the U.S. outboard motor market, through the joint venture or otherwise, has no relation to the efficient functioning of Sanshin, and only serves the anticompetitive goal of insulating Brunswick from Yamaha in the U.S. It is, in the language of *Penn-Olin*, a "collateral restrictive agreement"—here, the elimination by agreement of an actual and potential competitor in the U.S. market.

Second, Brunswick and Yamaha independently agreed to limit competition between themselves in the "non-exclusive markets," principally Europe and South America. In 1973, the Senior Managing Director of Yamaha wrote to the President of Mercury to ask that:

> in establishing MMI [Mariner] sales network in the non-exclusive markets, you refrain from inviting Yamaha's existing distributors/dealers to join MMI's sales network. Also, in order to avoid struggling with each other for new distributors/dealers by competing

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[47] *U.S. v. American Smelting and Refining Co.*, 182 F. Supp. 834, 858-60 (S.D.N.Y. 1960). In that case, two competitors divided the national market in lead by the device of one granting an exclusive sales agency to the other. Prior to the agreement, both companies sold lead in the eastern U.S. The contract made one the exclusive sales agent for the other in the east. As a result, each company was relieved of the other's competition for sales in its part of the country. The arrangement was struck down on a *per se* theory as an illegal division of markets.

> in the terms and conditions each party offers, we would like to propose to have as frequent meetings as possible. CX 76-B.

Mercury's President (who was also Mariner's Chairman) agreed to cooperate.

> We agree that we will not seek out Yamaha's distributors or dealers in the non-exclusive market but, in some area, such as Europe with its great number of subdealers, we may find dealers handling not only Yamaha and International's [Mariner's] line but Mercury, OMC and other brands as well, in spite of our efforts to keep them separate. As a matter [29] of good business, we recognize that, although we have separate marketing organizations, our basic philosophy must be to respect each other's position and to concentrate on making inroads against other outboard manufacturers. CX 77-C.

This agreement goes beyond anything that might reasonably be required to further a legitimate objective of the joint venture. While we do not have to decide whether competition between Mariner and Yamaha (the two sellers of joint venture output) could be reduced by an agreement of this sort without violating the law, the agreement here was a direct limitation of competition between Brunswick and Yamaha, a subject outside the ambit of the joint venture. It is, on its face, a naked agreement between horizontal competitors to direct their competitive efforts away from each other—not to compete—in certain markets. Such an agreement can not be hidden "under the cloak of a joint venture."[48]

Third and finally, Brunswick and Yamaha entered into a Technical Assistance Agreement as part of the joint venture, granting reciprocal non-exclusive, non-assignable licenses in each other's technical information. CX 1-Z-29-46. The use of such information by either party was limited, however, to the manufacture, use and sale of goods which were not competitive to the goods manufactured by the granting party. CX 1-Z-30. As a result, Mercury, for example, could not manufacture motorcycles without raising questions as to the extent to which Mercury had used Yamaha's technical information. As if to underscore the conclusion that the intent of this agreement was to lessen competition between Brunswick and Yamaha, Mercury made an additional promise: that because it would be too difficult to tell when Yamaha technical information was in fact used in a Mercury product, Mercury agreed "not to manufacture any product competitive to those manufactured by Yamaha at the date of the execution" of the joint venture agreement except snowmobiles. CX 1-Z-39.

Respondents contend that these limitations are of narrow scope and of limited duration. RAB 44-5. The ALJ found them to be reasonably related to providing for the free flow of technical information regarding outboard motors, I.D. 97, and to have had no adverse effect on competition since Mercury no longer produced boats and had "no intention of manufacturing motorcycles." I.D. at 96.

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[48] *U.S. v. Timken Roller Bearing Co., supra* 83 F. Supp. at 213. *See also U.S. v. Penn-Olin, supra* 378 U.S. at 176.

We have already discussed respondents' claim that the joint venture was of limited duration.[49] We find that claim to be without support. But even if it were not, we would find this limitation of competition to be an **[30]** unreasonable extension of the scope of the joint venture, and not to be necessary to the efficient functioning of the joint venture. While outboard motor technology is related to motorcycle technology, this agreement would keep Mercury from marketing a wholly new type of motorcycle, scooter, motorized bicycle or anything that might conceivably be "a product competitive to" Yamaha's motorcycles.[50] This, in our view, impermissibly extends the product coverage of the agreement without any offsetting procompetitive effect on the joint venture itself.

## VI. Remedy

The object of the remedy in this case is to dissipate the anticompetitive effects of the joint venture insofar as it is possible to do so. While we cannot turn back the clock, we can seek to restore the market structure to that which existed at the time the venture was entered upon. Our goal is to restore Yamaha as an actual and a potential competitor, in the U.S. outboard motor market, in at least as vigorous a form as it was in 1972 and to enjoin the collateral restrictive agreements.

The ALJ, having decided the complaint should be dismissed, failed to make findings or recommendations regarding remedy. We find the record is inadequate at this time for us to formulate an appropriate remedy. Indeed, we lack sufficient information to be able to determine how effective a particular remedy might be.

The preferred relief when a violation of Section 7 has been found is divestiture. *U.S.* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316, 334 (1961). The joint venture between Brunswick and Yamaha must be terminated and the restrictive agreements enjoined. The record is not sufficient at this time for us to determine what, if any, related or additional relief may be required. The Mariner brand will revert to Brunswick should the joint venture simply be terminated and no other provisions adopted; distributors carrying that brand would naturally continue to look to Mariner for supply. We do not know, however, whether Mariner has access to manufacturing capacity aside from Sanshin to source its line. Nor do we [31] know how many dealers Mariner has, whether they are on one-year contracts, whether they may or do carry more than one line of motors, whether they could easily switch to Yamaha as a source of supply, and so on.

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[49] *See* discussion, pp. 25-6, *supra*.

[50] We need not reach the question of the extent to which a patent holder may limit his licensee's operations. Although patents are included in the joint venture's definition of "technical information," much non-patent information is included as well. None of the agreements in question distinguishes patents from other kinds of information or places different use restrictions on patents than on other information.

Achieving the principal goal of the remedy in this case—restoring Yamaha as an actual potential competitor—should not be accomplished at the expense of the Mariner dealers if that is avoidable. Nor can it be accomplished without a record on the basis of which we can assess the effect Mariner has had and continues to have on the structure of the U.S. market.

Therefore we feel that a strictly limited remand is in order. The sole question for the parties and the ALJ is the shape a final order should take. Such a narrow question should require neither extensive new evidence nor protracted hearings. Similarly, only limited briefing time should be necessary. An appropriate order is appended.

## ORDER REMANDING FOR ADDITIONAL EVIDENCE

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, has determined to sustain the appeal. The administrative law judge, having dismissed the complaint, did not address the question of remedy and the record on that question is deficient. Accordingly,

*It is ordered*, That this matter is remanded to the administrative law judge for the receipt of additional evidence solely on the question of formulating an appropriate remedy.

*It is further ordered*, That the administrative law judge shall certify to the Commission the record of any further proceedings in this matter together with his findings of fact and recommendations regarding order provisions within 120 days of the date of this order.

Commissioner Bailey did not participate.

## IN THE MATTER OF

## WESTINGHOUSE CREDIT CORPORATION

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION, EQUAL CREDIT OPPORTUNITY, AND FAIR CREDIT REPORTING ACTS

*Docket C-2999. Complaint, Nov. 13, 1979—Decision, Nov. 13, 1979*

**This consent order, among other things, requires a Pittsburgh, Pa. finance company to cease violating federal regulations and statutes relating to credit discrimination and credit reporting by requesting, recording and utilizing prohibited consumer credit information; considering the sex and marital status of applicants in evaluating creditworthiness; and failing to provide rejected applicants with reasons for denial of credit. Respondent is further required to establish educational programs for its consumer credit employees and retail dealers to explain the application of federal credit regulations to firm's credit practices.**

### *Appearances*

For the Commission: *Rena Steinzor* and *Jean Noonan.*

For the respondent: *John S. Koch* and *Luize E. Zubrow, Covington & Burling*, Wash., D.C.

### COMPLAINT

Pursuant to the provisions of the Equal Credit Opportunity Act, as amended, its implementing regulation, Regulation B, the Fair Credit Reporting Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by such Acts, the Federal Trade Commission, having reason to believe that Westinghouse Credit Corporation, a corporation, has violated the provisions of said Acts and regulation, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. For the purposes of this complaint the following definitions are applicable:

1. "Equal Credit Opportunity Act" shall refer to that version of the Act, 15 U.S.C. 1691, *et seq.*, in effect on and after March 23, 1977.
2. "Regulation B" shall refer to that version of Regulation B, 12 C.F.R. 202, in effect on or after March 23, 1977.
3. The terms "adverse action", "applicant", "application", "completed application for credit", "consumer credit", "contractually liable", "credit", "creditor", "extend credit and extension of credit",

"marital status", "open end credit", and "person" shall be defined as provided in Section 202.2 of Regulation B.

4. The terms "consumer report" and "consumer reporting agency" shall be defined as provided in Sections 603(d) and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681, 1681a(d) and 1681a(f) (1970).

5. The term "no file response" shall be defined as a response by a consumer reporting agency to a creditor's request for information on a given applicant which indicates that the credit bureau has no credit history information in its files under the name and other identifiers supplied.

6. The term "derogatory information" shall be defined as information in a credit report reflecting slowly paid or delinquent credit obligations, garnishment, attachment, foreclosure, repossession, suit or bankruptcy.

7. The term "retail dealer" shall refer to a separate business entity engaged in the sale of retail merchandise with which respondent has an agreement or a course of dealing whereby it purchases sales finance contracts from the dealer.

8. The term "respondent's consumer credit plans" shall refer to both respondent's continuous or open end credit plans and respondent's installment or closed end, credit plans.

PAR. 2. Respondent Westinghouse Credit Corporation ("WCC") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at Three Gateway Center, Pittsburgh, Pennsylvania. All references to "respondent" in the following paragraphs shall describe respondent Westinghouse Credit Corporation.

PAR. 3. Respondent is engaged in the financing of sales of consumer products in interstate commerce. In the regular course of its business, respondent finances the sale of its retail dealers' products by extending credit to the dealers' customers through its consumer credit plans. The Commission has jurisdiction of the subject matter of this proceeding and of respondent, as provided by Section 704(c) of the Equal Credit Opportunity Act, Section 621 of the Fair Credit Reporting Act, and the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*

## COUNT I

Alleging violations of the Equal Credit Opportunity Act, the allegations of Paragraphs One, Two and Three heretofore are incorporated by reference into Count I as if fully set forth verbatim.

PAR. 4. Respondent receives applications for its consumer credit plans through the retail dealers with whom it does business. The dealers typically interview their customers on the sales floor and record information provided by the customers on an application form provided by respondent. The form is then signed by one or more of the customers applying for credit. This form becomes the contract after it is accepted by the dealer and purchased by respondent. (A copy of the form is attached as Exhibit A* to this complaint and shall be hereinafter referred to as the "application form/contract".)

PAR. 5. After the application form/contract is completed by the dealer, but before the application is accepted by the dealer, the information contained on the form is communicated to the WCC branch office serving the dealer's accounts. Some but not all of the information recorded on the application form/contract is typically transcribed onto a second form denominated as the "Purchaser's Statement". The completed Purchaser's Statement form is subsequently used by respondent to determine whether to accept or reject the application for credit and whether respondent will subsequently purchase the credit contract. (A copy of the Purchaser's Statement form used by respondent is attached as Exhibit B to this complaint and shall be hereinafter referred to as the "Purchaser's Statement".)

PAR. 6. In a substantial number of instances during the period from March 23, 1977 to the present, respondent has copied and is copying information communicated by its dealers and by consumer reporting agencies that an applicant is "divorced", "widowed" or "single" onto the Purchaser's Statements employed to process applications for its consumer credit plans. Respondent is prohibited from using this information to evaluate applications for credit. Respondent retains the Purchaser's Statements containing this information in its records.

PAR. 7. By and through the practices described in Paragraphs Four, Five and Six, above, respondent has been and is violating Section 202.12 of Regulation B.

PAR. 8. In the course of investigating the creditworthiness of applicants for its consumer credit plans, during the period from March 23, 1977 to the present, respondent has received and is receiving information concerning credit applicants from consumer reporting agencies and persons other than consumer reporting agencies.

PAR. 9. In a substantial number of instances during the period from March 23, 1977 to the present, respondent has circled, underlined or otherwise emphasized through handwritten notations, items of information concerning the marital status of its credit applicants which were contained in reports from consumer reporting agencies and persons other than consumer reporting agencies. These items of information include but are not limited to divorce suits and judgments in which applicants were parties and the names, employment and credit history of former spouses.

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* Only that portion of Exhibit A pertinent to the discussion herein is reproduced.

Par. 10. In a substantial number of instances during the period from March 23, 1977 to the present, respondent has reviewed and is reviewing Purchaser's Statements containing information that applicants are "divorced", "widowed", or "single" for the purpose of determining applicants' eligibility for its consumer credit plans.

Par. 11. In a substantial number of instances during the period from March 23, 1977 to the present, respondent has reviewed and is reviewing consumer credit reports containing notations emphasizing marital status information for the purpose of determining applicants' eligibility for its consumer credit plans.

Par. 12. In a substantial number of instances during the period from March 23, 1977 to the present, respondent has considered and is considering the information described in Paragraphs Nine, Ten, and Eleven, above, when evaluating applications for its consumer credit plans.

Par. 13. By and through the practices described in Paragraphs Four, Five, Six, Eight, Nine, Ten, Eleven, and Twelve, above, respondent has been and is violating Sections 202.4 and 202.6(b)(1) of Regulation B.

Par. 14. In a substantial number of instances during the period from March 23, 1977 to the present, respondent requested a consumer credit report about an applicant's spouse when respondent did not know whether the applicant was relying on the spouse's income to repay the credit requested or whether the spouse intended to become contractually liable for the credit transaction. In each such instance, the applicant's spouse would not be permitted to use the account, the applicant did not reside in a community property state or rely on property located in such a state as a basis for repayment, and the applicant did not rely on alimony, child support, or separate maintenance payments from a spouse or former spouse as a basis for repayment of the credit requested.

Par. 15. In a substantial number of instances during the period from March 23, 1977 to the present, respondent requested a consumer credit report about an applicant's deceased spouse.

Par. 16. By and through the practices described in Paragraphs Fourteen and Fifteen, above, during the period from March 23, 1977 to the present, respondent has been and is violating Section 202.5(c) of Regulation B.

Par. 17. During the period from March 23, 1977 through and including November 30, 1977, respondent used a standard form letter

("WC 483") to notify consumers of action taken on their credit applications. During the period from December 1, 1977 to the present, respondent has used and is using a revised version of standard form letter ("Revised WC 483") to inform consumers of adverse action taken on their credit applications. (A copy of standard form letter WC 483 is attached as Exhibit C to this complaint. A copy of standard form letter "Revised WC 483" is attached as Exhibit D to this complaint.)

PAR. 18. In a substantial number of instances, during the period from March 23, 1977 to the present, respondent has mailed and is mailing standard form letters WC 483 and Revised WC 483 to consumers more than 30 days after receiving their completed applications for credit.

PAR. 19. In a substantial number of instances, during the period from March 23, 1977 to the present, respondent has failed and is failing to mail standard form letters WC 483 or Revised WC 483 to consumers whose completed applications for credit had been denied.

PAR. 20. By and through the practices described in Paragraphs Seventeen, Eighteen, and Nineteen, above, during the period from March 23, 1977 to the present, respondent has been and is violating Section 202.9(a)(1) of Regulation B.

PAR. 21. Standard form letter WC 483, used by respondent during the period from March 23, 1977 through and including November 30, 1977 to communicate notifications of adverse action to rejected credit applicants, contained five alternative statements describing the credit decision reached by respondent.

The first four statements explained that some type of information from a consumer reporting agency or a person other than a consumer reporting agency had played a role in respondent's decision to deny the application for credit. The fifth statement explained that the adverse decision was based on respondent's "internal standards for granting credit". The letter informed consumers that they had a right to request a statement of reasons within 60 days *"if box five is checked"* (emphasis added) but did not advise consumers that they had a right to request a statement of reasons within 60 days if boxes one, two, three or four were checked.

PAR. 22. During the period from March 23, 1977 through and including November 30, 1977, respondent completed standard form letter WC 483 by checking the single box or combination of boxes which described the credit decision made on any individual application.

PAR. 23. During the period from March 23, 1977 through and including November 30, 1977, respondent regularly used consumer credit reports and information from a person other than a consumer reporting agency to evaluate applications for its consumer credit plans. In a substantial number of instances during that period, respondent sent versions of standard form letter WC 483 to consumers in which one or more of the boxes numbered 1 through 4 had been checked and box 5 had been left unchecked. A consumer receiving a version of form letter WC 483 which was completed by checking one or more of the boxes numbered 1 through 4 was not given either a statement of the specific reasons for the action taken or a disclosure of the applicant's right to a statement of reasons within 30 days after receipt by the creditor of a request made within sixty days of notification.

PAR. 24. In a substantial number of instances during the period from March 23, 1977 to the present, respondent failed to respond to requests by rejected applicants for a statement of reasons for adverse action made within sixty (60) days after respondent furnished a notification of adverse action to the rejected applicants.

PAR. 25. By and through the practices described in Paragraphs Twenty-one, Twenty-two, Twenty-three, and Twenty-four, above, during the period from March 23, 1977 through and including November 30, 1977, respondent violated Section 202.9(a)(2) of Regulation B.

PAR. 26. In a substantial number of instances during the period from March 23, 1977 to the present, respondent has failed to retain the originals of notifications of actions taken, or a copy thereof, and has failed to institute a record retention system whereby it could regenerate the precise text of these documents upon request.

PAR. 27. By and through the practices described in Paragraph Twenty-six, above, respondent has been and is violating Section 202.12 of Regulation B.

PAR. 28. In the ordinary course of business, respondent and its retail dealers regularly participate in the decision of whether or not to extend credit. In a substantial number of instances during the period from March 23, 1977 to the present, where respondent has rejected applications for credit, its retail dealers have failed to retain for twenty-five months the application form/contracts they received, or a copy thereof. In a substantial number of such instances, respondent knew or had reasonable notice before its involvement with the credit transactions that the retail dealers failed to retain applications in violation of Section 202.12 of Regulation B. Respondent is therefore a creditor regarding each such instance, as provided in Section 202.2(1) of Regulation B.

PAR. 29. By and through the practices described in Paragraph Twenty-eight, above, during the period from March 23, 1977 to the present, respondent has been and is violating Section 202.12 of Regulation B.

PAR. 30. Pursuant to Section 702(g) of the Equal Credit Opportunity

Act, respondent's failure to comply with Regulation B as described in Paragraphs Seven, Thirteen, Sixteen, Twenty, Twenty-five, Twenty-seven, and Twenty-nine, above, constitute violations of that Act, and pursuant to Section 704(c) thereof, respondent has violated Section 5(a)(1) of the Federal Trade Commission Act.

## COUNT II

Alleging violations of the Fair Credit Reporting Act, the allegations of Paragraphs One, Two and Three heretofore are incorporated by reference into Count II as if fully set forth verbatim.

PAR. 31. Respondent, in the ordinary course and conduct of its business, obtains consumer reports from consumer reporting agencies. Respondent uses in whole or in part information contained in these reports to deny applications for its consumer credit plans. In a substantial number of instances subsequent to April 24, 1971, respondent has denied consumers credit for personal, family, or household purposes based in whole or in part on information contained in a consumer report without so advising the consumer and without supplying the name and address of the consumer reporting agency making the report. In certain such instances the applications were denied based in whole or in part on adverse or derogatory information contained in a consumer report. In other such instances, the applications were denied based in whole or in part on other than derogatory information contained in a consumer report, on an absence of sufficient favorable information contained in a consumer report, or on a "no file" response from the consumer reporting agency.

PAR. 32. In a substantial number of instances, subsequent to April 24, 1971, respondent has furnished notices which omitted the address of the consumer reporting agency supplying a consumer credit report on the applicant when the report was used in whole or in part to deny the application for credit.

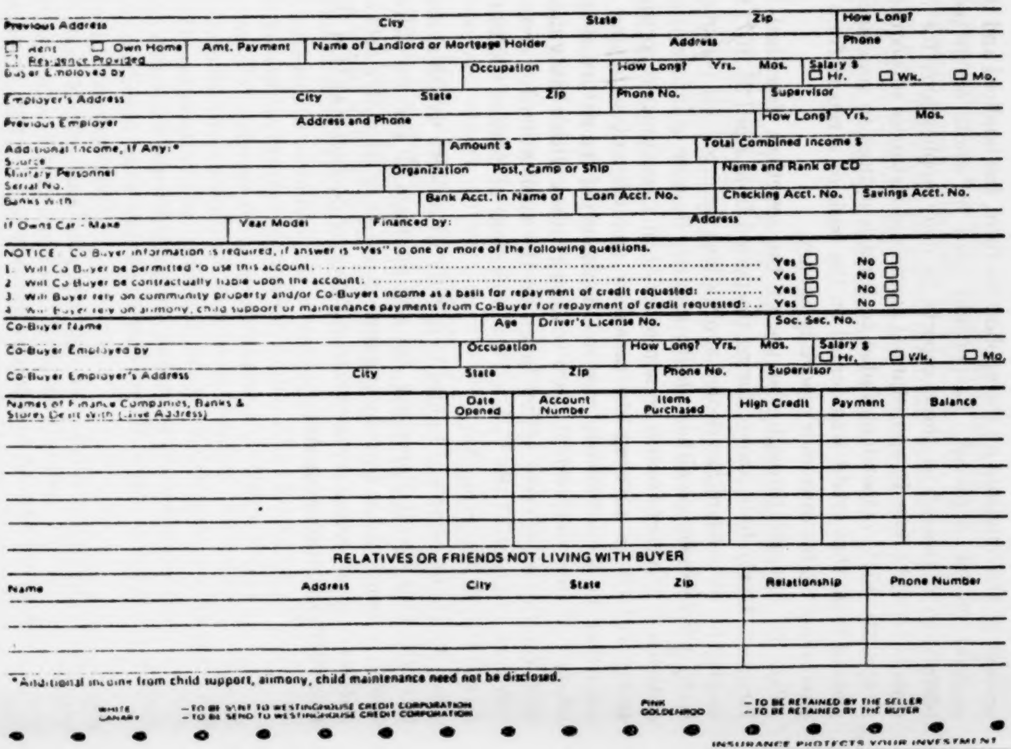
PAR. 33. By and through the use of the practices described in Paragraphs Thirty-one and Thirty-two above, during the period of April 25, 1971 to the present, respondent has denied applications for credit for personal, family or household use either wholly or partly because of information contained in a consumer report without so advising the consumer and without supplying the name and address of the consumer reporting agency making the report. Therefore, respondent has violated and is violating the provisions of Section 615(a) of the Fair Credit Reporting Act.

PAR. 34. Respondent, in the ordinary course and conduct of its business, obtains reports from persons other than consumer reporting agencies. Such persons include, but are not limited to, credit references provided by the applicant on the application form, the landlord and the employer of the applicant. Respondent uses in whole or in part information contained in these reports to deny applications for its consumer credit plans. In a substantial number of instances subsequent to April 24, 1971, respondent failed to furnish notices to consumers advising them that credit was denied on the basis of a report from a person other than a consumer reporting agency.

PAR. 35. By and through the use of the practices described in Paragraph Thirty-four, above, during the period from April 25, 1971 to the present, respondent has denied applications for credit for personal, family or household use either wholly or partly because of information contained in a report from a person other than a consumer reporting agency without so advising the consumer and without supplying a notice that the consumer may receive a disclosure of the nature of the information from respondent upon written request within sixty days after learning of adverse action taken on the application for credit. Therefore, respondent has violated the provisions of Section 615(b) of the Fair Credit Reporting Act.

PAR. 36. By its aforesaid failure to comply with Sections 615(a) and (b) of the Fair Credit Reporting Act and pursuant to Section 621(a) thereof, respondent has thereby engaged in unfair or deceptive acts or practices in or effecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

EXHIBIT A



Previous Address | City | State | Zip | How Long?

☐ Rent ☐ Own Home ☐ Residence Provided | Amt. Payment | Name of Landlord or Mortgage Holder | Address | Phone

Buyer Employed by | Occupation | How Long? Yrs. Mos. | Salary $ ☐ Hr. ☐ Wk. ☐ Mo.

Employer's Address | City | State | Zip | Phone No. | Supervisor

Previous Employer | Address and Phone | How Long? Yrs. Mos.

Additional Income, If Any:* Source | Amount $ | Total Combined Income $

Military Personnel Serial No. | Organization | Post, Camp or Ship | Name and Rank of CO

Banks with | Bank Acct. in Name of | Loan Acct. No. | Checking Acct. No. | Savings Acct. No.

If Owns Car - Make | Year Model | Financed by: | Address

NOTICE: Co-Buyer information is required, if answer is "Yes" to one or more of the following questions.

1. Will Co-Buyer be permitted to use this account. .......... Yes ☐ No ☐
2. Will Co-Buyer be contractually liable upon the account. .......... Yes ☐ No ☐
3. Will Buyer rely on community property and/or Co-Buyers income as a basis for repayment of credit requested: .......... Yes ☐ No ☐
4. Will Buyer rely on alimony, child support or maintenance payments from Co-Buyer for repayment of credit requested: ... Yes ☐ No ☐

Co-Buyer Name | Age | Driver's License No. | Soc. Sec. No.

Co-Buyer Employed by | Occupation | How Long? Yrs. Mos. | Salary $ ☐ Hr. ☐ Wk. ☐ Mo.

Co-Buyer Employer's Address | City | State | Zip | Phone No. | Supervisor

| Names of Finance Companies, Banks & Stores Dealt With (Give Address) | Date Opened | Account Number | Items Purchased | High Credit | Payment | Balance |
|---|---|---|---|---|---|---|
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |

RELATIVES OR FRIENDS NOT LIVING WITH BUYER

| Name | Address | City | State | Zip | Relationship | Phone Number |
|---|---|---|---|---|---|---|
| | | | | | | |
| | | | | | | |
| | | | | | | |

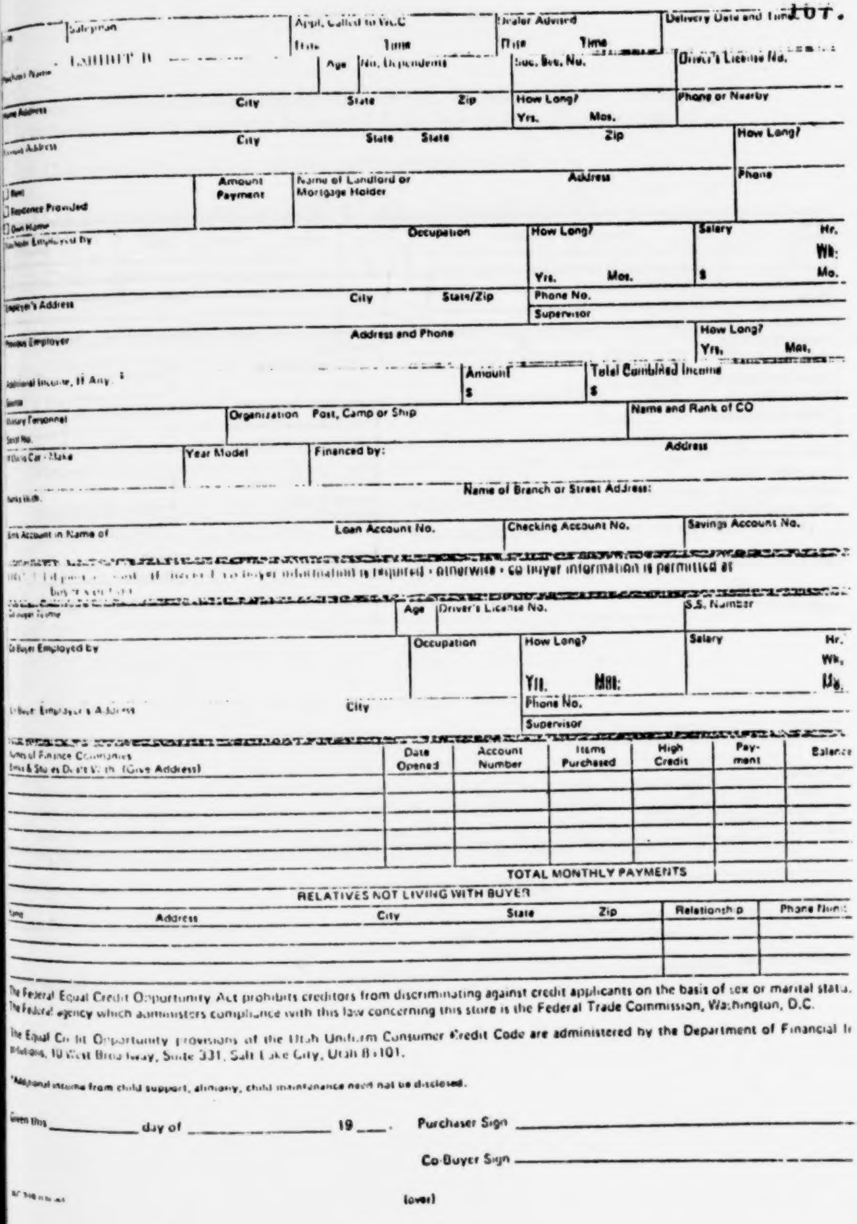
*Additional income from child support, alimony, child maintenance need not be disclosed.

WHITE — TO BE SENT TO WESTINGHOUSE CREDIT CORPORATION
CANARY — TO BE SEND TO WESTINGHOUSE CREDIT CORPORATION
PINK — TO BE RETAINED BY THE SELLER
GOLDENROD — TO BE RETAINED BY THE BUYER

INSURANCE PROTECTS YOUR INVESTMENT

## Complaint

1280



107.

Salesman

Appt. Called to W.C.C. Date Time

Dealer Advised Date Time

Delivery Date and Time

Purchaser Name LAMBERT B

Age

No. Dependents

Soc. Sec. No.

Driver's License No.

Home Address City State Zip

How Long? Yrs. Mos.

Phone or Nearby

Previous Address City State State Zip

How Long?

Phone

☐ Rent

☐ Residence Provided

☐ Own Home

Amount Payment

Name of Landlord or Mortgage Holder

Address

Purchaser Employed By

Occupation

How Long? Yrs. Mos.

Salary $ Hr. Wk. Mo.

Employer's Address City State/Zip

Phone No.

Supervisor

Previous Employer

Address and Phone

How Long? Yrs. Mos.

Additional Income, If Any *

Source

Amount $

Total Combined Income $

Military Personnel

Serial No.

Organization Post, Camp or Ship

Name and Rank of CO

Present Car - Make

Year Model

Financed by:

Address

Banks With:

Name of Branch or Street Address:

Bank Account in Name of

Loan Account No.

Checking Account No.

Savings Account No.

[illegible] co buyer information is required - otherwise - co buyer information is permitted at buyer's option

Co-Buyer Name

Age

Driver's License No.

S.S. Number

Co-Buyer Employed by

Occupation

How Long? Yrs. Mos.

Salary Hr. Wk. Mo.

Co-Buyer Employer's Address City

Phone No.

Supervisor

| Name of Finance Companies Banks & Stores Dealt With (Give Address) | Date Opened | Account Number | Items Purchased | High Credit | Payment | Balance |
|---|---|---|---|---|---|---|
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | TOTAL MONTHLY PAYMENTS | | | |

RELATIVES NOT LIVING WITH BUYER

| Name | Address | City | State | Zip | Relationship | Phone Number |
|---|---|---|---|---|---|---|
| | | | | | | |
| | | | | | | |
| | | | | | | |

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of sex or marital status. The Federal agency which administers compliance with this law concerning this store is the Federal Trade Commission, Washington, D.C.

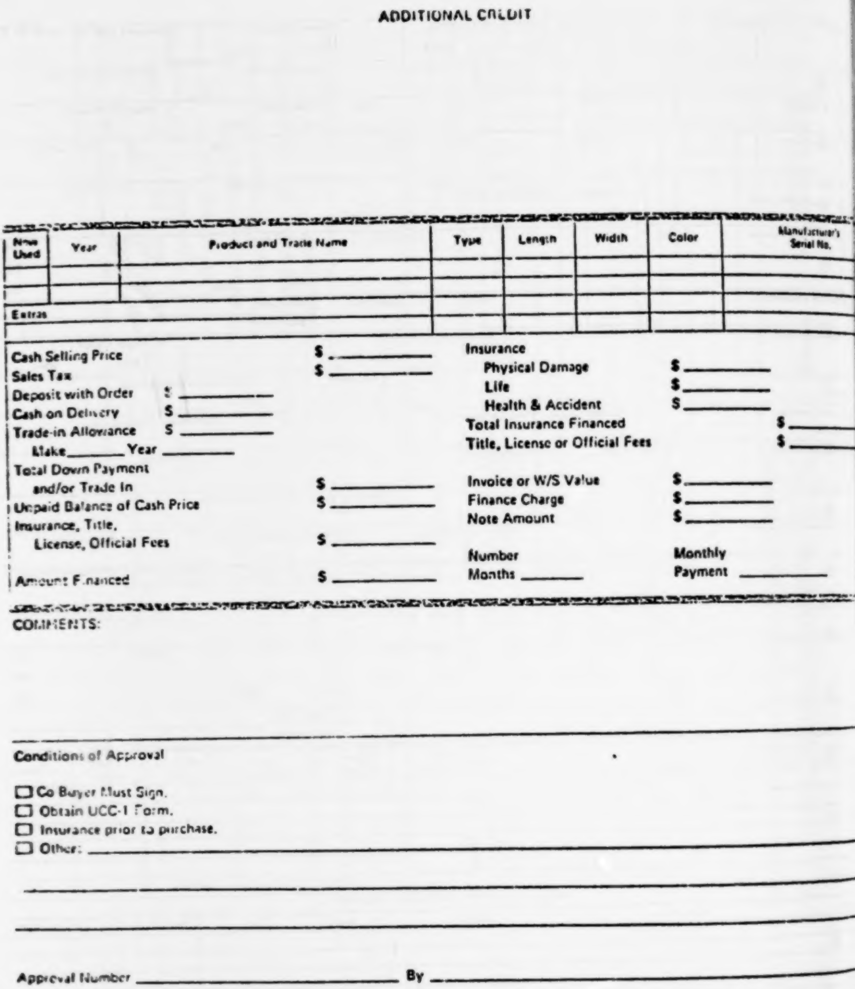
The Equal Credit Opportunity provisions of the Utah Uniform Consumer Credit Code are administered by the Department of Financial Institutions, 10 West Broadway, Suite 331, Salt Lake City, Utah 84101.

*Additional income from child support, alimony, child maintenance need not be disclosed.

Given this ____________ day of __________________ 19 ___. Purchaser Sign ______________________________

Co-Buyer Sign ______________________________

(over)



ADDITIONAL CREDIT

| New Used | Year | Product and Trade Name | Type | Length | Width | Color | Manufacturer's Serial No. |
|---|---|---|---|---|---|---|---|
| | | | | | | | |
| | | | | | | | |
| Extras | | | | | | | |

Cash Selling Price $ ____________

Sales Tax $ ____________

Deposit with Order $ ____________

Cash on Delivery $ ____________

Trade-in Allowance $ ____________

Make ________ Year ________

Total Down Payment and/or Trade In $ ____________

Unpaid Balance of Cash Price $ ____________

Insurance, Title, License, Official Fees $ ____________

Amount Financed $ ____________

Insurance

Physical Damage $ ____________

Life $ ____________

Health & Accident $ ____________

Total Insurance Financed $ ____________

Title, License or Official Fees $ ____________

Invoice or W/S Value $ ____________

Finance Charge $ ____________

Note Amount $ ____________

Number Months ________

Monthly Payment ____________

COMMENTS:

Conditions of Approval

☐ Co Buyer Must Sign.

☐ Obtain UCC-1 Form.

☐ Insurance prior to purchase.

☐ Other: ____________________________

Approval Number ____________________ By ____________________

1280

**Date:**

Thank you for your recent application for credit privileges. We regret that we have declined your application at this time, based upon the following factors (appropriate box(es) is (are) checked):

1. ☐ Information contained in a consumer credit report obtained from:

2. ☐ A consumer credit report containing insufficient information for our needs.
It was obtained from:

3. ☐ The consumer reporting agency contacted was unable to supply any information on you.
That agency was:

4. ☐ Information received from a person other than a consumer reporting agency. You have the right to make a written request of us within 60 days for disclosure of the nature of this information.

5. ☐ Our decision was based upon our own internal standards for granting credit.

If either of the first two boxes above is checked, you have the right to full disclosure of the nature and substance of all information on you (except medical) in the agency's files, at no charge to you.

If box 5 is checked, you have 60 days from the date of this letter within which to request a statement of reasons for which credit has been declined. Such statement may be obtained from our office at:

______________________________________

______________________________________

Telephone Number ______________________________

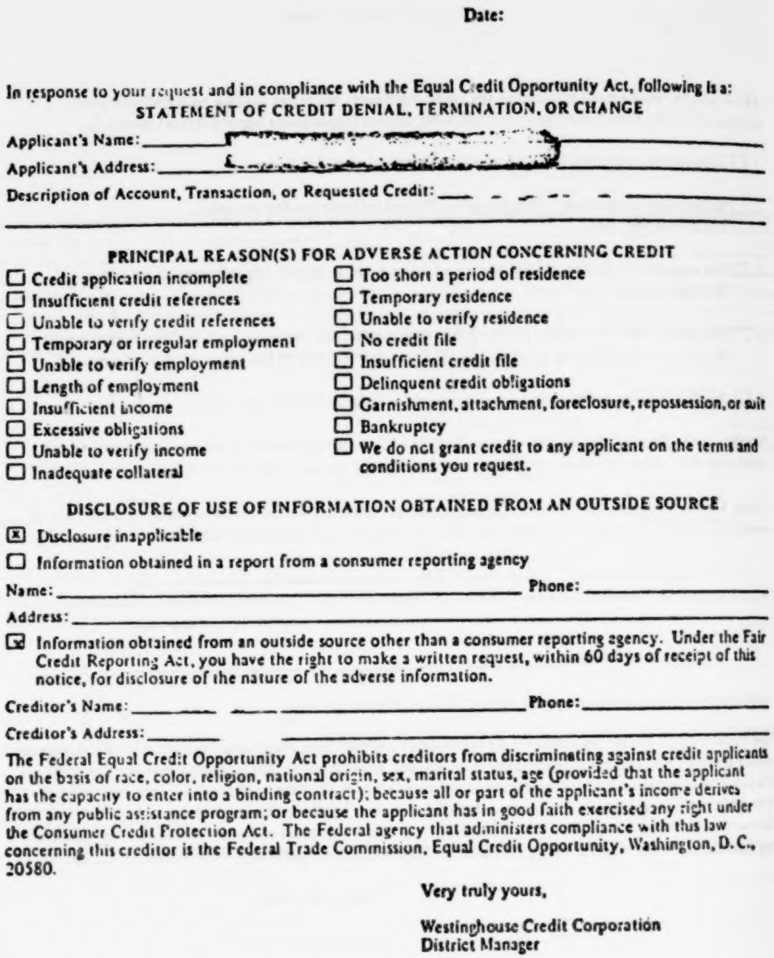
A statement will be furnished to you within 30 days of your request.

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided that the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this creditor is the Federal Trade Commission, Equal Credit Opportunity, Washington, D. C., 20580.

Yours very truly,

Westinghouse Credit Corporation
District Manager

WC 483 (3 77)



Date:

In response to your request and in compliance with the Equal Credit Opportunity Act, following is a:

STATEMENT OF CREDIT DENIAL, TERMINATION, OR CHANGE

Applicant's Name: [redacted]

Applicant's Address:

Description of Account, Transaction, or Requested Credit:

PRINCIPAL REASON(S) FOR ADVERSE ACTION CONCERNING CREDIT

- ☐ Credit application incomplete
- ☐ Insufficient credit references
- ☐ Unable to verify credit references
- ☐ Temporary or irregular employment
- ☐ Unable to verify employment
- ☐ Length of employment
- ☐ Insufficient income
- ☐ Excessive obligations
- ☐ Unable to verify income
- ☐ Inadequate collateral
- ☐ Too short a period of residence
- ☐ Temporary residence
- ☐ Unable to verify residence
- ☐ No credit file
- ☐ Insufficient credit file
- ☐ Delinquent credit obligations
- ☐ Garnishment, attachment, foreclosure, repossession, or suit
- ☐ Bankruptcy
- ☐ We do not grant credit to any applicant on the terms and conditions you request.

DISCLOSURE OF USE OF INFORMATION OBTAINED FROM AN OUTSIDE SOURCE

☒ Disclosure inapplicable

☐ Information obtained in a report from a consumer reporting agency

Name: Phone:

Address:

☑ Information obtained from an outside source other than a consumer reporting agency. Under the Fair Credit Reporting Act, you have the right to make a written request, within 60 days of receipt of this notice, for disclosure of the nature of the adverse information.

Creditor's Name: Phone:

Creditor's Address:

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided that the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this creditor is the Federal Trade Commission, Equal Credit Opportunity, Washington, D.C., 20580.

Very truly yours,

Westinghouse Credit Corporation
District Manager

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, the Equal Credit Opportunity Act, and the Fair Credit Reporting Act· and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Westinghouse Credit Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Three Gateway Center, in the City of Pittsburgh, Commonwealth of Pennsylvania.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

## ORDER

*Definitions:* For the purpose of this order the following definitions are applicable:

(a) "Equal Credit Opportunity Act" shall refer to that version of the Act, 15 U.S.C. 1691 *et seq.*, now in effect or as it may be amended. (A copy of the Act to which the citations in this order refer is attached as Appendix A* hereto.)

(b) "Regulation B" shall refer to that version of Regulation B, 12 C.F.R. 202, now in effect or as it may be amended. (A copy of the Regulation to which the citations in this order refer is attached as Appendix A* hereto.)

(c) "Fair Credit Reporting Act" shall refer to that version of the Act, 15 U.S.C. 1681 *et seq.*, now in effect or as it may be amended. (A copy of the Act to which the citations in this order refer is attached as Appendix A* hereto.)

(d) The terms "adverse action," "applicant," "application," "completed application for credit," "contractually liable," "consumer credit," "credit," "creditor," "credit transaction," "extend credit and extension of credit," "inadvertent error," "marital status" and "person" shall be defined as provided by Section 202.2 of Regulation B.

(e) The term "regional manager" shall refer to each employee of the respondent who has immediate supervisory responsibility for respondent's "district managers."

(f) The term "district manager" shall refer to each employee of the respondent who is the head of each office where respondent receives and evaluates applications for consumer credit.

(g) The terms "consumer report" and "consumer reporting agency" shall be defined as provided in Section 603(d) and 603(f) respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(d) and 1681a(f)(1970).

(h) The term "retail dealer" shall refer to a separate business entity engaged in the sale of retail merchandise with which respondent has an agreement or a course of dealing whereby it purchases consumer sales finance contracts from the dealer.

(i) The term "dealer audit program" shall refer to respondent's current and usual procedure of reviewing the business practices of retail dealers through communications by mail, telephone or a visit with a retail dealer or with a consumer who has financed a purchase from a retail dealer.

## PART I

*It is ordered*, That respondent Westinghouse Credit Corporation, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with every application for consumer credit do forthwith cease and desist from:

1. Retaining in its files information, the use of which is prohibited

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* For reasons of economy, not reproduced herein

by the Equal Credit Opportunity Act or Regulation B in the evaluation of a credit application, and retention of which is not expressly permitted by Section 202.12(a) of Regulation b

2. Recording the marital status of an applicant in terms other than "married," "unmarried," or "separated" on any document used to evaluate any application for consumer credit.

3. Placing any notation for the purpose of emphasizing prohibited marital status information on a consumer credit report used to evaluate any application for consumer credit.

4. Taking sex or marital status into account in the evaluation of any applicant's creditworthiness in connection with an application for consumer credit.

5. Requesting or considering information concerning the spouse (or former spouse under (e) below) of an applicant for consumer credit unless:

(a) The spouse will be permitted to use the account; or

(b) The spouse will be contractually liable upon the account; or

(c) The applicant is relying on the spouse's income as a basis for repayment of the credit requested; or

(d) The applicant resides in a community property state or property upon which an applicant is relying as a basis for repayment of the credit requested is located in such a state; or

(e) The applicant is relying on alimony, child support or separate maintenance payments from a spouse or former spouse as a basis of repayment of the credit requested.

6. Extending consumer credit or purchasing consumer credit contracts unless respondent provides each applicant against whom adverse action is taken upon an application for consumer credit with a written notification of the action taken on the application within 30 days of respondent's receipt of a completed application for consumer credit as required by Section 202.9(a)(1) of Regulation B. Within thirty (30) days after service of this order, each notification of adverse action shall be provided by sending by first class mail a notice in the form and language shown in Appendix B which has been properly completed to indicate the principal, specific reasons for adverse action on each consumer credit application.

(a) *Provided*, That where an application for consumer credit was denied by respondent after October 1, 1977, and the applicant was neither given the principal, specific reasons for the denial through issuance to the applicant of WCC Form 486 or otherwise, nor informed of the right to request the principal, specific reasons, as required by

Section 202.9 of Regulation B, respondent shall, within ninety (90) days of the service upon it of this order, mail to each such applicant known to respondent at the last address reflected in respondent's files, the letter and self-addressed, postage prepaid request form set forth in Appendix C. Respondent shall reply to each request which complies with Section 202.9 of Regulation B and shall enclose a copy of the Commission's pamphlet on the Equal Credit Opportunity Act, attached as Appendix D,* or a subsequent similar pamphlet mutually agreeable to the Federal Trade Commission and Westinghouse Credit Corporation. If, upon receiving a consumer request in response to this notification letter, respondent cannot determine the principal, specific reasons for the denial by a good faith examination of the applicant's file because one or more documents are missing from the file, respondent shall not be deemed to have violated the requirements of this order if respondent: (i) discloses to any such applicant that it is unable to provide reasons for denial because its records are incomplete and (ii) invites the applicant to reapply for consumer credit. A list of the names of consumers whose requests are processed pursuant to (i) and (ii) hereof shall be submitted as part of respondent's supplemental compliance report.

(b) *Provided further,* That if, during the next eight (8) years, respondent changes its consumer credit evaluation criteria and the notification letter contained in Appendix B can no longer be completed to disclose the principal, specific reasons for adverse action on each application, respondent shall submit to the Commission a supplemental written report of compliance setting forth the proposed changes to Appendix B and the reasons therefor, which report shall be received and filed by the Commission before respondent implements such changes in its evaluation system.

7. Failing to preserve records as required by Section 202.12(b) of Regulation B, including but not limited to (1) notifications of adverse actions, and (2) statements of the specific reasons for denial.

8. Extending consumer credit through or purchasing consumer credit contracts from any retail dealer from which respondent purchased 150 or more consumer sales finance contracts during the previous twelve (12) months and which engages in a pattern or practice of failing to provide respondent with a complete and legible copy of the application forms received by the retail dealer relating to applications for consumer credit acted upon by respondent.

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* For reasons of economy, not reproduced herein.

*Provided* that the provisions of this paragraph shall expire ten (10) years after service of this order.

9. Failing to implement, within one hundred and eighty (180) days after service of this order, an initial educational program, a full and complete description of which has been received and filed by the Commission as a supplemental report of compliance, for all of respondent's officers and employees who are responsible for the formulation and implementation of respondent's consumer credit policies and practices, including but not limited to the processing of credit applications. In order to satisfy its obligations under this paragraph, respondent shall:

(a) Furnish each such officer and employee a copy of this order, a copy of the Equal Credit Opportunity Act and Regulation B, and written educational materials which explain the Equal Credit Opportunity Act, Regulation B, and the Fair Credit Reporting Act, as they apply to respondent's credit practices. Such educational materials shall be clearly written, shall omit discussion of any part of the Equal Credit Opportunity Act, Regulation B, or the Fair Credit Reporting Act which is not relevant to respondent's credit practices, and shall emphasize those parts of Regulation B and the Fair Credit Reporting Act which are particularly relevant to respondent's credit practices, including but not limited to Sections 202.4, 202.5(c), 202.5(d), 202.6(b)(2), 202.6(b)(5), 202.6(b)(6), 202.7(a), 202.7(d), 202.9 and 202.12 of Regulation B and Section 615 of the Fair Credit Reporting Act;

(b) Inform orally each such officer and employee, at a general meeting, or otherwise, of the provisions of this order and of the duties of Westinghouse Credit Corporation and its officers and employees under the Equal Credit Opportunity Act, Regulation B, and the Fair Credit Reporting Act. Each such officer and employee shall be advised that his or her failure to comply with the provisions of this order shall subject him or her to disciplinary action, including possible dismissal, as Westinghouse Credit Corporation deems appropriate. Respondent shall submit a written agenda of its oral presentation to its employees as part of the supplemental report of compliance filed pursuant to this paragraph; and

(c) Secure a signed statement from each such officer and employee that he or she has been given a copy of this order, the Equal Credit Opportunity Act and Regulation B, has also been given and has read the educational materials described in subparagraph (a), and has received the information described in subparagraph (b). A copy of each such statement shall be retained for at least three (3) years and shall be made available for inspection by a representative of the Commission.

10. Failing to provide the documents described in Paragraph 9(a) hereof and the information described in Paragraph 9(b) hereof to each officer or employee who within five (5) years after the service of this order is given the responsibilities described in Paragraph 9 hereof and to require each such officer or employee to sign within ten (10) days of the assumption of said responsibilities a statement as described in Paragraph 9(c) hereof. A copy of each such statement shall be retained for at least three (3) years and shall be made available upon request for inspection by a representative of the Commission.

11. Failing to conduct a refresher educational program at least once a year for five (5) years after service of this order for all officers and employees having the responsibilities described in Paragraph 9 hereof, for the purpose of explaining the requirements of the Equal Credit Opportunity Act, Regulation B, and the Fair Credit Reporting Act and ensuring that such employees are carrying out their employment responsibilities in conformity with this order. In order to satisfy its obligations under this paragraph, respondent shall:

(a) Conduct a conference or seminar for all district managers to discuss the requirements of the Equal Credit Opportunity Act, Regulation B, and the Fair Credit Reporting Act as they pertain to respondent's credit practices. Such conferences or seminars shall also cover relevant amendments to the Equal Credit Opportunity Act, Regulation B, or the Fair Credit Reporting Act and relevant current regulatory or judicial interpretations.

(b) Conduct at each district office similar conferences or seminars led by an appropriate person, for all employees at the district level having the responsibilities described in Paragraph 9 hereof in order to ensure that each such employee receives or has received in the past the written materials described in Paragraph 9(a) and an oral explanation of those materials, and of the requirements of the Equal Credit Opportunity Act, Regulation B, and the Fair Credit Reporting Act as they pertain to respondent's credit practices. These sessions also shall cover relevant amendments to the Equal Credit Opportunity Act, Regulation B, or the Fair Credit Reporting Act and relevant current regulatory and judicial interpretations.

(c) If necessary to reflect relevant amendments to the Equal Credit Opportunity Act, Regulation B, or the Fair Credit Reporting Act, or relevant regulatory and judicial interpretations, furnish each employee having the responsibilities described in Paragraph 9 hereof with an updated version of the written educational materials described in subparagraph 9(a). Such written materials shall be retained for a period of three (3) years and shall be made available upon request for inspection by a Commission representative.

12. Extending consumer credit through or purchasing consumer credit contracts from retail dealers unless respondent conducts an initial retail dealer education program as herein described. A full and complete description of said initial retail dealer educational program shall be filed with the Commission as a supplemental report of compliance within one hundred and eighty (180) days after service of this order. In order to satisfy its obligations under this paragraph, respondent shall:

(a) Within one hundred and eighty (180) days after service of this order, send by first-class mail to each retail dealer from which respondent purchased 150 or more consumer sales finance contracts during the previous twelve (12) months, the letter set forth in Appendix E;

(b) Within one hundred and eighty (180) days after service of this order, send by first-class mail to each retail dealer not included in subparagraph (a) hereof, the letter set forth in Appendix F;

(c) Within one hundred and eighty (180) days after service of this order, furnish to each retail dealer written educational materials which explain in clearly written language the Equal Credit Opportunity Act and Regulation B as they apply to the retail dealer's credit practices regarding applications referred to respondent. Such educational materials shall omit discussion of any part of the Equal Credit Opportunity Act or Regulation B which is not relevant to the retail dealer's or respondent's credit practices, and shall address itself to those parts of Regulation B which are particularly relevant to the retail dealer's credit practices, including but not limited to Sections 202.4, 202.5(a), 202.5(c), 202.5(d), 202.6(b)(6), 202.7(a), 202.7(d), and 202.12;

(d) Make available to each retail dealer described in subparagraph (a) hereof an initial educational class which shall include an oral explanation of the written educational materials described in subparagraph (c) hereof. Such initial educational class may be provided by respondent's district managers as part of the district manager's normal ongoing business relationship with the retail dealer, and shall be made available at such a time or times as to facilitate attendance by the retail dealer's officers and/or employees who have responsibilities regarding the processing of applications for consumer credit, including but not limited to those who have direct contact with consumers regarding such applications. Within one hundred and eighty (180) days after service of this order, respondent shall contact each retail dealer described in subparagraph (a) hereof to set a date for the initial retail dealer educational classes; and

(e) With respect to each retail dealer described in subparagraph (a) hereof, secure a signed statement from the responsible representative of respondent which states or provides:

(i) That the retail dealer has been provided with the written educational materials described in subparagarph (c) hereof;

(ii) That respondent made available the educational class described in subparagraph (d) hereof;

(iii) The date(s) on which respondent made available the educational class described in subparagraph (d) hereof; and

(iv) A list setting forth the titles and number of individuals who attended the educational class described in subparagraph (d) hereof, a list setting forth the titles and number of individuals who received the written educational materials described in subparagraph (c) hereof, and a statement as to the total number of such dealer's employees who, in the dealer's opinion, have the responsibilities set forth in subparagraph (d) above. A copy of such lists shall be retained for at least three (3) years and shall be made available for inspection by a representative of the Commission.

13. Failing to provide, within thirty (30) days after respondent purchases the first consumer credit contract, the letter described in subparagraph 12(b) hereof and the written educational materials described in subparagraph 12(c) hereof to each business entity which within five (5) years after the service of this order becomes a retail dealer.

14. Extending consumer credit through or purchasing any consumer credit contract from any retail dealer unless respondent conducts at least once a year for five (5) years after service of this order a refresher retail dealer educational program. In order to satisfy its obligations under this paragraph, respondent shall:

(a) If necessary to reflect relevant amendments to the Equal Credit Opportunity Act or Regulation B, or relevant, current regulatory and judicial interpretations, furnish to each retail dealer an updated version of the written educational materials described in subparagraph 12(c) hereof. If an updated version of the educational materials is not furnished to retail dealers, a notice informing said dealers of the availability of additional copies of the written educational materials from the previous year shall be furnished. Such updated written materials shall be retained for at least three (3) years and shall be made available for inspection by a representative of the Commission.

(b) Make available to each retail dealer from which respondent purchased 150 or more consumer credit contracts during the previous twelve (12) months, a refresher educational class which shall include an oral explanation of the written educational materials described in subparagraph (a) hereof. Such refresher educational class may be provided by respondent's district managers as part of the district manager's normal ongoing business relationship with the retail dealer, and shall be made available at such a time or times as will facilitate attendance by the retail dealer's officers and/or employees of the retail dealer who have responsibilities regarding the processing of applications for consumer credit, including but not limited to those who have direct contact with consumers regarding such applications.

15. Failing to use credit application forms which clearly and conspicuously disclose to the applicant that he or she is entitled to apply for an individual account, and that if the applicant chooses to apply for an individual account, he or she need not supply any information about his or her spouse or former spouse unless the applicant is relying upon a spouse's income, is relying on alimony, child support or separate maintenance payments, or resides in a community property state.

16. Failing to make available to each retail dealer and to each business entity that within five (5) years after service of this order becomes a retail dealer an equal opportunity in credit sign for the purpose of public display in the retail dealer's place of business, which is clear and conspicuous, not smaller in dimension than twenty-two (22) inches by twenty-eight (28) inches, states the provisions of Section 701(a) of the Equal Credit Opportunity Act, and further states the right to apply for an individual account regardless of the applicant's marital status.

17. Failing to include in its ordinary dealer audit program questions to determine whether retail dealers are in compliance with the requirements of the Equal Credit Opportunity Act and Regulation B, which are contained in Sections 202.5, 202.7(a), 202.7(d) and 202.12 of the Regulations.

*Provided,* that if respondent eliminates its dealer audit program at any time in the future, it shall nevertheless retain those portions of the program which pertain to compliance by retail dealers with the Equal Credit Opportunity Act and its implementing Regulation.

*Provided further,* that the provisions of this paragraph shall expire fifteen (15) years after service of this order.

18. Respondent shall not be liable for a civil penalty for any

violation of any paragraph except 4 and 5 of Part I of this order if it shows by a preponderance of the evidence that any such violation was caused by an inadvertent error.

## PART II

*It is further ordered,* That respondent, Westinghouse Credit Corporation, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with any application for credit that is primarily for personal, family, household purposes, and in connection with either the receipt or consideration of any consumer report, do forthwith cease and desist from:

1. Failing whenever credit for personal, family or household purposes involving the consumer is denied, either wholly or partly because of information contained in a consumer report from a consumer reporting agency, to so advise the consumer against whom such adverse action has been taken and to supply the name and address of the consumer reporting agency making the report as required by Section 615(a) of the Fair Credit Reporting Act.

2. Failing, within ninety (90) days after service of this order, to mail the letter and self-addressed, postage prepaid request form contained in Appendix G to each applicant who was denied credit after October 1, 1977, and before the service of this consent order, for personal, family, or household purposes involving the consumer, based in whole or in part on information contained in a consumer report from a consumer reporting agency. The letter shall be sent to the last address of the applicant which is reflected in respondent's files.

(a) *Provided,* that to the extent that respondent's records indicate that the notice required by Section 615(a) of the Fair Credit Reporting Act was previously given to the applicant, respondent shall be deemed to be in compliance with this provision of the order as to each such applicant.

(b) *Provided further,* that the notice required in this paragraph may be combined, where appropriate, with the notice required under Paragraph 6, Part I, hereof.

(c) *Provided further,* that in replying to requests from applicants received in response to the letter contained in Appendix G, respondent shall include the language set forth in Appendix H in the Section 615(a) notice it sends to the applicant and shall enclose a copy of the

Commission's pamphlet on the Fair Credit Reporting Act attached as Appendix I,* or a subsequent pamphlet mutually agreeable to the Federal Trade Commission and Westinghouse Credit Corporation.

3. Failing whenever credit for personal, family, or household purposes involving the consumer is denied, either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, to disclose, at the time such adverse action is communicated to the consumer, his or her right to make a written request for the nature of the information upon which such adverse action was based, and failing, upon receipt of such a request to disclose within a reasonable period of time the nature of the information to the consumer, as required by Section 615(b) of the Fair Credit Reporting Act.

4. Failing, within ninety (90) days after service of this order, to mail the letter and self-addressed, postage prepaid request form contained in Appendix G to each applicant who was denied credit after October 1, 1977, and before the service of this consent order, for personal, family or household purposes involving the consumer, based in whole or in part on information obtained from a person other than a consumer reporting agency bearing on the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. The letter shall be sent to the last address of the applicant which is reflected in respondent's files.

(a) *Provided*, that to the extent that respondent's records indicate that the notice required by Section 615(b) of the Fair Credit Reporting Act was previously given to the applicant, respondent shall be deemed to be in compliance with this provision of the order as to each such applicant.

(b) *Provided further*, that the notice required by this paragraph may be combined, where appropriate, with the notice required under Paragraph 6, Part I, hereof.

5. Respondent shall not be liable for a civil penalty for any violation of Part II of this order if it shows by a preponderance of the evidence that any such violation was caused by an inadvertent error.

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* For reasons of economy, not reproduced herein.

### PART III

1. *It is further ordered*, That respondent shall preserve evidence of compliance with the requirements imposed under this order for a period of not less than three (3) years after respondent notifies each applicant of the reasons for denial pursuant to Paragraph 6 of Part I of this order, the right to request the name and address of any consumer reporting agency pursuant to Paragraph 2 of Part II of this order, and the right to request the nature of third party information pursuant to Paragraph 4 of Part II of this order. Respondent shall upon request permit Commission representatives to inspect such records.

2. *It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, arrangement or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

3. *It is further ordered*, That respondent shall:

(a) Within sixty (60) days after service of this order, submit to the Commission a written report setting forth in detail the manner and form in which it has complied with Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 15 of Part I of this order and Paragraphs 1 and 3 of Part II of this order, and the manner and form in which it intends to comply with Paragraphs 9, 10, 11, 12, 13, 14, and 17 of Part I of this order and Paragraphs 2 and 4 of Part II of this order.

(b) Within one hundred and eighty (180) days after service of this order submit to the Commission a supplemental written report setting forth the manner and form in which it has complied with Paragraphs 9, 10, 12, 13, 16, and 17 of Part I of this order and Paragraphs 2 and 4 of Part II of this order.

(c) Once a year for five (5) years, submit to the Commission a supplemental written report setting forth the manner and form in which it has complied with Paragraphs 11 and 14 of Part I of this order. These five (5) annual periods shall begin the day after service of this order and such supplemental reports shall be submitted within ten (10) days after the close of each annual period.

### APPENDIX A

[A copy of ECOA, Regulation B, and FCRA as required by Definitions (a), (b) and (c).]

## APPENDIX B

DATE:

Thank you for your recent application for credit privileges which was referred to Westinghouse Credit Corporation by [*name of retail dealer*]. We regret that we have declined your application at this time, based upon the following factors (appropriate box[es] is [are]) checked or information provided.

### STATEMENT OF CREDIT DENIAL OR TERMINATION

Applicant's Name:

Applicant's Address:

Description of Transaction: New Application  Add on to Existing Account

### PRINCIPAL REASON(S) FOR ADVERSE ACTION CONCERNING CREDIT

1. Insufficient credit references
2. Unable to verify credit references
3. Temporary or irregular employment
4. Unable to verify employment
5. Length of employment
6. Insufficient income
7. Excessive obligations
8. Unable to verify income
9. Too short a period of residence
10. Temporary residence
11. Unable to verify residence
12. No credit file
13. Insufficient credit file
14. Delinquent credit obligation(s)
15. Garnishment, attachment, foreclosure, repossession or suit
16. Bankruptcy
17. Insufficient credit experience with WCC to warrant additional credit
18. Applicant rejected WCC offer of reduced amount of credit
19. Failure to meet _____% down payment requirement
20. _____ times delinquent with WCC account number _____
21. Credit application incomplete because of ____________________

Other ____________________

### DISCLOSURE OF USE OF INFORMATION OBTAINED FROM AN OUTSIDE SOURCE

No information from a consumer reporting agency or an outside source other than a consumer reporting agency was used in whole or in part as a basis for the adverse action. Additional disclosure inapplicable.

Information obtained in a report from a consumer reporting agency. If you have any questions about the report, you may contact the agency.

Name: Phone:
Address:

Information obtained from an outside source other than a consumer reporting agency. Under the Fair Credit Reporting Act, you have the right to make a written request, within 60 days of receipt of this notice, for disclosure of the nature of the adverse information. Write or call Westinghouse Credit Corporation at the address appearing at the top of this letter.

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided that the applicant has the legal capacity to enter into a binding contract), because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this creditor is the Federal Trade Commission, Equal Credit Opportunity, Washington, D.C. 20580.

Very truly yours,

Westinghouse Credit Corporation
District Manager

WC 456

## APPENDIX C

Dear :

Our records show that Westinghouse Credit Corporation denied your application for consumer credit within the last two years. In most circumstances, the Equal Credit Opportunity Act requires WCC to give its applicants for consumer credit whose applications were denied the right to be told the specific reasons for the denial.

Our records show that you may not have been informed of your right to request the reasons for WCC's denial of your application. If you were not so informed, or if you exercised that right but found that the reasons given to you were not meaningful or helpful, let us know within the next sixty (60) days by returning the enclosed self-addressed, postage prepaid request form. We will do our best promptly to provide you with the information you seek.

If you want more information about federal credit laws, write: Federal Trade Commission, Equal Credit Opportunity, Washington, D.C. 20580.

Sincerely,

Westinghouse Credit Corporation

### REQUEST FORM

Yes, I would like to know the specific reasons why my application for Westinghouse credit was denied.

________________
(Name)

________________
(Street Address)

________________
(City, State)

(If possible, please note the month and year of your application to WCC.)

## APPENDIX D

[ATTACH ECOA PAMPHLET AS REQUIRED BY PART I, ¶ 6(a).]

## APPENDIX E

Dear :

The Equal Credit Opportunity Act and Regulation B prohibit discrimination on the basis of sex, marital status, race, religion, national origin, age, receipt of public assistance or exercise of rights under federal consumer credit laws. Some months ago the Federal Trade Commission initiated an investigation of Westinghouse Credit Corporation and other national credit companies relating to their compliance with the Equal Credit Opportunity Act. On [date], WCC entered into a consent agreement with the FTC, which terminated the investigation of WCC. A copy of that agreement, with its incorporated order, is enclosed.

Many of the provisions of the consent order concern only WCC's internal procedures and have no bearing whatsoever on the operations of its dealers. For example, the order contains detailed provisions governing the mailing of notices by WCC to applicants against whom adverse action has been taken and provisions concerning the education of WCC employees with respect to the requirements of the Equal Credit Opportunity Act and Regulation B.

There are, however, other provisions in the consent order that directly or indirectly affect WCC's relationship with your company and with other retail dealers. Under those provisions WCC has agreed:

To furnish to you the various materials enclosed with this letter, including a copy of the consent order referred to above, a copy of the Equal Credit Opportunity Act and Regulation B, and a copy of certain written materials summarizing the requirements of the statute and regulations.

To meet once a year with your employees for the purpose of discussing and answering questions about WCC's policies concerning compliance with the requirements of the Equal Credit Opportunity Act and Regulation B as they relate to applications referred to WCC.

To make available to you, upon request, an equal-opportunity-in-credit sign, for display in your place of business.

To require you to furnish to WCC complete and legible copies of all documents received by you relating to credit applications referred to WCC.

WCC has agreed to these provisions for two reasons. First, it is the FTC Staff's opinion that under certain circumstances WCC itself could be liable for civil penalties if retail dealers with whom WCC has an agreement or a course of dealing (whereby WCC purchases sales finance contracts) violated the Equal Credit Opportunity Act. To protect itself against such possible liability, as well as because of its general policy of supporting the protection of rights of consumers in credit transactions, WCC has agreed to and intends to comply fully with the provisions of the consent order set forth above concerning WCC's relationship with retail dealers. Second, WCC believes that compliance by WCC with these provisions of its agreement will assist its dealers in avoiding problems under the Act.

WCC urges that you review the enclosed materials carefully, and that you take steps to insure that WCC receives copies of all documents received by you relating to applications for consumer credit referred to WCC. WCC's District Manager will contact you in the near future to arrange a convenient time to meet with your staff to discuss compliance with the Act.

Your assistance and cooperation in this program can be critical in protecting both WCC as well as your own company from exposure to the substantial penalties that the Equal Credit Opportunity Act provides for violation of its provisions.

Thank you for your cooperation. If you have any questions, please contact [name] at [address] [telephone number].

Sincerely yours,

Westinghouse Credit Corporation

## APPENDIX F

Dear :

The Equal Credit Opportunity Act and Regulation B prohibit discrimination on the basis of sex, marital status, race, religion, national origin, age, receipt of public assistance or exercise of rights under federal consumer credit laws. Some months ago the Federal Trade Commission initiated an investigation of Westinghouse Credit Corporation and other national credit companies relating to their compliance with the Equal Credit Opportunity Act. On [date], WCC entered into a consent agreement with the FTC, which terminated the investigation of WCC.

Many of the provisions of the consent order concern only WCC's internal procedures and have no bearing whatsoever on the operations of its dealers. For example, the order contains detailed provisions governing the mailing of notices by WCC to applicants against whom adverse action has been taken and provisions concerning the education of WCC employees with respect to the requirements of the Equal Credit Opportunity Act and Regulation B.

There are, however, other provisions in the consent order that directly or indirectly affect WCC's relationship with your company and with other retail dealers. Under those provisions WCC has agreed:

To furnish to you the various materials enclosed with this letter, including a copy of the Equal Credit Opportunity Act and Regulation B and a copy of certain written materials summarizing the requirements of the statute and regulations.

To make available to you, upon request, an equal-opportunity-in-credit sign, for display in your place of business.

To require you to furnish to WCC complete and legible copies of all documents received by you relating to credit applications referred to WCC.

WCC has agreed to these provisions for two reasons. First, it is the FTC Staff's opinion that under certain circumstances WCC itself could be liable for civil penalties if retail dealers with whom WCC has an agreement or a course of dealing (whereby WCC purchases sales finance contracts) violated the Equal Credit Opportunity Act. Therefore, in order to protect itself from exposure to such liability, as well as because of its general policy of supporting the protection of rights of consumers in credit transactions, WCC has agreed to and intends to comply fully with the provisions of the consent order set forth above concerning WCC's relationship with retail dealers. Second, WCC believes that compliance by WCC with these provisions of its agreement will assist its dealers in avoiding problems under the Act.

WCC urges that you review the enclosed materials carefully, and that you take steps to insure that WCC receives copies of all documents received by you relating to applications for consumer credit referred to WCC.

Your assistance and cooperation in this program can be critical in protecting both WCC as well as your own company from exposure to the substantial penalties that the Equal Credit Opportunity Act provides for violations of its provisions.

Thank you for your cooperation. If you have any questions, please contact [name] at [address] [telephone number].

Sincerely yours,

Westinghouse Credit Corporation

## APPENDIX G

Dear :

Our records show that Westinghouse Credit Corporation denied your application for consumer credit within the last two years. The Fair Credit Reporting Act gives persons denied consumer credit the right to know whether the denial was based on information supplied by a consumer credit reporting agency and, if so, the name and address of such agency. Credit reports provide a variety of information to creditors including information about how many and what types of credit accounts you have, whether you are able to pay your bills, and whether you have been sued.

The Fair Credit Reporting Act also gives persons denied credit the right to know the substance of information relied upon in denying credit if such information was supplied by a person other than a consumer credit reporting agency. For example, you can find out whether a creditor considered information from your employer concerning your salary or the period of time which you have been employed, or information from your landlord about how much rent you pay or how long you have lived at a given address.

Our records show that you may not have been informed about whether WCC used information from a credit bureau or from some other person in considering your application. If you would like to find out whether such information was taken into account, please fill out and return the enclosed self-addressed, postage prepaid request form.

One reason that you may want to return the enclosed form is to see whether credit report or third party information is accurate. If such information is wrong, you may be able to correct it and improve your chances to get credit.

If you want more information about the federal credit laws, write: Federal Trade Commission, Equal Credit Opportunity, Washington, D.C. 20580.

Sincerely,

Westinghouse Credit Corporation

REQUEST FORM

YES, I would like to know whether my application was denied because of information supplied by a credit bureau. If so, please supply me with the name and address of the credit bureau.

I would also like to know whether my application was denied because of information received from a third person other than a credit bureau.

If my application was denied because of information received from a third person,

I do

I do not

want WCC to describe this information to me.

Thank you.

______________________________
[Name]

______________________________
[Street Address]

______________________________
[City, State]

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(If possible, please note the month and year of your application to WCC.)

## APPENDIX H

If you ask the credit bureau to disclose the nature and substance of information in your file *within thirty days* after you receive this notice, the bureau cannot charge you a fee for the disclosure.

## APPENDIX I

[Attach FCRA pamphlet as required by Part II, ¶ 2(c).]

# IN THE MATTER OF

# FORD MOTOR COMPANY

*Docket 9105. Interlocutory Order, Nov. 19, 1979*

## ORDER DENYING LUBRIZOL CORPORATION'S PETITION FOR INTERLOCUTORY REVIEW

Lubrizol Corporation ("Lubrizol") has petitioned for interlocutory review of an order denying its motion to quash a third-party subpoena that was served on it by respondent Ford Motor Company. Lubrizol argues in its petition that enforcement of this subpoena would violate its right to procedural due process because Ford's application for the subpoena was made to the administrative law judge *ex parte*.

By order dated October 12, 1979, Administrative Law Judge Mathias declined to certify Lubrizol's request for interlocutory review on this matter. Under the Commission's Rules of Practice, certification is required for such review unless the issue involved is within the scope of Rule 3.23(a) or the administrative law judge has clearly abused his discretion to the prejudice of the petitioning party. *Kellogg Co., et al.*, 91 F.T.C. 704 (1978). The question raised by Lubrizol does not fall within the ambit of Rule 3.23(a). Neither does it appear that the administrative law judge clearly erred in denying Lubrizol access to the respondent's subpoena application.

Rule 3.31(e) permits parties to apply for subpoenas *ex parte*, and the Commission has previously held that the confidential status of an *ex parte* application by a respondent should be disturbed only for a compelling reason, since disclosure could reveal the respondent's litigation strategy. *Lehigh Portland Cement Co.*, 73 F.T.C. 1252 (1968). The only reason advanced by Lubrizol for access to Ford's application is that, without such access, the company cannot evaluate the purpose and relevance of the subpoena specifications. The relevancy of an adjudicative subpoena is determined, however, by comparing its specifications to the pleadings in the case, and Lubrizol certainly has access to these. *All-State Industries of North Carolina, Inc.*, 74 F.T.C. 1591 (1968); *see Adams* v. *F.T.C.*, 296 F.2d 861, 867 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1962). Lubrizol has, moreover, failed to show any exceptional need to go beyond the pleadings to determine the propriety of Ford's subpoena. Accordingly,

*It is ordered*, That the Petition for Interlocutory Review of the Order Denying the Motion of Lubrizol Corporation To Quash Ford's Third-Party Subpoena be denied.

## IN THE MATTER OF

# RR INTERNATIONAL, INC., ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3000. Complaint, Nov. 28, 1979—Decision, Nov. 28, 1979*

**This consent order, among other things, requires a Wilmington, Del. firm and two corporate officers engaged in the advertising and sale of a product known, among other names, as the G.R. Valve, to cease representing, without substantiation, that installing the G.R. Valve or any substantially similar automobile retrofit device in a motor vehicle will result in fuel economy improvement. Respondents are also barred from using any unauthorized endorsement or testimonial; and prohibited from misrepresenting a product endorser's expertise in a field of knowledge, and the conclusions of tests or surveys pertaining to energy consumption or energy saving characteristics of automobile retrofit devices. Additionally, the order requires that any material connection existing between respondents and a product endorser be disclosed in advertising.**

## *Appearances*

For the Commission: *Laurence M. Kahn.*

For the respondents: *Pro se.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that RR International, Inc., a corporation; Eduard A. Hamala, and Cary Bunin, individually and as officers of the corporation, hereinafter referred to collectively as "respondents," having violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent RR International, Inc. is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at c/o Corporation Trust Company, 100 West 10th St., Wilmington, Delaware. Respondent Eduard A. Hamala, whose address is 4333 Admiralty Way, Marina Del Rey, California, is President, director and shareholder; respondent Cary Bunin, whose address is 306 E. 51st St., New York, New York, is Vice President, director and shareholder of respondent corporation, RR International, Inc.; and said corporation is owned, dominated, controlled, and directed by the individual respondents, Eduard A. Hamala, and Cary Bunin.

All of said respondents have cooperated and acted together in the performance of the acts and practices hereinafter alleged.

PAR. 2. Respondents have been and are now engaged in the marketing and advertising of a product variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names (hereinafter "product"), which product is advertised to be a means of improving fuel economy in automobiles. Said product is an automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011. Respondents, in connection with the marketing of said product, have disseminated, published and distributed and now disseminate, publish and distribute advertisements and promotional material for the purpose of promoting the sale of said product.

PAR. 3. One of the means respondents have used to market and advertise said product has been to use a celebrity endorsement. Gordon Cooper has aided the promotion of said device by providing such endorsement. This endorsement appeared in disseminated advertisements and other sales promotional materials for said product. In return for his role in the marketing of said product, Gordon Cooper has received remuneration from the manufacturer and distributor of the product. The amount of such remuneration was and is dependent upon the number of products sold.

PAR. 4. In the course and conduct of their said businesses, the respondents have disseminated and caused the dissemination of certain advertisements for said product through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act including, but not limited to, the insertion of advertisements in magazines and newspapers with national circulations and the placement of advertisements through television stations with sufficient power to broadcast across state lines and into the District of Columbia; and have disseminated and caused the dissemination of advertisements for said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce.

PAR. 5. Among the advertisements and other sales promotional materials are the materials identified as Exhibits A–J which are attached hereto.

PAR. 6. Through the use of advertisements referred to in Paragraph Five and other advertisements and sales promotional materials, respondents represented and now represent, directly or by implication, that

a. the G.R. Valve when installed in a typical automobile will significantly improve fuel economy;

b. a typical driver can ordinarily obtain, under normal driving conditions, a fuel economy improvement which will approximate or equal eight miles per gallon when the G.R. Valve is installed in his/her automobile;

c. competent scientific tests for fuel economy of automobiles in which the G.R. Valve has been installed prove the fuel economy claims made for the G.R. Valve;

d. Gordon Cooper bears only the relationship of endorser to the marketing of said product;

e. Gordon Cooper has the education, training, and knowledge necessary to qualify him as an expert in the field of automotive engineering;

f. results of consumer usage, as evidenced by consumer testimonials, prove that the G.R. Valve significantly improves fuel economy.

PAR. 7. At the time respondents made the representations alleged in Paragraph six of the complaint, they did not possess and rely upon a reasonable basis for such representations. Therefore, said advertisements are deceptive, misleading, or unfair.

PAR. 8. In truth and in fact, contrary to respondents' representations in Paragraph six:

a. the G.R. Valve when installed in a typical automobile will not significantly improve fuel economy;

b. a typical driver cannot ordinarily obtain under normal driving conditions a fuel economy improvement which will approximate or equal eight miles per gallon when the G.R. Valve is installed in his/her automobile;

c. no competent scientific tests for fuel economy of automobiles in which the G.R. Valve has been installed prove the fuel economy claims made for the G.R. Valve;

d. Gordon Cooper bears not only the relationship of endorser to the marketing of said product, but also bears the relationship of principal to the marketing of said product which fact is not disclosed and is material;

e. Gordon Cooper does not have the education, training, and knowledge to qualify him as an expert in the field of automotive engineering;

f. results of consumer usage, as evidenced by consumer testimonials, do not prove that the G.R. Valve significantly improves fuel economy.

Therefore, said advertisements are deceptive, misleading, or unfair.

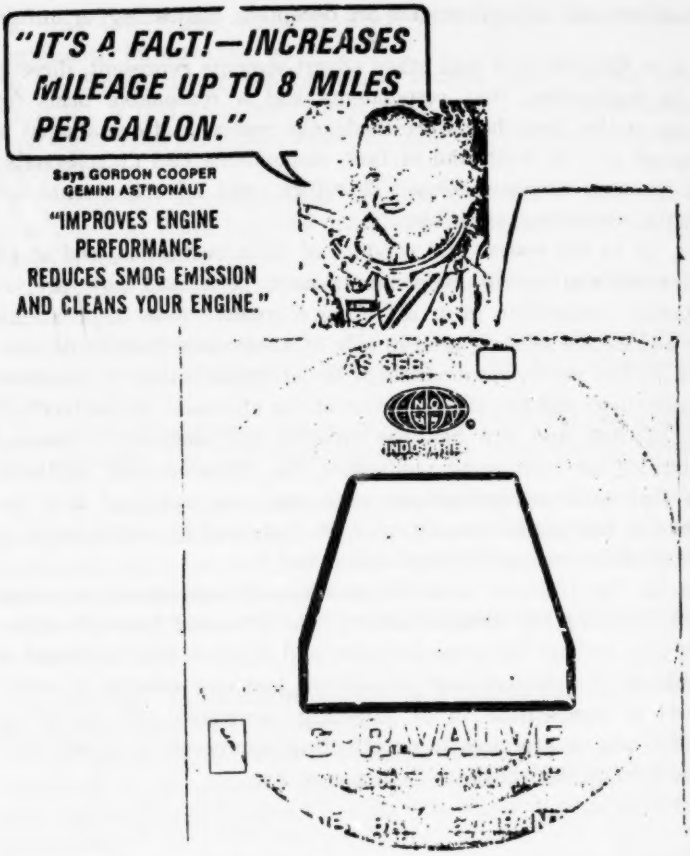
Par. 9. Exhibits A–J and other advertisements represent, directly and by implication, that respondents had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph six. In truth and in fact, respondents had no reasonable basis for such representations. Therefore, said advertisements are deceptive, misleading, or unfair.

Par. 10. In the course and conduct of their businesses, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in sale of automobile retrofit devices.

Par. 11. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of products sold by respondents by reason of said erroneous and mistaken belief.

Par. 12. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

Ex. A



"IT'S A FACT!—INCREASES MILEAGE UP TO 8 MILES PER GALLON."

Says GORDON COOPER
GEMINI ASTRONAUT

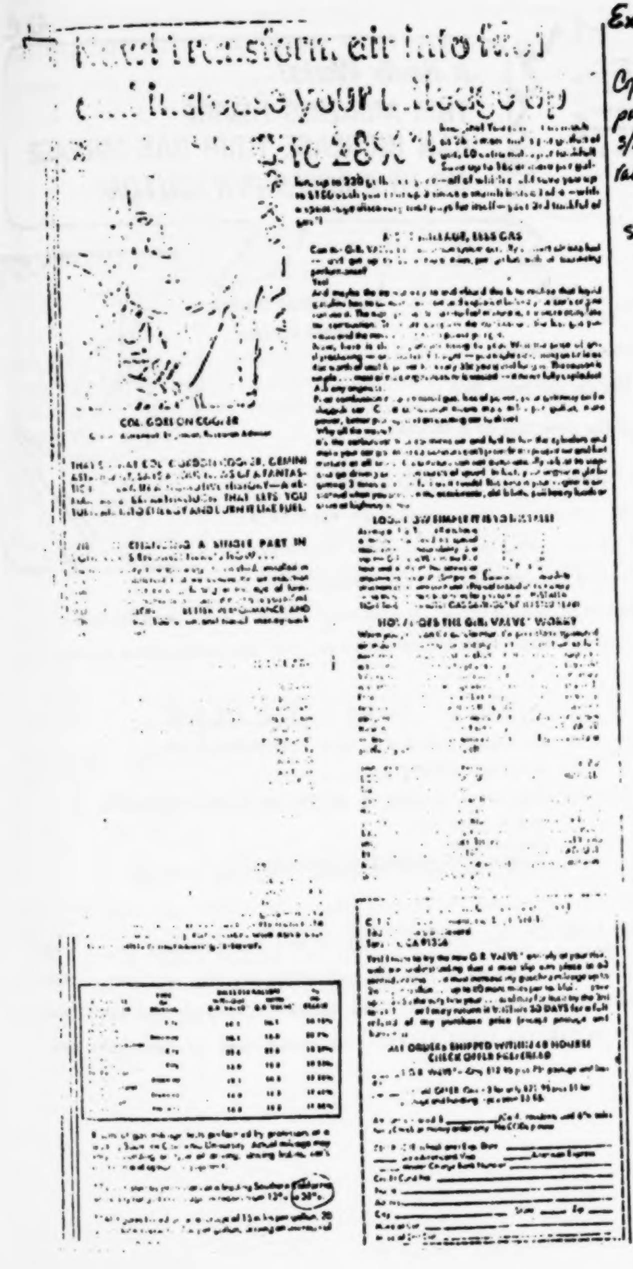
"IMPROVES ENGINE PERFORMANCE, REDUCES SMOG EMISSION AND CLEANS YOUR ENGINE."

1312

Ex. 8

Copy of ad published 3/17/78 Valley News

SPEC 2



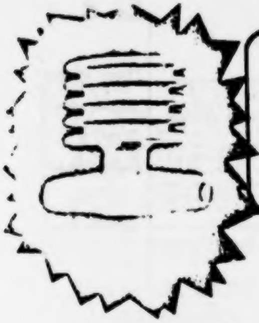
Now! Transform air into fuel and increase your mileage up to 28%!

COL. GORDON COOPER

HOW DOES THE G.R. VALVE™ WORK?

ALL ORDERS SHIPPED WITHIN 48 HOURS
CHECK OFFER PREFERRED

Ex. C



*It Really Works!*

**THIS AMAZING DEVICE CAN INCREASE YOUR GAS MILEAGE**

***UP TO 8 MILES PER GALLON!***

*Says GORDON COOPER, Gemini Astronaut*

*Yes! Save Gas by the Gallon!*

*Make Your Car Run Better Too!*

*New Gas Saver Slips On in Minutes!*

If there's one thing an astronaut has no use for, it's a new invention that doesn't do what it's supposed to do! That's why we asked astronaut Gordon Cooper to test the G-R GAS SAVER VALVE in his independent engineering laboratory. Here's what Gordon Cooper told us the G-R GAS SAVER VALVE would do for any carbureted automobile:

- INCREASE GAS MILEAGE -- UP TO 28% MORE!
- ACTUALLY IMPROVE ENGINE PERFORMANCE AT THE SAME TIME!
- CLEAN THE ENGINE OF CRIPPLING CARBON DEPOSITS WHILE DRIVING!
- REDUCE SMOG EMISSIONS MEASURABLY!

Impressive results? Definitely. But we are particularly fussy about our cars. So, Mr. Cooper's results not withstanding, we went to the Dept. of Industrial Education at Loma Linda University and gave them a dozen or so G-R GAS SAVER VALVES. We asked them to test this new

invention in city and highway driving -- use it on different kinds of cars, big and small -- even trucks -- and report the conclusions, good or bad. Here's what the Loma Linda University tests confirmed about the G-R GAS SAVER VALVE:

- It Cuts Gas Consumption in Every Car Tested -- Up to 28%!
- It Makes the Engine Run More Efficiently!
- It Reduces Polluting Exhaust Emissions as Much as 50%!

Then reports came back from our own "seat of the pants" test. That's where ordinary drivers like you and me pop a G-R GAS SAVER VALVE into their car and record the results for themselves.
For example:

> "...on my Pontiac Le Mans...mileage increased from 10 to 27.2...the improvement is phenomenal."
>
> -Mr. F. v. S.
> Newbury Park, Calif.
>
> "...on my Volkswagen Bus, it's mileage increased from 18 to 23 miles per gallon...also have better start in the morning."
>
> -Mr. Otto Geller,
> President, Volkswagen Club of America
> Ventura, Calif.

We found that a 1966 GMC 66-passenger school bus got 40% better gas mileage! A pickup truck with camper got 38.2% better mileage! A 1973 Ford got 28.7% better mileage! And so it went. Everybody we heard from reported a significant increase in gas mileage and often a noticeable improvement in performance the moment they snapped the G-R GAS SAVER VALVE on their car!

## *SLIP IT IN PLACE YOURSELF...IN SECONDS!*

By now we were thoroughly convinced that there really was an exciting and easy way to save big money at the gas pump. We wanted a G-R GAS SAVER VALVE on every company car as fast as possible! But we still wondered if installing this fascinating money saver was as simple as it was cracked up to be. Instead of going to a mechanic we handed the

device and its simple instructions to three people:

1. A young lady who is so mechanically minded she really needed help opening the hood.
2. A self-admitted fumble-fingers copy chief who shies away from a pair of pliers.
3. A guy who spends his weekends tinkering with the innards of his imported English sports car.

Care to guess the outcome of the race?

> Frankly, it was a dead heat! (Subtracting the time it took the young lady to get the hood open). Mechanical skill just isn't required! Nearly everybody can follow the one-two-three step instructions and be saving gas by the gallon in minutes! (Susan Cooper, Gordon's lovely wife, popped a G-R GAS SAVER VALVE into her '74 Vega in a mere 30 seconds!)

## *BUY THOSE SPECIAL THINGS YOU WANT WITH WHAT YOU SAVE ON GAS!*

Now, instead of spiraling gasoline prices stealing money from your pocket (even on short trips), you'll put the brakes to this money drain! You'll do it effortlessly in minutes -- and your insatiably thirsty carburetor will be under control at last! Certainly we all have plenty of things to do with our hard-earned money and pouring it into the gas tank isn't one of them!

## *FEEL YOUR ENGINE RUN BETTER - AND CLEAN ITSELF TOO!*

The G-R GAS SAVER VALVE makes your carburetor work with optimum efficiency AT ALL SPEEDS. (Most carburetors are really efficient only at about 35 mph.) It makes your carburetor breathe freely, perfectly mixing, with almost computer accuracy, the precise ratio of gas and air needed at any given split second. Not a drop more gas than necessary -- just all you really need and no more. Better yet, the G-R GAS SAVER VALVE makes your engine run so right that many exhaust fumes which used to pollute the air around your car are now re-burned as valuable fuel!

**ORDER NOW ON OUR UNCONDITIONAL MONEY-BACK GUARANTEE!**

We want you to put a G-R GAS SAVER VALVE on your car right away -- before you spend another unnecessary dollar for gas your car is now consuming ravenously.

We want to prove that Gordon Cooper's laboratory results, the special investigation by the staff at Loma Linda University and our own results are everything we say they are. Use the order form below...and if for any reason you don't agree -- enthusiastically, wholeheartedly -- that the G-R GAS SAVER VALVE is the best idea you've ever seen for your car, send it back for refund, no questions asked. Try it for two weeks; then if you're not convinced return it. The G-R GAS SAVER VALVE costs $15.95. You'll be amazed how fast it will pay for itself -- and start putting money back into your pocket!

**HAPPY CUSTOMERS WRITE...**

"I have a 1977 Malibu Classic Station Wagon which I use for work. I was getting an average of 11.9 miles per gallon . . . since the installation of the G-R Valve I am getting an average of 15.4 miles per gallon . . . I am a very cautious man about pushing or posing any item before I know from my own personal use that it works. I must say that I would advise everyone. . . to use the new G R Valve, plus I feel my car's performance has increased."

Mr. T. M.
Compton, Calif.

"In my capacity as Sales Manager I drive several hundred miles per week. My work car is a 1968 Ford Galaxy. Last May I installed a G R Valve, increasing the mileage from 18.2 to 19.9 mpg."

Mr. W. S.
Santa Monica, Calif.

"I installed one of your gas savers on my '74 Continental Mark IV in December. Since that time I have averaged at least 2½ miles per gallon more than before."

Mr. D. A.
Tarzana, Calif.

**ORDER FOR EVERY CAR IN YOUR FAMILY!**

**ORDER FORM**

C. I. ENERGY DEVELOPMENT, INC.
18346 VENTURA BOULEVARD
TARZANA, CALIFORNIA 91356

Gentlemen: Send me ____ G-R GAS SAVER VALVES @ $15.95 each. I enclose $______ in ( ) Cash ( ) Check ( ) M.O. in full payment.

( ) Send my order COD. I enclose 20% deposit. ( Sorry, no COD's outside the Continental USA).

ACCT. NO. ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

INTERBANK NO. Mastercharge Only ☐☐☐☐
(The number over your Name)

Exp. Date: Mo. ☐☐ Yr. ☐☐

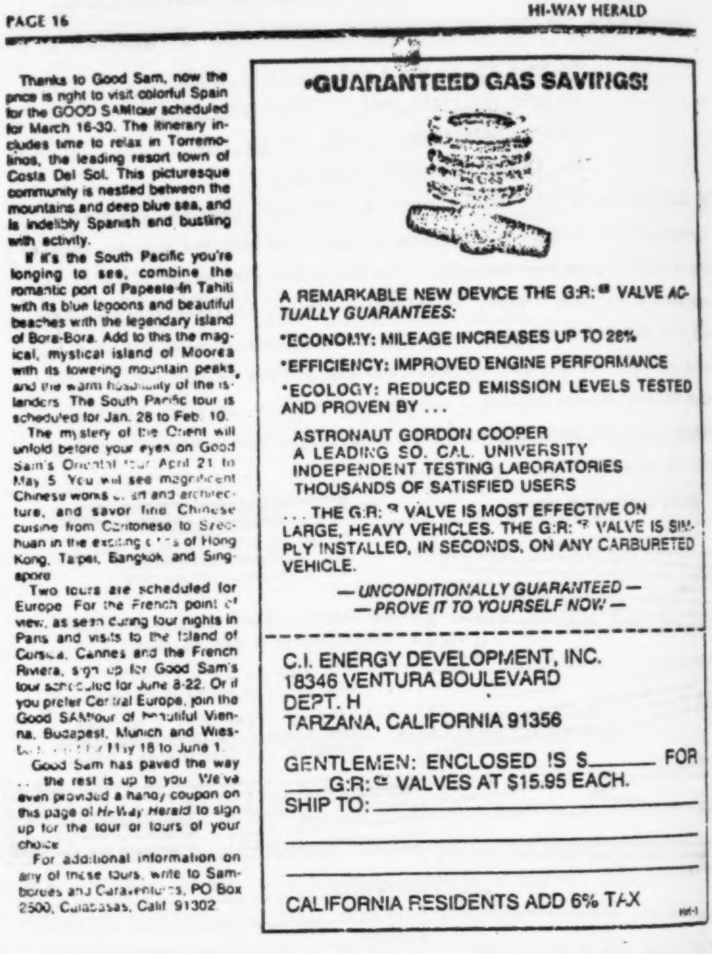
SIGNATURE ______________________

NAME ______________________

ADDRESS ______________________

CITY ____________ STATE ____ ZIP _____

Ex. D



Thanks to Good Sam, now the price is right to visit colorful Spain for the GOOD SAMtour scheduled for March 16-30. The itinerary includes time to relax in Torremolinos, the leading resort town of Costa Del Sol. This picturesque community is nestled between the mountains and deep blue sea, and is indelibly Spanish and bustling with activity.

If it's the South Pacific you're longing to see, combine the romantic port of Papeete in Tahiti with its blue lagoons and beautiful beaches with the legendary island of Bora-Bora. Add to this the magical, mystical island of Moorea with its towering mountain peaks, and the warm hospitality of the islanders. The South Pacific tour is scheduled for Jan. 28 to Feb. 10.

The mystery of the Orient will unfold before your eyes on Good Sam's Oriental tour April 21 to May 5. You will see magnificent Chinese works of art and architecture, and savor fine Chinese cuisine from Cantonese to Szechuan in the exciting cities of Hong Kong, Taipei, Bangkok and Singapore.

Two tours are scheduled for Europe. For the French point of view, as seen during four nights in Paris and visits to the Island of Corsica, Cannes and the French Riviera, sign up for Good Sam's tour scheduled for June 8-22. Or if you prefer Central Europe, join the Good SAMtour of beautiful Vienna, Budapest, Munich and Wiesbaden scheduled for May 18 to June 1.

Good Sam has paved the way . . . the rest is up to you. We've even provided a handy coupon on this page of *Hi-Way Herald* to sign up for the tour or tours of your choice.

For additional information on any of these tours, write to Samborees and Caraventures, PO Box 2500, Calabasas, Calif. 91302.

**•GUARANTEED GAS SAVINGS!**

A REMARKABLE NEW DEVICE THE G:R:® VALVE ACTUALLY GUARANTEES:

•ECONOMY: MILEAGE INCREASES UP TO 28%

•EFFICIENCY: IMPROVED ENGINE PERFORMANCE

•ECOLOGY: REDUCED EMISSION LEVELS TESTED AND PROVEN BY . . .

ASTRONAUT GORDON COOPER
A LEADING SO. CAL. UNIVERSITY
INDEPENDENT TESTING LABORATORIES
THOUSANDS OF SATISFIED USERS

. . . THE G:R:® VALVE IS MOST EFFECTIVE ON LARGE, HEAVY VEHICLES. THE G:R:® VALVE IS SIMPLY INSTALLED, IN SECONDS, ON ANY CARBURETED VEHICLE.

*— UNCONDITIONALLY GUARANTEED —*
*— PROVE IT TO YOURSELF NOW —*

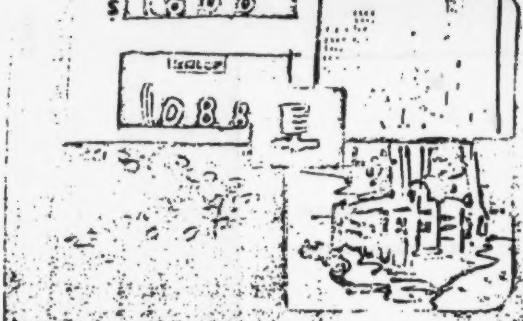
C.I. ENERGY DEVELOPMENT, INC.
18346 VENTURA BOULEVARD
DEPT. H
TARZANA, CALIFORNIA 91356

GENTLEMEN: ENCLOSED IS $______ FOR ____ G:R:® VALVES AT $15.95 EACH.

SHIP TO: ____________________

CALIFORNIA RESIDENTS ADD 6% TAX

HH-1

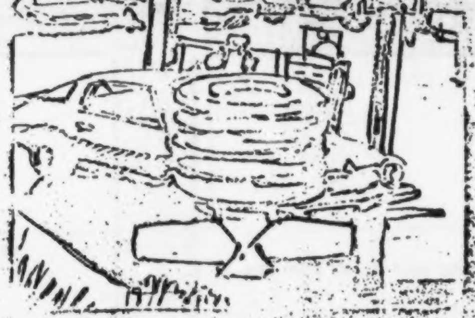


IN THESE DAYS OF RISING GAS PRICES

AND REDUCED AUTOMOTIVE PERFORMANCE,

WE INTRODUCE THE G.R. VALVE.

1 A/B



TO PUT THE GRRRRRR IN YOUR CAR. CARS

TESTED WITH G.R. VALVES IMPROVE THEIR

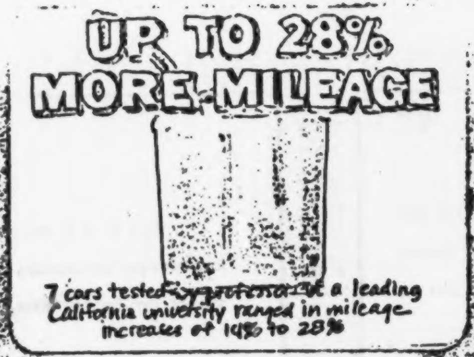
GAS MILEAGE

2 A/B

Ex E
Ex F

(Exhibit E is A frames
Exhibit F is B frames)

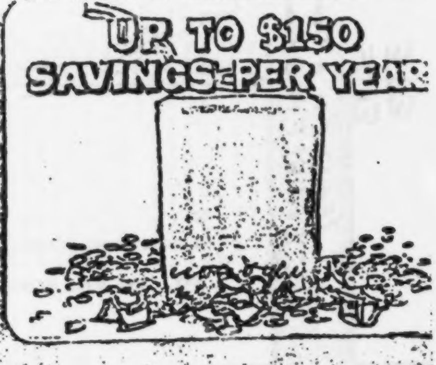
Spec 2


UP TO 28%
MORE MILEAGE
7 cars tested by professors at a leading California university ranged in mileage increases of 14% to 28%

THAT'S RIGHT. GET UP TO 28% MORE

MILEAGE

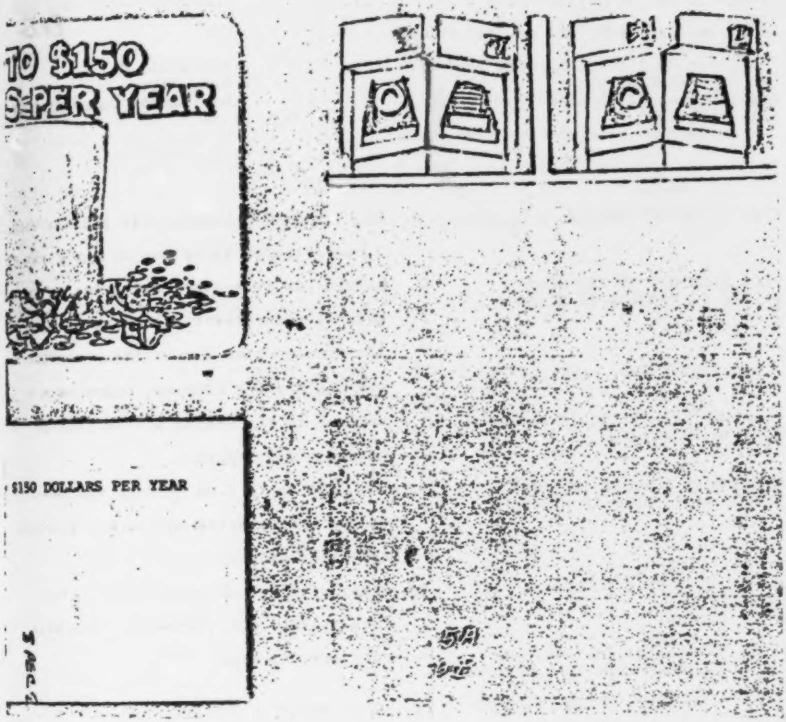
4B


UP TO $150
SAVINGS PER YEAR

AND SAVE UP TO $150 DOLLARS PER YEAR

5B

SPEC 2


TO $150
S-PER YEAR
$150 DOLLARS PER YEAR
5A

Ex. G

ALEXANDER HAMILTON CO., LTD.
[illegible] Shoreham Drive
West Hollywood, CA 90069
(213) 652-2396

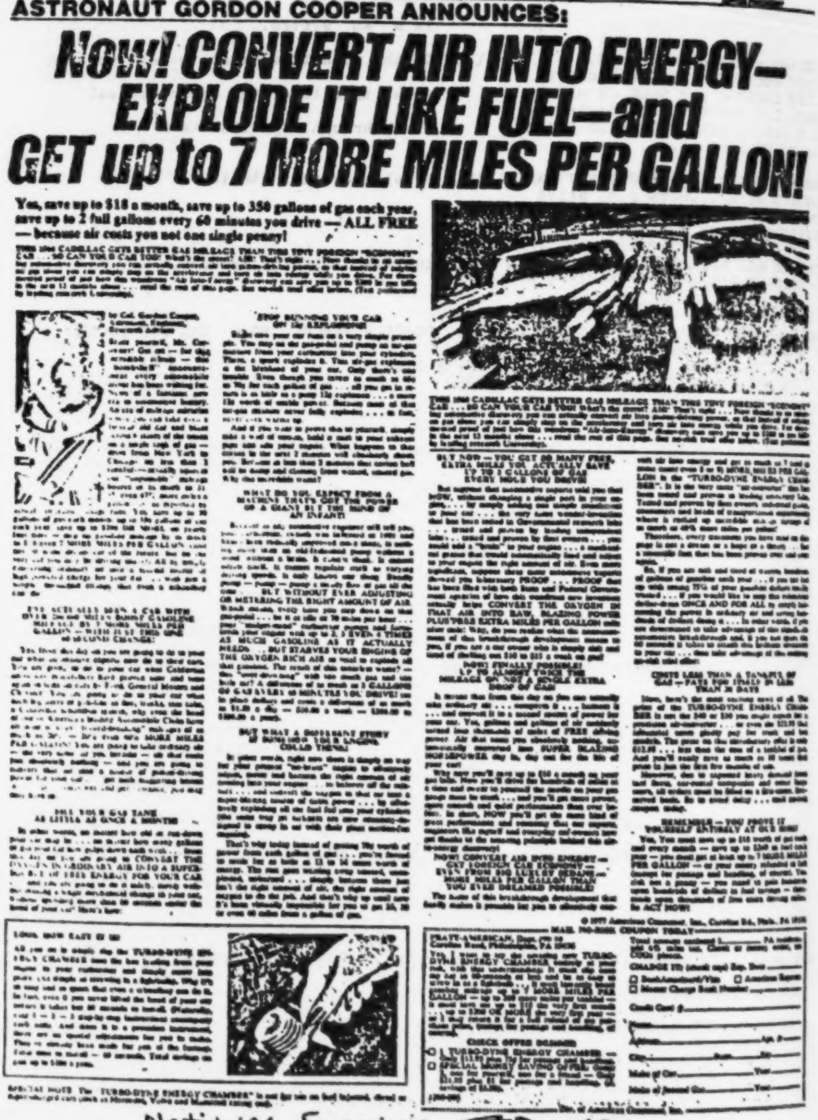
SAM KASSI CO.
G.R. Valve
One Minute Commercial TV

| VIDEO | AUDIO |
|---|---|
| OPEN CU GORDON COOPER | 1. Hi, I'm Gordon Cooper. As you may know, I was selected to be one of the first |
| SLOW ZOOM OUT TO SEE WOMAN IN THE BG WORKING ON A CAR. | 2. astronauts to explore space due to my extensive engineering background. At the present time I'm actively heading my own engineering company, where we are |
| HE HOLDS UP G.R. VALVE, DOESN'T GESTURE TO IT.... | engaged in the design and testing of products for industry. |
| AS HE DOES GESTURE TO VALVE CUT TO XCU VALVE HELD IN HIS HAND. | 4. The G.R. VALVE I am holding has been tested and retested by leading independent laboratories |
| CUT TO CU 2/SHOT, COOPER'S FACE AND VALVE.... | 5. along with my own tests. And it's a fact....this G.R. Valve will increase |
| DISS. TO ROLLING FOOTAGE, CAR DRIVING DOWN PRETTY ROAD, PROFILE | 6. your auto mileage |
| SUPER "INCREASE AUTO MILEAGE UP TO 28%" | 7. up to twenty eight per cent.... |
| CHANGE SUPER TO "IMPROVE PERFORMANCE" AND WIDEN SHOT ALLOWING CAR TO PULL AHEAD INTO A 3/4 REAR TO FRONT SHOT..... | 8. improve your car's performance, |
| CHANGE SUPER TO "CLEAN YOUR ENGINE" | 9. clean your engine..... |
| LET CAR PULL IN FRONT AND ZOOM IN ON MCU TAIL PIPE FEATURING LACK OF SMOKE, CHANGE SUPER TO "REDUCE SMOG EMISSIONS & ENGINE WEAR". | 10. And reduce smog emissions ~~[illegible]~~. |
| CUT BACK TO COOPER, MCU HOLDING VALVE (IN PACKAGE) | 11. In short, the G.R. VALVE will save you money...and save precious fuel...while helping to clean the air for everyone. |

## Complaint

| | |
|---|---|
| SLOW ZOOM TO CU COOPER | 12. Before I say a system is "go" I check it and recheck it...and the G.R. VALVE is a "go" system. |
| COOPER STEPS OUT OF SHOT. RACK FOCUS TO MLS SUSAN COOPER JUST CLOSING THE HOOD ON HER CAR, SHE TURNS TOWARD CAMERA A SMILES A SELF SATISFIED SMILE AS WE ZOOM MCU...... | 13. IX the time I've taken to tell you xhx about this important technological breakthrough, XXXXIXXXSXXXX |
| COOPER WALKS INTO SHOT, PUT ARM AROUND WIFE....PUTS G.R. VALVE PACKAGE ON HOOD OF CAR....XXXX XXXXXXXXXXXXXX | 14. My wife Susan installed |
| CUT TO XCU PACKAGE ON HOOD OF CAR & HOLD | 15. the G.R. VALVE on her car. |
| HOLD ON END SHOT, EXCU PACKAGE FOR LIVE SLIDE SUPER AT STATION | 16. STATION ANNCR., VO.: TAG FOR LOCAL X STORES. |

Ex. H



ASTRONAUT GORDON COOPER ANNOUNCES:

# Now! CONVERT AIR INTO ENERGY— EXPLODE IT LIKE FUEL—and GET up to 7 MORE MILES PER GALLON!

**Yes, save up to $18 a month, save up to 350 gallons of gas each year, save up to 2 full gallons every 60 minutes you drive — ALL FREE — because air costs you not one single penny!**

National Enquirer. JTD-58

H-3

TECHNICAL DESCRIPTION

The G:R: VALVE is a precision engineered air induction valve which fits into the hose between the PCV valve and the carburetor. It is automatically controlled by the amount of vacuum produced by the engine under varying speeds and loads. The ideal mixture of air-to-fuel in an automobile engine is approximately 15.1. However, most normal carburetors are unable to provide this ideal mixture at all times. Normal carburetors are set when in the idle position with the correct mixture. This is efficient only until about 2000 rpm. Under acceleration, heavy loads and grades, this efficiency is lost because there is not enough air to properly mix with the added fuel being pumped into the combustion chamber. The G:R: VALVE is precision calibrated to help remedy this situation by shutting down when the mixture is correct and opening up when the mixture is air-starved. Its valve action is controlled by the constantly changing vacuum in the PCV hose as the engine makes it demands for air. An added feature of the G:R: VALVE is the re-energizing of dead gases as they return to the carburetor from the crankcase. As the PCV valve releases these gases, they are mixed with oxygen in the G:R: VALVE, thus making these gases a combustible fuel. Since the G:R: VALVE works in perfect harmony with the engine, carburetor and smog device, THERE ARE ABSOLUTELY NO TUNING ADJUSTMENTS TO MAKE. Since it is always working to provide the correct (not lean) air-to-fuel mixture, IT CANNOT DAMAGE YOUR ENGINE IN ANY WAY. On the contrary, it will give it cleaner, longer-lasting life. That is why the G:R: VALVE is covered with full product liability insurance.

(Typical Responses on File From Satisfied Customers)

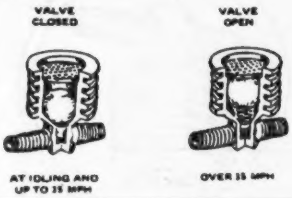
| | Miles Per Gallon | | Percent Increase |
|---|---|---|---|
| | Without G:R:V | With G:R:V | |
| 1972 V.W. BUS | 18 | to 23 | 27.78% |
| 1974 MARK IV CONTINENTAL | 10 | to 12.25 | 22.5% |
| 1973 FORD | 10.1 | to 13.0 | 28.7% |
| 1956 GMC SCHOOL BUS (66 passenger) | 4.0 | to 5.6 | 40%% |
| 1972 DODGE | 15.8 | to 18.5 | 17.1% |
| 1966 CHEVROLET PICK-UP WITH CAMPER | 11 | to 15.2 | 38.2% |

COMPARE THE G:R: VALVE

Similar devices are on the market, but the G:R: Valve operates on the time-proven, durable, trouble-free principle of the spring loaded ball-and-seat. Unlike "poppet" or "reed" type valves, the ball and seat has these distinct features:

- Continuous positive seating because the ball will always adjust to its seat.
- Self-cleaning action due to the constant rotation of the ball in its seat.

Look at the diagrams below and BUY THE VERY BEST for your car.



100% UNCONDITIONAL
MONEY-BACK GUARANTEE

NCI guarantees that with proper installation of the G:R: VALVE . . . your automobile will result in instant improvement of engine performance and significant improvement in fuel economy. If, for any reason, you are not fully satisfied with the performance of the device after installation, return the G:R: VALVE to the dealer from whom it was purchased within 30 days and the full price will be cheerfully refunded.

N C Industries
**Dan Norman, President**

Pursuant to Executive Order D-31, the G:R: VALVE may be legally installed on 1974 and older vehicles in California in accordance with the provisions of Vehicle Code 27156, with the exception of VW, diesel, fuel injection or supercharged engine vehicle.

© 1974 NC INDUSTRIES PO BOX 757 NEWBURY PARK CA [illegible]

it's a FACT
the
G:R:™ VALVE
is a GO system

[illegible] astronaut
GORDON COOPER
[illegible]

As demonstrated on
SUSAN COOPER did it in
30 seconds on her 1974 Vega

**A TYPICAL LAB TEST RESPONSE:**

"We have tested the G:R: Valve in our university auto lab on a number of vehicles differing in size and make. The results have shown a significant overall increase in gas mileage, and reduced smog emissions. I am convinced that within normal driving habits, the G:R: Valve would soon pay for itself in fuel savings, better performance and cleaner engines."

Jake Weicher
Professor of Industrial Education
Loma Linda University

*Detailed test data on file at NCI.

The unconditional money-back guarantee offered by G:R: Valve distributors is positive proof of their confidence in these

YOU TOO can install the G:R: Valve in minutes without special tools or mechanical ability. Just follow the simple 1-2-3 instructions included with each valve.

## the facts are...

1. **THE G:R: VALVE SAVES MONEY** by giving your car, boat, truck, or motor home up to 8 more miles per gallon. That could mean a savings of up to 30¢ per gallon of gasoline. In a year this could amount to several hundred dollars, depending on how much you drive.

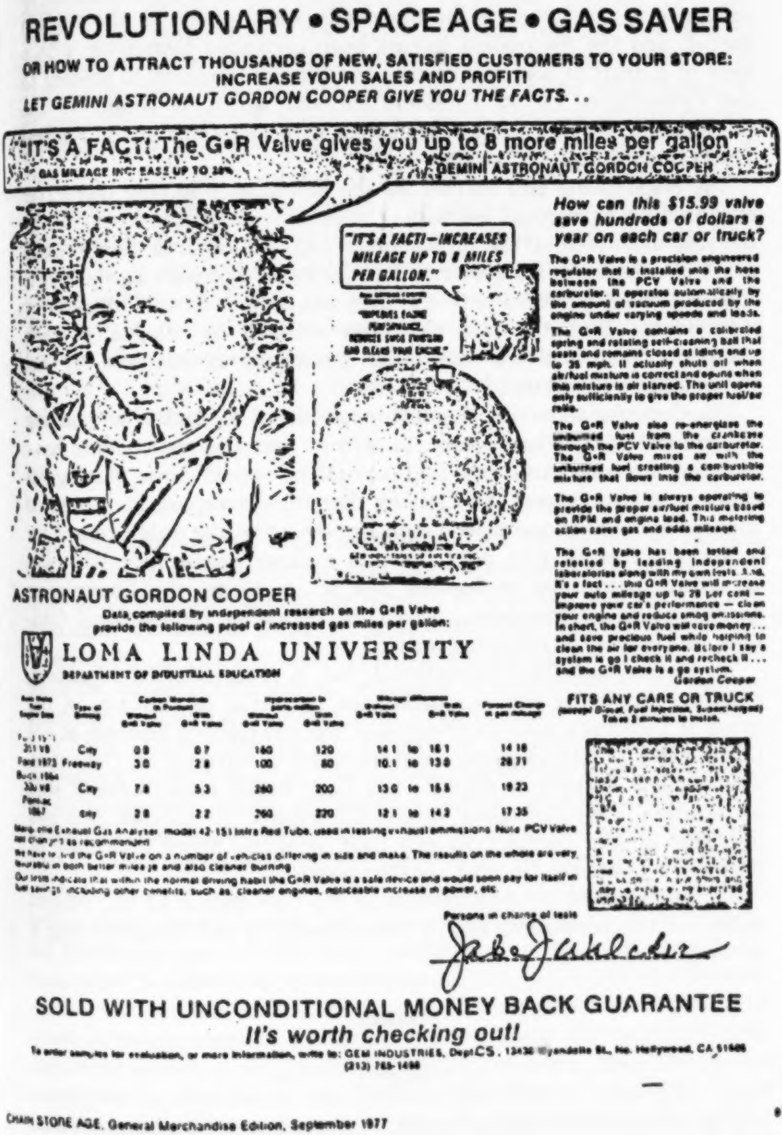
2. **THE G:R: VALVE IMPROVES PERFORMANCE** by allowing additional air to reach your engine only when it is needed. Most normal carburetors cannot meet the entire range of engine demands for air, so they are set for idle and speeds under 35 mph. This means your engine is air-starved when accelerating, climbing hills and pulling loads, but your car can reach its full horsepower every time you "step-on-it."

3. **THE G:R: VALVE FIGHTS POLLUTION** by insuring a more complete combustion of gasoline elements. It also re-energizes particles from the smog device so they can be burned. We call this process "Gas Re-energizing" (G:R:). Smog tests* have shown you can expect up to 50% decrease in air pollutants with this device on your present car.

4. **THE G:R: VALVE INCREASES ENGINE LIFE** by reducing the amount of carbon build up on valves and pistons. When gasoline burns more efficiently, it leaves less harmful by-products to clog and wear out your engine.

*Tests conducted at Loma Linda University at engine idle utilitizing Marquette Exhaust Gas Analyzer: 42-151 Infra Red tube, used in testing exhaust emissions.

Ex. J



# REVOLUTIONARY • SPACE AGE • GAS SAVER

**OR HOW TO ATTRACT THOUSANDS OF NEW, SATISFIED CUSTOMERS TO YOUR STORE: INCREASE YOUR SALES AND PROFIT!**

***LET GEMINI ASTRONAUT GORDON COOPER GIVE YOU THE FACTS. . .***

"IT'S A FACT! The G•R Valve gives you up to 8 more miles per gallon"
GAS MILEAGE INCREASE UP TO 28%
GEMINI ASTRONAUT, GORDON COOPER
"IT'S A FACT!—INCREASES MILEAGE UP TO 8 MILES PER GALLON."
"IMPROVES ENGINE PERFORMANCE, REDUCES SMOG EMISSIONS AND CLEANS YOUR ENGINE."

ASTRONAUT GORDON COOPER

***How can this $15.99 valve save hundreds of dollars a year on each car or truck?***

The G•R Valve is a precision engineered regulator that is installed into the hose between the PCV Valve and the carburetor. It operates automatically by the amount of vacuum produced by the engine under varying speeds and loads.

The G•R Valve contains a calibrated spring and rotating self-cleaning ball that seats and remains closed at idling and up to 35 mph. It actually shuts off when air/fuel mixture is correct and opens when the mixture is air starved. The unit opens only sufficiently to give the proper fuel/air ratio.

The G•R Valve also re-energizes the unburned fuel from the crankcase through the PCV Valve to the carburetor. The G•R Valve mixes air with the unburned fuel creating a combustible mixture that flows into the carburetor.

The G•R Valve is always operating to provide the proper air/fuel mixture based on RPM and engine load. This metering action saves gas and adds mileage.

The G•R Valve has been tested and retested by leading independent laboratories along with my own tests. And, it's a fact . . . the G•R Valve will increase your auto mileage up to 28 per cent — improve your car's performance — clean your engine and reduce smog emissions. In short, the G•R Valve will save money . . . and save precious fuel while helping to clean the air for everyone. Before I say a system is go I check it and recheck it . . . and the G•R Valve is a go system.

Gordon Cooper

**FITS ANY CARS OR TRUCK**
(except Diesel, Fuel Injection, Supercharged)
Takes 3 minutes to install.

Data compiled by independent research on the G•R Valve provide the following proof of increased gas miles per gallon:

**LOMA LINDA UNIVERSITY**
DEPARTMENT OF INDUSTRIAL EDUCATION

| Auto Make Year Engine Size | Type of Driving | Carbon Monoxide in Percent |  | Hydrocarbons in parts million |  | Mileage difference |  |  | Percent Change in gas mileage |
|---|---|---|---|---|---|---|---|---|---|
|  |  | Without G•R Valve | With G•R Valve | Without G•R Valve | With G•R Valve | Without G•R Valve |  | With G•R Valve |  |
| Ford 1971 351 V8 | City | 0.8 | 0.7 | 160 | 120 | 14.1 | to | 16.1 | 14.18 |
| Ford 1973 | Freeway | 3.0 | 2.8 | 100 | 80 | 10.1 | to | 13.0 | 28.71 |
| Buick 1964 330 V8 | City | 7.8 | 5.3 | 280 | 200 | 13.0 | to | 15.5 | 19.23 |
| Pontiac 1967 | City | 2.8 | 2.2 | 260 | 220 | 12.1 | to | 14.2 | 17.35 |

Marquette Exhaust Gas Analyzer model 42-151 Infra Red Tube, used in testing exhaust emmissions. Note: PCV Valve not changed as recommended.

We have tested the G•R Valve on a number of vehicles differing in size and make. The results on the whole are very favorable in both better mileage and also cleaner burning.

Our tests indicate that within the normal driving habit the G•R Valve is a safe device and would soon pay for itself in fuel savings including other benefits, such as, cleaner engines, noticeable increase in power, etc.

Persons in charge of tests

Jake Jakleder

**SOLD WITH UNCONDITIONAL MONEY BACK GUARANTEE**

***It's worth checking out!***

To order samples for evaluation, or more information, write to: GEM INDUSTRIES, Dept.CS, 13430 Wyandotte St., No. Hollywood, CA 91605
(213) 765-1466

① 97

CHAIN STORE AGE, General Merchandise Edition, September 1977

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent RR International, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at c/o Corporation Trust Company, 100 West 10th St., Wilmington, Delaware. Respondents Eduard A. Hamala and Cary Bunin are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation and their principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

## ORDER

### PART I

*It is ordered*, That respondents RR International, Inc., a corporation, Eduard A. Hamala and Cary Bunin, individually and as officers of the corporation, their successors and assigns, either jointly or individually, and the respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of the automobile retrofit device, variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names, or of any other automobile retrofit device, as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, having substantially similar properties, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that the automobile retrofit device variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names, or any other automobile retrofit device having substantially similar properties, will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle.

## PART II

*It is further ordered*, That respondents, their successors and assigns, either jointly or individually, and the respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, do forthwith cease and desist from representing, directly or by implication, that such device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle unless (1) such representation is true, and (2) at the time of making such representation, respondents possess and rely upon written results of dynamometer testing of such device according to the then current urban and highway driving test cycles established by the Environmental Protection Agency and these results substantiate such representation, and (3) where the representation of the fuel economy improvement is expressed in miles per gallon or percentage, all advertising and other sales promotional materials which contain the representation expressed in such a way must also contain, in a way that clearly and conspicuously discloses it, the following disclaimer: "REMINDER: Your actual fuel saving may be less. It depends on the kind of driving you do, how you drive and the condition of your car."

## PART III

*It is further ordered,* That respondents, their successors and assigns, either jointly or individually, and the respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. representing, directly or by implication, that an endorser of such product has expertise in a field of knowledge unless the endorser has the expertise which he is represented as possessing with respect to the endorsement;

b. using, publishing, or referring to any testimonial or endorsement from any person or organization for such product unless, within the twelve (12) months immediately preceding any such use, publication, or reference, respondents have obtained from that person or organization an express written and dated authorization for such use, publication or reference;

c. failing to disclose a material connection, where one exists, between an endorser of such product and any of the respondents. A "material" connection shall mean, for purposes of this order, any direct or indirect economic interest in the sale of the product which is the subject of this endorsement other than (1) a fixed sum payment for the endorsement, all of which is paid before any advertisement containing the endorsement is disseminated, or (2) payment for the endorsement which is directly related to the extent of the dissemination of advertising containing it;

d. representing, directly or by implication, any energy consumption or energy saving characteristic of such product unless (1) at the time of making the representation, respondents possessed and relied upon competent and reliable scientific tests substantiating the representation, and (2) respondents possess a written test report which describes both test procedures and test results. A competent and reliable "scientific test" is one in which one or more persons, qualified by professional training, education and experience, formulate and conduct a test and evaluate its results in an objective manner using testing procedures which are generally accepted in the profession to attain valid and reliable results. The test may be conducted or approved by (a) a reputable and reliable organization which conducts such tests as one of its principal functions, (b) an agency or department of the government of the United States, or (c) persons employed or retained by respondents if they are qualified (as defined above in this paragraph) and conduct and evaluate the test in an objective manner;

e. misrepresenting in any manner the purpose, content, or conclusion of any test or survey pertaining to any energy consumption or energy saving characteristic of such product;

f. misrepresenting in any manner either consumer preference for such product or the results obtained by consumer usage of such product where such preference or results pertain to any energy consumption or energy saving characteristic of such product;

g. misrepresenting in any manner the performance, efficacy, capacity, or usefulness of any energy consumption or energy saving characteristic of such product.

## PART IV

*It is further ordered,* That respondents, their successors and assigns, either jointly or individually, and the respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records which may be inspected by Commission staff members upon fifteen (15) days' notice: copies of any dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials; documents authorizing use, publication or reference to testimonials or endorsements; records of the number of pieces of direct mail advertising sent in each direct mail advertisement dissemination; documents which substantiate or which contradict any claim, made directly or by implication concerning any energy consumption or energy saving characteristic of such product, which is a part of the advertising, sales promotional materials, or post-purchase materials disseminated by respondents directly or through any business entity. Such records shall be retained by respondents for a period of three (3) years from the last date any such advertising, sales promotional, or post-purchase materials were disseminated.

## PART V

*It is further ordered,* That corporate respondent shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees who are engaged in the preparation and placement of advertisements, and that the individual respondents shall forthwith distribute a copy of this order to each of their agents, representatives, employees, successors and assigns. Respondents shall also distribute a copy of this order to any individual or corporation that purchases or has purchased from them, through one purchase or through a series of purchases, more than five (5) of the devices variously known as the G.R. Valve, the Turbo-Dyne Chamber, and by other names.

### PART VI

*It is further ordered*, That respondents notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondents such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

### PART VII

*It is further ordered*, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's position in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

### PART VIII

*It is further ordered*, That the respondents shall within sixty (60) days after service upon them of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

### IN THE MATTER OF

## C.I. ENERGY DEVELOPMENT, INC., ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3001. Complaint, Nov. 29, 1979—Decision, Nov. 29, 1979*

**This consent order, among other things, requires a Tarzana, Calif. firm and two corporate officers, engaged in the advertising, sale and distribution of a product known, among other names, as the G.R. Valve, to cease representing, without substantiation, that installing the G.R. Valve or any substantially similar automobile retrofit device in a motor vehicle will result in fuel economy improvement. Respondents are also barred from using any endorsement or testimonial which has not been properly authorized; and prohibited from misrepresenting an endorser's expertise in a field of knowledge, and the conclusions of tests or surveys pertaining to the performance of a product or service. The order additionally requires respondents to disclose in advertising any material connection existing between them and an endorser of their products or services.**

### *Appearances*

For the Commission: *Laurence M. Kahn.*

For the respondents: *Pro se.*

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that C.I. Energy Development, Inc., a corporation, Joseph J. London, and David A. Mullin, individually and as officers of the corporation, hereinafter referred to collectively as "respondents," having violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent C.I. Energy Development, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 18346 Ventura Boulevard, Tarzana, California. Respondent Joseph J. London, whose address is 20325 Angelina St., Woodland Hills, California, is President, director and shareholder; and respondent David A. Mullin, whose address is 5247 Armida Drive, Woodland Hills, California, is Secretary, director and shareholder of respondent corporation, C.I. Energy Development, Inc.; and said corporation is owned, dominated, controlled and directed by the individual respondents, Joseph J. London and David A. Mullin.

All of said respondents have cooperated and acted together in the performance of the acts and practices hereinafter alleged.

PAR. 2. Respondents have been and are now engaged in the marketing and advertising of a product variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names (hereinafter "product"), which product is advertised to be a means of improving fuel economy in automobiles. Said product is an automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011. Respondents, in connection with the marketing of said product, have disseminated, published and distributed and now disseminate, publish and distribute advertisements and promotional material for the purpose of promoting the sale of said product.

PAR. 3. One of the means respondents have used to market and advertise said product has been to use a celebrity endorsement. Former astronaut Gordon Cooper has aided the promotion of said product by providing such endorsement. This endorsement appeared in disseminated advertisements and other sales promotional materials for said product. In return for his role in the marketing of said product, Gordon Cooper has received remuneration from the manufacturer and distributor of the product. The amount of such remuneration was and is dependent upon the number of products sold.

PAR. 4. In the course and conduct of their said businesses, the respondents have disseminated and caused the dissemination of certain advertisements for said product through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act including, but not limited to, the insertion of advertisements in magazines and newspapers with national circulations and the placement of advertisements through television stations with sufficient power to broadcast across state lines and into the District of Columbia; and have disseminated and caused the dissemination of advertisements for said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce.

PAR. 5. Among the advertisements and other sales promotional materials are the materials identified as Exhibits A–H which are attached hereto.

PAR. 6. Through the use of advertisements referred to in Paragraph five and other advertisements and sales promotional materials, respondents represented and now represent, directly or by implication, that

a. the G.R. Valve when installed in a typical automobile will significantly improve fuel economy;

b. a typical driver can ordinarily obtain, under normal driving conditions, a fuel economy improvement which will approximate or equal eight miles per gallon when the G.R. Valve is installed in his/her automobile;

c. competent scientific tests for fuel economy of automobiles in which the G.R. Valve has been installed prove the fuel economy claims made for the G.R. Valve;

d. Gordon Cooper bears only the relationship of endorser to the marketing of said product;

e. Gordon Cooper has the education, training, and knowledge necessary to qualify him as an expert in the field of automotive engineering;

f. results of consumer usage, as evidenced by consumer testimonials, prove that the G.R. Valve significantly improves fuel economy.

PAR. 7. At the time respondents made the representations alleged in Paragraph six of the complaint, they did not possess and rely upon a reasonable basis for such representations. Therefore, said advertisements are deceptive, misleading, or unfair.

PAR. 8. In truth and in fact, contrary to respondents' representations in Paragraph six:

a. the G.R. Valve when installed in a typical automobile will not significantly improve fuel economy;

b. a typical driver cannot ordinarily obtain under normal driving conditions a fuel economy improvement which will approximate or equal eight miles per gallon when the G.R. Valve is installed in his/her automobile;

c. no competent scientific tests for fuel economy of automobiles in which the G.R. Valve has been installed prove the fuel economy claims made for the G.R. Valve;

d. Gordon Cooper bears not only the relationship of endorser to the marketing of said product, but also bears the relationship of principal to the marketing of said product which fact is not disclosed and is material;

e. Gordon Cooper does not have the education, training, and knowledge to qualify him as an expert in the field of automotive engineering;

f. results of consumer usage, as evidenced by consumer testimonials, do not prove that the G.R. Valve significantly improves fuel economy.

Therefore, said advertisements are deceptive, misleading, or unfair.

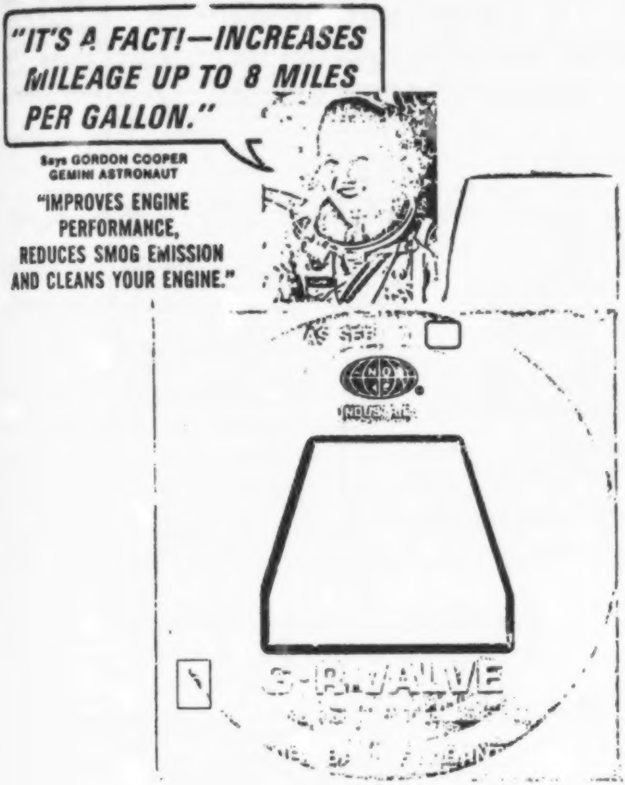
PAR. 9. Exhibits A–H and other advertisements represent, directly and by implication, that respondents had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph six. In truth and in fact, respondents had no reasonable basis for such representations. Therefore, said advertisements are deceptive, misleading, or unfair.

PAR. 10. In the course and conduct of their businesses, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in sale of automobile retrofit devices.

PAR. 11. The use by respondents of the aforesaid unfair or deceptive representations and the dissemination of the aforesaid false advertisements has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of products sold by respondents by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

Exhibit A



"IT'S A FACT!—INCREASES MILEAGE UP TO 8 MILES PER GALLON."

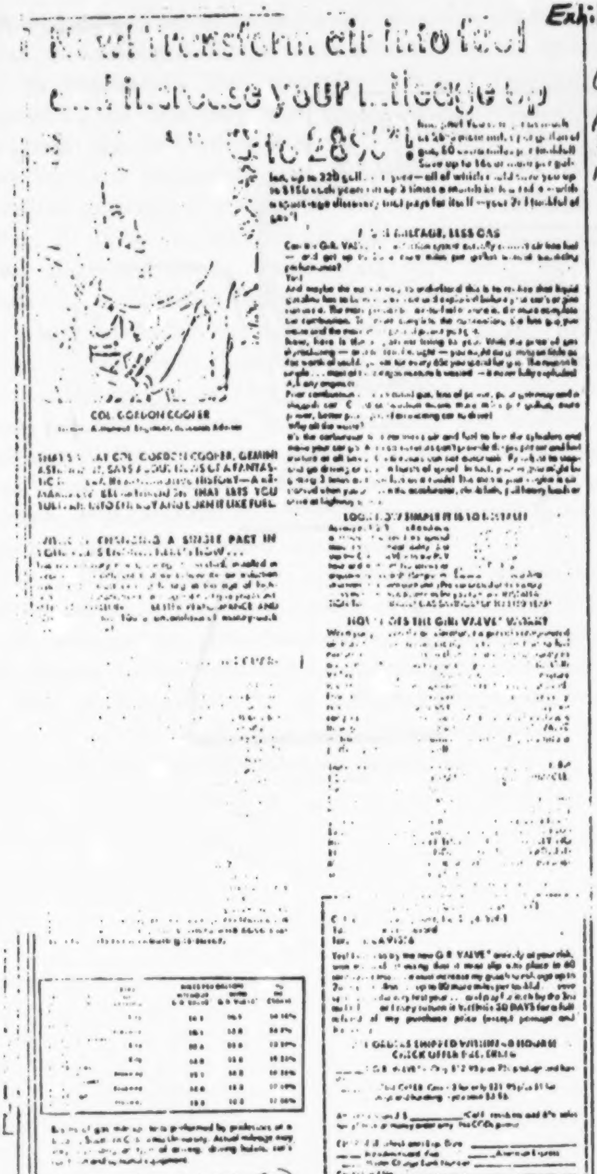
Says GORDON COOPER
GEMINI ASTRONAUT

"IMPROVES ENGINE PERFORMANCE, REDUCES SMOG EMISSION AND CLEANS YOUR ENGINE."

Exhibit B

Copy of ad published 3/19/78 Valley News

spec 2



Now! Transform air into fuel and increase your mileage up to 28%!

COL. GORDON COOPER

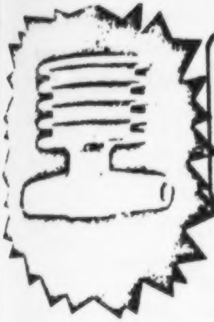
MORE MILEAGE, LESS GAS

LOOK HOW SIMPLE IT IS TO INSTALL

HOW DOES THE G.R. VALVE WORK?

6

Exhibit C



*It Really Works!*

**THIS AMAZING DEVICE CAN INCREASE YOUR GAS MILEAGE**

***UP TO 8 MILES PER GALLON!***

*Says GORDON COOPER,*

*Gemini Astronaut*

*Yes! Save Gas by the Gallon!*

*Make Your Car Run Better Too!*

*New Gas Saver Slips On in Minutes!*

If there's one thing an astronaut has no use for, it's a new invention that doesn't do what it's supposed to do! That's why we asked astronaut Gordon Cooper to test the G-R GAS SAVER VALVE in his independent engineering laboratory. Here's what Gordon Cooper told us the G-R GAS SAVER VALVE would do for any carbureted automobile:

- INCREASE GAS MILEAGE -- UP TO 28% MORE!
- ACTUALLY IMPROVE ENGINE PERFORMANCE AT THE SAME TIME!
- CLEAN THE ENGINE OF CRIPPLING CARBON DEPOSITS WHILE DRIVING!
- REDUCE SMOG EMISSIONS MEASURABLY!

Impressive results? Definitely. But we are particularly fussy about our cars. So, Mr. Cooper's results not withstanding, we went to the Dept. of Industrial Education at Loma Linda University and gave them a dozen or so G-R GAS SAVER VALVES. We asked them to test this new

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invention in city and highway driving -- use it on different kinds of cars, big and small -- even trucks -- and report the conclusions, good or bad. Here's what the Loma Linda University tests confirmed about the G-R GAS SAVER VALVE:

- It Cuts Gas Consumption in Every Car Tested -- Up to 28%!
- It Makes the Engine Run More Efficiently!
- It Reduces Polluting Exhaust Emissions as Much as 50%!

Then reports came back from our own "seat of the pants" test. That's where ordinary drivers like you and me pop a G-R GAS SAVER VALVE into their car and record the results for themselves.
For example:

> "...on my Pontiac Le Mans...mileage increased from 10 to 27.2...the improvement is phenomenal."
>
> -Mr. F. v. S.
> Newbury Park, Calif.

> "...on my Volkswagen Bus, it's mileage increased from 18 to 23 miles per gallon...also have better start in the morning."
>
> -Mr. Otto Geller,
> President, Volkswagen Club of America
> Ventura, Calif.

We found that a 1966 GMC 66-passenger school bus got 40% better gas mileage! A pickup truck with camper got 38.2% better mileage! A 1973 Ford got 28.7% better mileage! And so it went. Everybody we heard from reported a significant increase in gas mileage and often a noticeable improvement in performance the moment they snapped the G-R GAS SAVER VALVE on their car!

## *SLIP IT IN PLACE YOURSELF...IN SECONDS!*

By now we were thoroughly convinced that there really was an exciting and easy way to save big money at the gas pump. We wanted a G-R GAS SAVER VALVE on every company car as fast as possible! But we still wondered if installing this fascinating money saver was as simple as it was cracked up to be. Instead of going to a mechanic we handed the

device and its simple instructions to three people:

1. A young lady who is so mechanically minded she really needed help opening the hood.
2. A self-admitted fumble-fingers copy chief who shies away from a pair of pliers.
3. A guy who spends his weekends tinkering with the innards of his imported English sports car.

Care to guess the outcome of the race?

> Frankly, it was a dead heat! (Subtracting the time it took the young lady to get the hood open). Mechanical skill just isn't required! Nearly everybody can follow the one-two-three step instructions and be saving gas by the gallon in minutes! (Susan Cooper, Gordon's lovely wife, popped a G-R GAS SAVER VALVE into her '74 Vega in a mere 30 seconds!)

## *BUY THOSE SPECIAL THINGS YOU WANT WITH WHAT YOU SAVE ON GAS!*

Now, instead of spiraling gasoline prices stealing money from your pocket (even on short trips), you'll put the brakes to this money drain! You'll do it effortlessly in minutes -- and your insatiably thirsty carburetor will be under control at last! Certainly we all have plenty of things to do with our hard-earned money and pouring it into the gas tank isn't one of them!

## *FEEL YOUR ENGINE RUN BETTER - AND CLEAN ITSELF TOO!*

The G-R GAS SAVER VALVE makes your carburetor work with optimum efficiency AT ALL SPEEDS. (Most carburetors are really efficient only at about 35 mph.) It makes your carburetor breathe freely, perfectly mixing, with almost computer accuracy, the precise ratio of gas and air needed at any given split second. Not a drop more gas than necessary -- just all you really need and no more. Better yet, the G-R GAS SAVER VALVE

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makes your engine run so right that many exhaust fumes which used to pollute the air around your car are now re-burned as valuable fuel!

**ORDER NOW ON OUR UNCONDITIONAL MONEY-BACK GUARANTEE!**

We want you to put a G-R GAS SAVER VALVE on your car right away -- before you spend another unnecessary dollar for gas your car is now consuming ravenously.

We want to prove that Gordon Cooper's laboratory results, the special investigation by the staff at Loma Linda University and our own results are everything we say they are. Use the order form below...and if for any reason you don't agree -- enthusiastically, wholeheartedly -- that the G-R GAS SAVER VALVE is the best idea you've ever seen for your car, send it back for refund, no questions asked. Try it for two weeks; then if you're not convinced return it. The G-R GAS SAVER VALVE costs $15.95. You'll be amazed how fast it will pay for itself -- and start putting money back into your pocket!

**HAPPY CUSTOMERS WRITE...**

"I own a 1977 Malibu Classic Station Wagon which I use for work. I was getting an average of 11.9 miles per gallon . . . since the installation of the G-R Valve I am getting an average of 15.4 miles per gallon . . . I am a very cautious man about pushing or praising any item before I know from my own personal use that it works. I must say that I would advise everyone. . . to use the new G-R Valve, plus I feel my car's performance has increased."

Mr. T. M.
Compton, Calif.

"In my capacity as Sales Manager I drive several hundred miles per week. My work car is a 1968 Ford Galaxy. Last May I installed a G-R Valve, increasing the mileage from 15.2 to 19.8 m.p.g."

Mr. W. S.
Santa Monica, Calif.

"I installed one of your gas savers on my '74 Continental Mark IV in December. Since that time I have averaged at least 2½ miles per gallon more than before."

Mr. D. A.
Tarzana, Calif.

**ORDER FOR EVERY CAR IN YOUR FAMILY!**

**ORDER FORM**

C. I. ENERGY DEVELOPMENT, INC.
18346 VENTURA BOULEVARD
TARZANA, CALIFORNIA 91356

Gentlemen: Send me ____ G-R GAS SAVER VALVES @ $15.95 each. I enclose $______ in ( ) Cash ( ) Check ( ) M.O. in full payment.

( ) Send my order COD. I enclose 20% deposit. ( Sorry, no COD's outside the Continental USA).

ACCT. NO. ☐☐☐☐☐☐☐☐☐☐☐☐☐☐
INTERBANK NO. ☐☐☐☐
Mastercharge Only
(The number over your Name)
Exp. Date: Mo. ☐☐ Yr. ☐☐

SIGNATURE ________________________
NAME ________________________
ADDRESS ________________________
CITY ______________ STATE______ ZIP______

10

Exhibit D

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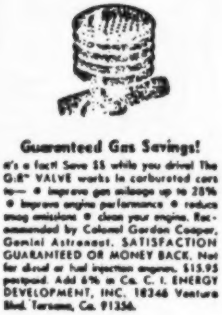
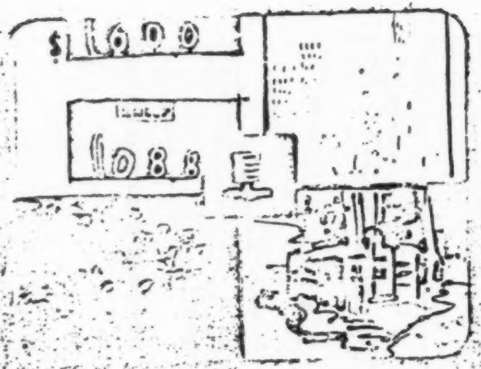


**Guaranteed Gas Savings!**

It's a fact! Save $$ while you drive! The G.R™ VALVE works in carbureted cars to— • improve gas mileage up to 28% • improve engine performance • reduce smog emissions • clean your engine. Recommended by Colonel Gordon Cooper, Gemini Astronaut. SATISFACTION GUARANTEED OR MONEY BACK. Not for diesel or fuel injection engines. $15.95 postpaid. Add 6% in Ca. C. I. ENERGY DEVELOPMENT, INC. 18346 Ventura Blvd. Tarzana, Ca. 91356.

Exhibit E
Exhibit F

(Ex E 11 A frames)
(Ex F 11 A frames)

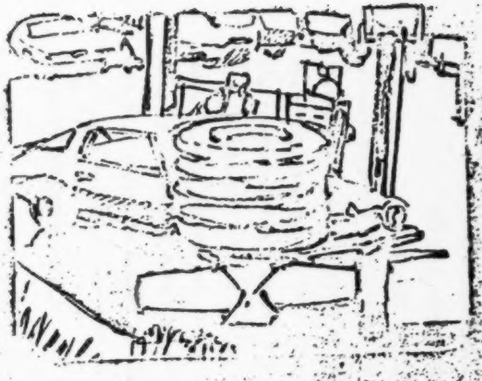


IN THESE DAYS OF RISING GAS PRICES

AND REDUCED AUTOMOTIVE PERFORMANCE,

WE INTRODUCE THE G.R. VALVE.

1 A/G



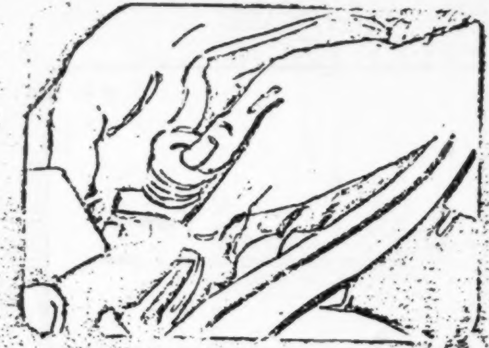
TO PUT THE GRRRRRR IN YOUR CAR. CARS

TESTED WITH G.R. VALVES IMPROVE THEIR

GAS MILEAGE

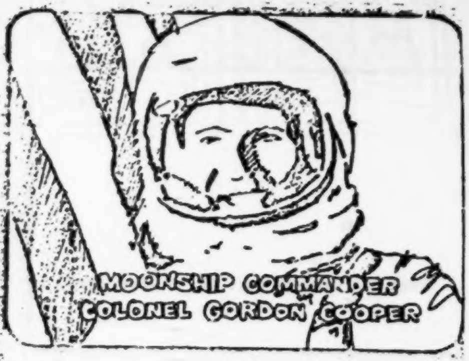
3 A/G

SPEC. 2
11



UP TO 28%

3 A/B

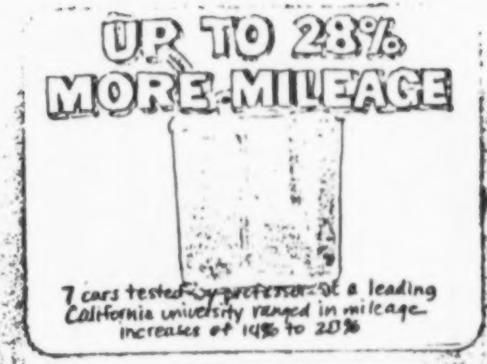

MOONSHIP COMMANDER
COLONEL GORDON COOPER

AND IT'S A FACT. THE G.R. VALVE IS A

GO SYSTEM.

4A

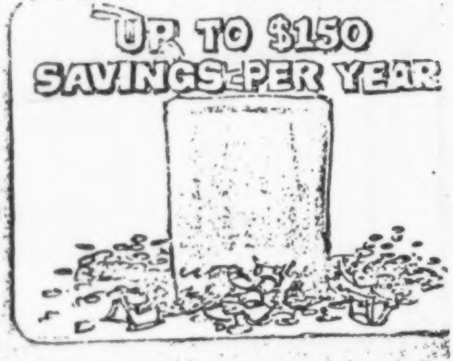
SPEC 2


UP TO 28%
MORE MILEAGE
7 cars tested by professor at a leading California university ranged in mileage increases of 14% to 20%

THAT'S RIGHT. GET UP TO 28% MORE

MILEAGE

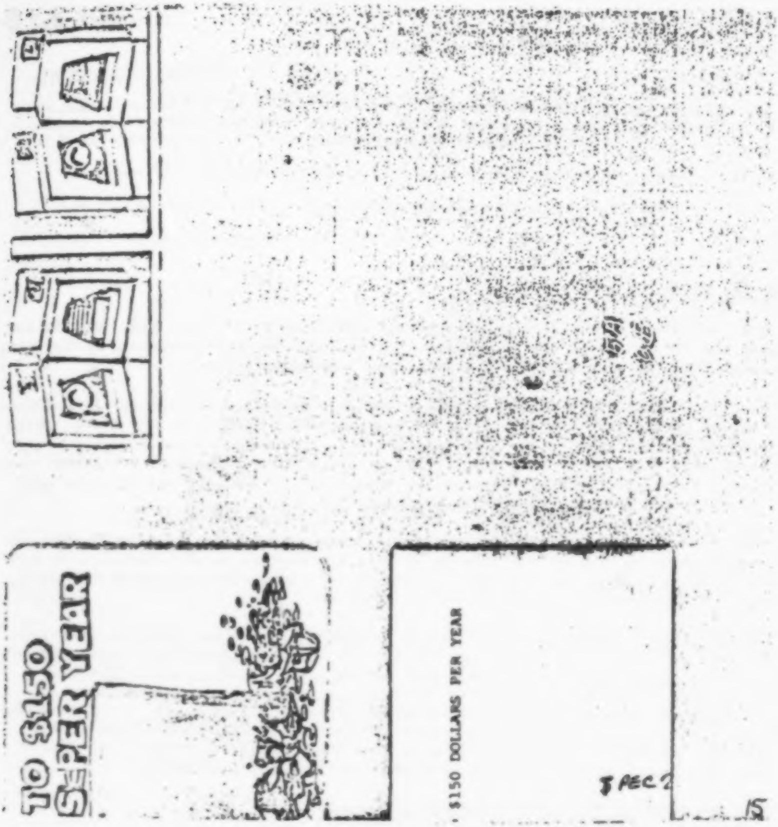
4B


UP TO $150
SAVINGS PER YEAR

AND SAVE UP TO $150 DOLLARS PER YEAR

5B

SPEC 2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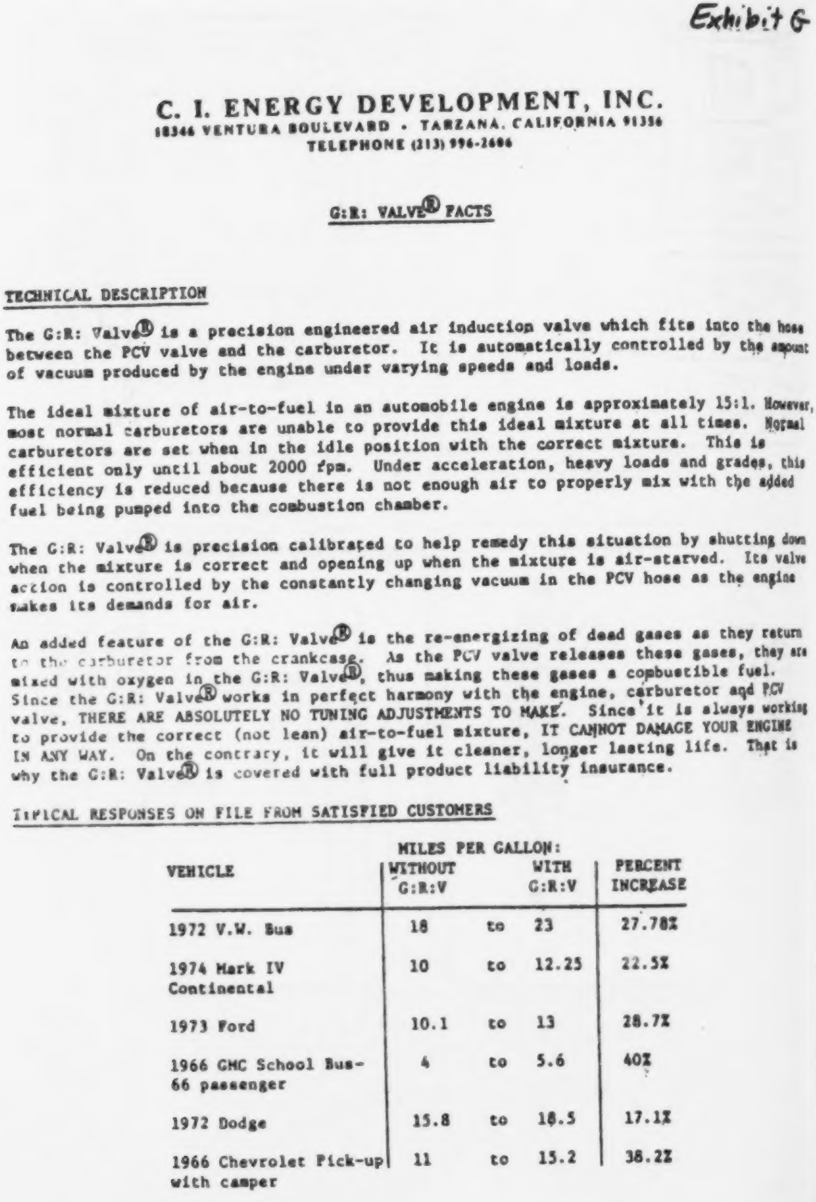


Exhibit G

C. I. ENERGY DEVELOPMENT, INC.
18346 VENTURA BOULEVARD · TARZANA, CALIFORNIA 91356
TELEPHONE (213) 996-2686

## G:R: VALVE® FACTS

### TECHNICAL DESCRIPTION

The G:R: Valve® is a precision engineered air induction valve which fits into the hose between the PCV valve and the carburetor. It is automatically controlled by the amount of vacuum produced by the engine under varying speeds and loads.

The ideal mixture of air-to-fuel in an automobile engine is approximately 15:1. However, most normal carburetors are unable to provide this ideal mixture at all times. Normal carburetors are set when in the idle position with the correct mixture. This is efficient only until about 2000 rpm. Under acceleration, heavy loads and grades, this efficiency is reduced because there is not enough air to properly mix with the added fuel being pumped into the combustion chamber.

The G:R: Valve® is precision calibrated to help remedy this situation by shutting down when the mixture is correct and opening up when the mixture is air-starved. Its valve action is controlled by the constantly changing vacuum in the PCV hose as the engine makes its demands for air.

An added feature of the G:R: Valve® is the re-energizing of dead gases as they return to the carburetor from the crankcase. As the PCV valve releases these gases, they are mixed with oxygen in the G:R: Valve®, thus making these gases a combustible fuel. Since the G:R: Valve® works in perfect harmony with the engine, carburetor and PCV valve, THERE ARE ABSOLUTELY NO TUNING ADJUSTMENTS TO MAKE. Since it is always working to provide the correct (not lean) air-to-fuel mixture, IT CANNOT DAMAGE YOUR ENGINE IN ANY WAY. On the contrary, it will give it cleaner, longer lasting life. That is why the G:R: Valve® is covered with full product liability insurance.

### TYPICAL RESPONSES ON FILE FROM SATISFIED CUSTOMERS

| VEHICLE | MILES PER GALLON: WITHOUT G:R:V | | MILES PER GALLON: WITH G:R:V | PERCENT INCREASE |
|---|---|---|---|---|
| 1972 V.W. Bus | 18 | to | 23 | 27.78% |
| 1974 Mark IV Continental | 10 | to | 12.25 | 22.5% |
| 1973 Ford | 10.1 | to | 13 | 28.7% |
| 1966 GMC School Bus-66 passenger | 4 | to | 5.6 | 40% |
| 1972 Dodge | 15.8 | to | 18.5 | 17.1% |
| 1966 Chevrolet Pick-up with camper | 11 | to | 15.2 | 38.2% |

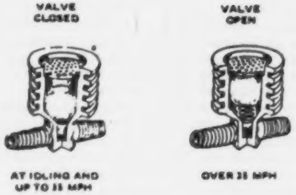
**G:R: VALVE® FACTS**

**COMPARE THE G:R: VALVE®**

Similar devices are on the market, but the G:R: Valve® operates on the time-proven, durable trouble-free principle of the spring loaded ball and seat. Unlike "poppet" or "reed" type valves, the ball and seat has these distinct features:

- Continuous positive seating because the ball will always adjust to its seat.
- Self-cleaning action due to the constant rotation of the ball in its seat.

Look at the diagrams below and BUY THE VERY BEST for your car.



**ANSWERS TO QUESTIONS ASKED ABOUT THE G:R: VALVE®**

**MANUFACTURING**

Q. HOW IS THE G:R: VALVE® MADE?
A. The G:R: Valve® is a precision engineered device consisting of six parts, each chosen for its mechanical attributes:
1. Corrosion-free, heat resistant, space-age plastic for durability.
2. Precisely calibrated stainless steel spring for accurate and dependable adjustment to pressure changes.
3. Polyethylene ball for positive, non-wearing, non-sticking, self-cleaning, trouble-free ball and seat operation.
4. Air-flow vents, reamed to provide the exact amount of air needed for efficient combustion.
5. Aluminum cover, perforated for control of air flow.
6. Heat retention fins to help vaporize the fuel mixture.

Q. WHAT DOES "G:R:" STAND FOR?
A. It stands for "gas re-energizing" - the unique ability of the G:R: Valve® to re-energize with oxygen the blow-by gases from the crankcase, thus saving previously wasted fuel.

Q. HOW DOES THE G:R: VALVE® DIFFER FROM OTHER SIMILAR DEVICES ON THE MARKET?
A. The G:R: Valve® differs from other valves both in choice of design and materials:
1. DESIGN: The ball and seat is the oldest and most positive seal ever developed. Unlike "poppet" valves and "reed" valves also on the market, the ball and seat design utilized in the G:R: Valve® will never stick or become clogged. Since it is virtually friction-free, it will also outlast any other type of valve.

G:R: VALVE® FACTS

2. MATERIALS: No other valve is made of a more durable heat retention material than the G:R: Valve®.

These attributes not only make the G:R: Valve® last longer, but aid in its functionability.

Q. IS THE G:R: VALVE® PATENTED?

A. Yes. The G:R: Valve® is patent-pending and "G:R: Valve®" is a registered trademark.

OPERATION

Q. WHAT IS THE OPERATING PRINCIPLE OF THE G:R: VALVE®?

A. The G:R: Valve® is operated automatically by the engine vacuum and by the pressure build-up in the crankcase activating the PCV valve. When the engine is receiving enough air the vacuum increases and the G:R: VALVE® IS INOPERATIVE. However, when accelerating or the engine is running over approximately 1500 to 2000 rpm, the pressure build-up in the crankcase from piston blow-by increases until it is released through the PCV valve, thereby releasing the ball in the G:R. Valve®, thus utilizing the two fold function of the G:R: Valve®:

1. Helping to maintain a more perfect air-to-fuel ratio, preventing "air starvation" which usually occurs whenever the engine is placed under heavy load.
2. Re-energizing the unburned fuel in the blow-by gases from the crankcase. As these gases are released through the PCV valve to the mixing chamber of the G:R: Valve® they are super-vaporized while being mixed with clean air, thus producing a more combustible fuel and increasing engine efficiency.

Q. ISN'T A WELL-TUNED CARBURETOR ALL YOU NEED FOR CORRECT AIR-TO-FUEL MIXTURE?

A. Sorry. No standard carburetor is capable of providing the ideal ratio at all speeds and under all load conditions. Therefore it is set at the factory for "average" driving. This usually means that it works most efficiently at idle and speeds under 35 mph. However, when you accelerate above these speeds, more fuel is being pumped into the combustion chamber while the amount of air taken in remains the same. Without sufficient air, your engine loses power and wastes valuable gasoline. That is where the G:R: Valve® comes in. By opening up when you "step on it", the correct mixture is restored and your engine's performance is improved.

Q. DOES THE G:R: VALVE® "LEAN" THE MIXTURE?

A. No. As explained in the previous question, it remains closed when the mixture is correct (at idle, for instance) and opens up only when the mixture is too rich. This merely assists in re-establishing the correct air-to-fuel ratio.

Q. SINCE IT SEEMS EVERY CAR NEEDS A G:R: VALVE®, WHY DON'T THE MAJOR CAR COMPANIES INSTALL IT AS STANDARD EQUIPMENT?

A. Good question! We believe they will in a few years. The industry is governed by mass buyer awareness and demand. When the G:R: Valve® becomes as well known to the general public as disc brakes, radial tires, oil and temperature gauges, tachometers, superior gas and oil filters, etc., it will probably be included as standard equipment on the average car. In the meantime, like most high-performance equipment for your car, the G:R: Valve® is a valuable accessory purchased by the knowledgeable driver.

Q. ARE THE FINS ON THE G:R: VALVE® FOR HEAT DISSIPATION?

A. No. They are for the retention of heat, since the vapors mix better with warm air.

G:R: VALVE® FACTS

INSTALLATION AND MAINTENANCE

Q. HOW DIFFICULT IS IT TO INSTALL A G:R: VALVE®?
A. Very simple. The only tool you'll need is a sharp knife. Easy to follow instructions tell you exactly which hose to cut. Just insert the valve and the job is finished - no screws, no adjustments. (On some Ford and Chrysler cars, clamps may be required.)

Q. ARE THERE ANY PRECAUTIONS I SHOULD TAKE BEFORE INSTALLING MY G:R: VALVE®?
A. The G:R: Valve® will only work at optimum efficiency if the PCV valve is working properly and the hose fits snugly around the valve nipples. That is why we suggest that you replace the PCV valve and the hose when you are installing your G:R: Valve®.

Q. WILL THE G:R: VALVE® FIT ALL CARS?
A. Yes, from Datsuns to Cadillacs, 4-cylinders to V-8's. In fact, it will work beautifully on any gasoline combustion engine, including trucks, motorhomes, recreational vehicles, and boats. NOTE: It will not work on diesel, fuel-injected, or supercharged engines.

Q. DOES THE G:R: VALVE® REQUIRE CLEANING?
A. The G:R: Valve® requires no maintenance and is self-cleaning. However, since the PCV valve should be changed every 10,000 miles or so, we suggest swishing the G:R: Valve® through solvent at the same time.

SAFETY

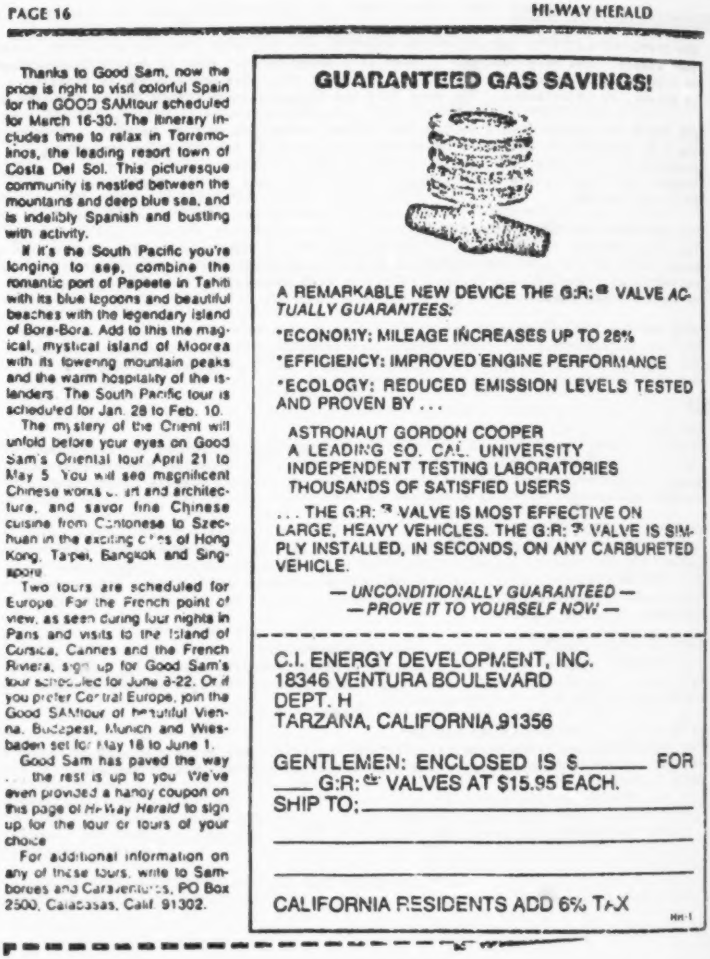
Q. CAN THE G:R: VALVE® BURN MY VALVES?
A. Absolutely not! We have complete laboratory reports which confirm the fact that the G:R: Valve® does not raise the heat of an engine's combustion above its normal range. Remember, the valve only opens when the air-to-fuel mixture is too rich, so that the correct ratio is restored.

Q. CAN THE G:R: VALVE® MALFUNCTION?
A. Due to the spring loaded ball and seat valve design, we can guarantee the valve against malfunction. However, if your PCV valve becomes stuck or clogged, the G:R: Valve® will not be able to perform to its maximum capabilities. That is why we recommend that the PCV valve be periodically checked and cleaned or changed, depending upon its condition.

Q. DOES THE G:R: VALVE® HAVE PRODUCT LIABILITY INSURANCE?
A. Yes. The G:R: Valve® is fully covered by product liability insurance, underwritten by a major insurance company. This is possible because the G:R: Valve® has been tested and proven safe for installation.

Q. IS IT LEGAL TO INSTALL A G:R: VALVE®?
A. Yes. In California, the state with the most stringent air quality standards, the Air Resources Board has approved the G:R: Valve® in accordance with Executive Order D-31.

Exhibit H



PAGE 16 HI-WAY HERALD

Thanks to Good Sam, now the price is right to visit colorful Spain for the GOOD SAMtour scheduled for March 16-30. The itinerary includes time to relax in Torremolinos, the leading resort town of Costa Del Sol. This picturesque community is nestled between the mountains and deep blue sea, and is indelibly Spanish and bustling with activity.

If it's the South Pacific you're longing to see, combine the romantic port of Papeete in Tahiti with its blue lagoons and beautiful beaches with the legendary island of Bora-Bora. Add to this the magical, mystical island of Moorea with its towering mountain peaks and the warm hospitality of the islanders. The South Pacific tour is scheduled for Jan. 28 to Feb. 10.

The mystery of the Orient will unfold before your eyes on Good Sam's Oriental tour April 21 to May 5. You will see magnificent Chinese works of art and architecture, and savor fine Chinese cuisine from Cantonese to Szechuan in the exciting cities of Hong Kong, Taipei, Bangkok and Singapore.

Two tours are scheduled for Europe. For the French point of view, as seen during four nights in Paris and visits to the Island of Corsica, Cannes and the French Riviera, sign up for Good Sam's tour scheduled for June 8-22. Or if you prefer Central Europe, join the Good SAMtour of beautiful Vienna, Budapest, Munich and Wiesbaden set for May 18 to June 1.

Good Sam has paved the way . . . the rest is up to you. We've even provided a handy coupon on this page of *Hi-Way Herald* to sign up for the tour or tours of your choice.

For additional information on any of these tours, write to Samborees and Caraventures, PO Box 2500, Calabasas, Calif. 91302.

**GUARANTEED GAS SAVINGS!**

A REMARKABLE NEW DEVICE THE G:R:® VALVE *ACTUALLY GUARANTEES:*

- *ECONOMY: MILEAGE INCREASES UP TO 28%
- *EFFICIENCY: IMPROVED ENGINE PERFORMANCE
- *ECOLOGY: REDUCED EMISSION LEVELS TESTED AND PROVEN BY . . .

ASTRONAUT GORDON COOPER
A LEADING SO. CAL. UNIVERSITY
INDEPENDENT TESTING LABORATORIES
THOUSANDS OF SATISFIED USERS

. . . THE G:R:® VALVE IS MOST EFFECTIVE ON LARGE, HEAVY VEHICLES. THE G:R:® VALVE IS SIMPLY INSTALLED, IN SECONDS, ON ANY CARBURETED VEHICLE.

*— UNCONDITIONALLY GUARANTEED —*
*— PROVE IT TO YOURSELF NOW —*

C.I. ENERGY DEVELOPMENT, INC.
18346 VENTURA BOULEVARD
DEPT. H
TARZANA, CALIFORNIA 91356

GENTLEMEN: ENCLOSED IS $_____ FOR ___ G:R:® VALVES AT $15.95 EACH.

SHIP TO; ____________________

______________________________

______________________________

CALIFORNIA RESIDENTS ADD 6% TAX

HH-1

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent C.I. Energy Development, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 18346 Ventura Boulevard, Tarzana, California. Respondents Joseph J. London and David A. Mullin are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation and their principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

## ORDER

### PART I

*It is ordered*, That respondents C.I. Energy Development, Inc., a corporation; Joseph J. London, and David A. Mullin, individually and as officers of the corporation, their successors and assigns, either jointly or individually, and the respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of the automobile retrofit device, variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names, or of any other automobile retrofit device, as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, having substantially similar properties, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that the automobile retrofit device variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names, or any other automobile retrofit device having substantially similar properties, will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle.

## PART II

*It is further ordered*, That respondents, their successors and assigns, either jointly or individually, and the respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle unless (1) such representation is true, and (2) at the time of making such representation, respondents possess and rely upon written results of dynamometer testing of such device according to the then current urban and highway driving test cycles established by the Environmental Protection Agency and these results substantiate such representation, and (3) where the representation of the fuel economy improvement is expressed in miles per gallon or percentage, all advertising and other sales promotional materials which contain the representation expressed in such a way must also contain, in a way that clearly and conspicuously discloses it, the following disclaimer: "REMINDER: Your actual fuel saving may be less. It depends on the kind of driving you do, how you drive and the condition of your car."

### PART III

*It is further ordered,* That respondents, their successors and assigns, either jointly or individually, and the respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product or service in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. representing, directly or by implication, that an endorser of such product or service has expertise in a field of knowledge unless the endorser has the education, training, and knowledge necessary to be qualified as an expert in that field;

b. using, publishing, or referring to any testimonial or endorsement from any person or organization for such product or service unless, within the twelve (12) months immediately preceding any such use, publication, or reference, respondents have obtained from that person or organization an express written and dated authorization for such use, publication, or reference;

c. failing to disclose a material connection, where one exists, between an endorser of such product or service and any of the respondents. A "material" connection shall mean, for purposes of this order, any direct or indirect economic interest in the sale of the product or service which is the subject of this endorsement other than (1) a fixed sum payment for the endorsement, all of which is paid before any advertisement containing the endorsement is disseminated, or (2) payment for the endorsement which is directly related to the extent of the dissemination of advertising containing it;

d. representing, directly or by implication, any performance characteristic of such product or service unless (1) at the time of making the representation, respondents possessed and relied upon competent and reliable scientific tests substantiating such representation, and (2) respondents possess a written test report which describes both test procedures and test results. A competent and reliable "scientific test" is one in which one or more persons, qualified by professional training, education and experience, formulate and conduct a test and evaluate its results in an objective manner using testing procedures which are generally accepted in the profession to attain valid and reliable results. The test may be conducted or approved by (a) a reputable and reliable organization which conducts such tests as one of its principal functions, (b) an agency or department of the government of the United States, or (c) persons employed or retained by respondents if they are qualified (as defined above in this paragraph) and conduct and evaluate the test in an objective manner;

e. misrepresenting in any manner the purpose, content, or conclusion of any test or survey pertaining to such product or service;

f. misrepresenting in any manner either consumer preference for such product or service or the results obtained by consumer usage of such product or service;

g. misrepresenting in any manner the performance, efficacy, capacity, or usefulness of such product or service.

## PART IV

*It is further ordered,* That respondents, their successors and assigns, either jointly or individually, and the respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records which may be inspected by Commission staff members upon fifteen (15) days' notice: copies of and dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials; documents authorizing use, publication or reference to testimonials or endorsements; records of the number of pieces of direct mail advertising sent in each direct mail advertisement dissemination; documents which substantiate or which contradict any claim which is a part of the advertising, sales promotional material, or post-purchase materials disseminated by respondents directly or through any business entity. Such records shall be retained by respondents for a period of three (3) years from the last date any such advertising, sales promotional, or post-purchase materials were disseminated.

## PART V

*It is further ordered,* That corporate respondent shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees who are engaged in the preparation and placement of advertisements, and that the individual respondents shall forthwith distribute a copy of this order to each of their agents, representatives, employees, successors and assigns. Respondents shall also distribute a copy of this order to any individual or corporation that purchases or has purchased from them, through one purchase or through a series of purchases, more than five (5) of the devices variously known as the G.R. Valve, the Turbo-Dyne Energy Chamber, and by other names.

### PART VI

*It is further ordered,* That respondents notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

### PART VII

*It is further ordered,* That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

### PART VIII

*It is further ordered,* That the respondents shall within sixty (60) days after service upon them of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

## IN THE MATTER OF

# HOME CENTERS, INC., ET AL.

### CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3005. Complaint, Dec. 18, 1979—Decision, Dec. 18, 1979*

**This consent order, among other things, requires two Tallmadge, Ohio firms engaged in the sale and distribution of retail general merchandise to cease representing price reductions in product advertising, unless comparison prices are bona fide, and duration of advertised offer is disclosed; or misrepresenting, in any way, that their products are being sold at a savings to consumers.**

## *Appearances*

For the Commission: *Robert P. Weaver.*

For the respondents: *Robert W. Briggs, Sam D. Bartlo, Buckingham, Doolittle & Burroughs,* Akron, Ohio.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Home Centers, Inc., a corporation, and Home Centers of Cleveland, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Home Centers, Inc. and Home Centers of Cleveland, Inc. are corporations organized, existing, and doing busines under and by virtue of the laws of the State of Ohio, with thei principal place of business located at 65 Midway Plaza, Tallmadge Ohio.

PAR. 2. Respondents are now, and for some time last past have bee engaged in the business of advertising, offering for sale, selling, an distributing to the public at retail general merchandise, including, bu not limited to, appliances.

PAR. 3. In the course and conduct of their aforesaid busines respondents have disseminated, or have caused to be disseminate certain advertisements in commerce or affecting commerce, as "con merce" is defined in the Federal Trade Commission Act, including, b not limited to, advertisements in daily newspapers of general circulation, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of [illegible]ducts by the public.

PAR. 4. In the course and conduct of its aforesaid business, respondents maintain and have maintained, a substantial course of business, including the acts and practices as hereinafter set forth which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the further course and conduct of their business, and for the purpose of inducing the purchase of products, respondents have made, and are now making, numerous statements and representations in their advertising, promotional materials, or sales presentations with respect to the prices of their products.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

> Starts Friday 10 sharp.
> Shop and Save Till 9:00 PM
> Operation Clean Up!
> The big once a year sale that
> saves you 20%, 30%, and more

* * * * * * *

> Monday Only
> Operation Clean Up
> RCA 100% Solid-State Portable TV.
> Was $119. $98.

* * * * * * *

> Super July Values
> GE 12' Upright Freezer . . . $248
> Tonight Till 9!
> Again Thursday, Friday 10 to 9!

* * * * * * *

> One big day
> End of Year Sale
> $1850 Zenith Top-Of-The-Line Color Theatre
> $1299

* * * * * * *

PAR. 6. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, respondents have represented, and are now representing, directly or by implication, that:

best copy available

pages tightly bound

(A) Certain products are being offered for sale at special or reduced prices, and savings are thereby afforded to their purchasers because of reductions from respondents' regular selling prices of said products.

(B) Certain products are being offered for sale at prices lower than those at which the same or similar products are being offered or sold in the immediate area, and savings are thereby afforded to their purchasers because of respondents' lower prices for said products.

(C) Respondents' advertised offers are made for a limited period of time.

PAR. 7. In truth and in fact:

(A) A substantial number of respondents' products which are represented, either directly or by implication, to be offered for sale at a savings to the purchaser are not being so offered for sale at the savings represented, because:

(1) Respondents' regular selling price is substantially less than that represented to purchasers, or

(2) Respondents' special or reduced prices are the same, or substantially the same, as respondents' regular selling prices for said products.

Consequently, purchasers are not afforded the represented significant savings from respondents' regular selling price.

(B) At the time the above-quoted statements and representations and others of similar import and meaning were made, respondents did not possess or retain a reasonable basis for the representation that the same or similar products were being offered or sold in the immediate area either at the price represented in the statements and representations, or, if no price was set forth in the statement or representation, at a price substantially above the price offered by respondents.

(C) Respondents' advertised offers are not of a limited duration.

Therefore, the statements and representations as set forth in Paragraphs Five and Six hereof were and are false, misleading, and deceptive.

PAR. 8. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and are now, in substantial competition in or affecting commerce, with corporations, firms, and individuals engaged in the sale and distribution of products of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, acts, and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The acts and practices of each respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondents Home Centers, Inc. and Home Centers of Cleveland, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of Ohio, with their

principal place of business located at 65 Midway Plaza, in the City of Tallmadge, State of Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, and of the respondents, and the proceeding is in the public interest.

## ORDER

PARAGRAPH 1. For purposes of this order, the following definition shall apply:

"Reference price" shall mean a price against which, directly or by implication, the offering price is being compared. A reference price includes prices described variously as "regular price," "former price," "list price," "retail price," "value," or terms of similar import and meaning, or a reference price may be implied by terms such as "$40 savings," "save 20%," or terms of similar import and meaning.

PAR. 2. *It is ordered*, That each of the respective respondents, Home Centers, Inc. and Home Centers of Cleveland, Inc., corporations, and their respective successors and assigns, each of the respective respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(A) Representing in any manner, directly or by implication, that any of respondents' products are being sold at a reduction from a higher, reference price, either by use of such reference price, by the use of terms such as "special," "savings," "sale," "clearance," or other terms of similar import and meaning, or otherwise, unless:

(1) Such reference price is respondents' actual, bona fide price at which substantial sales were made to the public by respondents on a regular basis for a reasonably substantial period of time in the immediate, recent past;

(2) Such reference price is respondents' actual, bona fide price at which the product was openly and actively offered for sale to the public for a reasonably substantial period of time in the recent, regular course of respondents' business; or

(3) Such reference price is based on some other price at which the same or similar products were offered or sold to the public in the immediate area in the recent, regular course of business, respondents

have actual knowledge of these facts at the time the representation is made, and respondents clearly and conspicuously disclose, at the time and place that the representation is made, the source and nature of such reference price.

(B) Representing in any manner, directly or by implication, that any of respondents' products are being sold at a special or reduced price, unless the reduction in price is meaningful, and unless respondents clearly and conspicuously disclose, at the time and place that the representation is made, the duration for which the special or reduced price is in effect.

(C) Misrepresenting in any manner, directly or by implication, that any of respondents' products are being sold at a special or reduced price or at a savings to consumers.

PAR. 3. *It is further ordered*, That:

(A) Respondents shall, for a period of three (3) years subsequent to the date of this order:

(1) Maintain such records as will show the measures taken to insure continuing compliance with the terms and provisions of this order;

(2) Grant any duly authorized representative of the Federal Trade Commission, upon reasonable notice of time and place, access to all such records;

(3) Furnish to the Federal Trade Commission, at the Commission's expense, copies of such records which are requested by any of its duly authorized representatives.

(B) Respondents shall maintain such records as are necessary to substantiate each representation which, in any manner, is subject to Paragraph Two (A) or Two (B) of this order. Such records shall be maintained for a period of one (1) year from the date each such representation is made.

PAR. 4. *It is further ordered*, That a copy of this order be delivered to all present and future personnel either (a) engaged in a supervisory capacity in the design and creation of advertising materials for respondents' products, or (b) engaged in a management or supervisory capacity in the sale of products. Respondents shall secure from each said person a signed statement acknowledging receipt of this order.

PAR. 5. *It is further ordered*, That respondents notify the Commission at least thirty (30) days prior to any proposed change in either corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

PAR. 6. *It is further ordered,* That each of the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

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